Citation: Trinity Western University v. British Columbia College of Teachers, 2001 SCC 31, [2001] 1 S.C.R. 772
Date: May 17, 2001
Docket: 27168
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Trinity Western University *v*. College of Teachers, [2001] 1 S.C.R. 772, 2001 SCC 31

British Columbia College of Teachers *Appellant*

v.

Trinity Western University and
Donna Gail Lindquist *Respondents*

and

The Evangelical Fellowship of Canada,
the Ontario Secondary School Teachers' Federation,
the Canadian Conference of Catholic Bishops,
the British Columbia Civil Liberties Association,
EGALE Canada Inc.,
the Christian Legal Fellowship,
the Seventh-Day Adventist Church in Canada and
the Canadian Civil Liberties Association *Interveners*

Indexed as: Trinity Western University *v*. British Columbia College of Teachers

Neutral citation: 2001 SCC 31.

File No.: 27168.

2000: November 9; 2001: May 17.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for british columbia

Administrative law -- Judicial review -- Jurisdiction -- British Columbia College of Teachers - Private institution with religious affiliations applying to College for permission to assume full responsibility for teacher education program – College denying application – Whether College had jurisdiction to consider discriminatory practices of private institution in dealing with its application – Teaching Profession Act, R.S.B.C. 1996, c. 449, s. 4.

Administrative law -- Judicial review -- Standard of review – British Columbia College of Teachers – Private institution with religious affiliations applying to College for permission to assume full responsibility for teacher education program – College denying application – Whether College's decision justified – Standard of review applicable to College's decision -- Manner of resolving potential conflict between religious freedoms and equality rights.

Trinity Western University ("TWU") is a private institution in B.C., associated with the Evangelical Free Church of Canada. TWU established a teacher training program offering baccalaureate degrees in education upon completion of a five-year course, four years of which were spent at TWU, the fifth year being under the aegis of Simon Fraser University ("SFU"). TWU applied to the B.C. College of Teachers ("BCCT") for permission to assume full responsibility for the teacher education program. One of the reasons for assuming complete responsibility for the program was TWU's desire to have the full program reflect its Christian world view. The BCCT refused to approve the application because it was contrary to the public interest for the BCCT to approve a teacher education program offered by a private institution which appears to follow discriminatory practices. The BCCT was concerned that the TWU Community Standards, applicable to all students, faculty and staff, embodied discrimination against homosexuals. Specifically, the concern stemmed from the list of "PRACTICES THAT ARE BIBLICALLY CONDEMNED", which encompassed "sexual sins including . . . homosexual behaviour". TWU community members were asked to sign a document in which they agreed to refrain from such activities. On application for judicial review, the B.C. Supreme Court found that it was not within the BCCT's jurisdiction to consider whether the program follows discriminatory practices under the public interest component of the *Teaching Profession Act* and that there was no reasonable foundation to support the BCCT's decision with regard to discrimination. The court granted an order in the nature of mandamus, allowing approval of the TWU proposed teacher education program for a five-year period subject to a number of conditions. The Court of Appeal found that the BCCT had acted within its jurisdiction, but affirmed the trial judge's decision on the basis that there was no reasonable foundation for the BCCT's finding of discrimination.

Held (L'Heureux-Dubé J. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.: The BCCT had jurisdiction to consider discriminatory practices in dealing with the TWU application. The suitability for entrance into the profession of teaching must take into account all features of the education program at TWU and the power to establish standards provided for in s. 4 of the *Teaching Profession Act* must be interpreted in light of the general purpose of the statute. Public schools are meant to develop civic virtue and responsible citizenship and to educate in an environment free of bias, prejudice and intolerance. It would not be correct, in this context, to limit the scope of s. 4 to a determination of skills and knowledge. The standard of correctness must be applied to the BCCT's decision to consider discriminatory practices because it was determinative of jurisdiction and beyond the expertise of the members of the BCCT.

The absence of a privative clause, the expertise of the BCCT, the nature of the decision and the statutory context all favour a correctness standard of review on the issue of whether the BCCT's decision is justified. While this case deals with the discretion of an administrative body to determine the public interest, the BCCT is not the only government actor entrusted with policy development. Furthermore, its expertise does not qualify it to interpret the scope of human rights nor to reconcile competing rights. The Court of Appeal was wrong in applying a lower standard to the findings of the BCCT with regard to the existence of discriminatory practices and whether any such practices create a perception that the BCCT condones this discrimination or create a risk that graduates of TWU will not provide a discrimination-free environment for all public school students. The existence of discriminatory practices is based on the interpretation of the TWU documents and human rights values and principles. This is a question of law that is concerned with human rights and not essentially educational matters.

At the heart of the appeal is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system, concerns that may be shared by society generally. While TWU is a private institution that is exempted, in part, from the B.C. human rights legislation and to which the *Canadian Charter of Rights and Freedoms* does not apply, the BCCT 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. Any potential conflict between religious freedoms and equality rights should be resolved through the proper delineation of the rights and values involved. Properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute. The proper place to draw the line is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. Acting on those beliefs, however, is a different matter. If a teacher in the public school system engages in discriminatory conduct, that teacher can be subject to disciplinary proceedings before the BCCT. In this way, the scope of the freedom of religion and equality rights that have come into conflict can be circumscribed and thereby reconciled.

Here, by not taking into account the impact of its decision on the right to freedom of religion of the members of TWU, the BCCT did not weigh the various rights involved in its assessment of the alleged discriminatory practices of TWU. Consideration of human rights values in the present circumstances encompasses consideration of the place of private institutions in our society and the reconciling of competing rights and values. Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation. Even though the requirement that students and faculty adopt the Community Standards creates differential treatment since it would probably prevent homosexual students and faculty from applying, one must consider the true nature of the undertaking and the context in which this occurs. Many Canadian universities have traditions of religious affiliations. Religious public education rights are enshrined in s. 93 of the *Constitution Act, 1867*. Moreover, a religious institution is not considered to breach B.C. human rights legislation where it prefers adherents of its religious constituency. It cannot be reasonably concluded that private institutions are protected but that their graduates are *de facto* considered unworthy of fully participating in public activities. While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers. Clearly, the restriction on freedom of religion must be justified by evidence that the exercise of this freedom of religion will, in the circumstances of this case, have a detrimental impact on the public school system. There is nothing in the TWU Community Standards, which are limited to prescribing conduct of members while at TWU, that indicates that graduates of TWU will not treat homosexuals fairly and respectfully. The evidence to date is that graduates from the joint TWU-SFU teacher education program have become competent public school teachers, and there is no evidence before this Court of discriminatory conduct. In addition, there is no basis for the inference that the fifth year of the TWU program conducted under the aegis of SFU corrected any attitudes which were the subject of the BCCT's concerns. On the evidence, the participation of SFU had nothing to do with the apprehended intolerance from its inception to the present. Rather, the cooperation was intended to support a small faculty in its start-up stage.

The order of mandamus was justified because the exercise of discretion by the BCCT was fettered by s. 4 of the Act and because the only actual reason for denial of certification was the consideration of discriminatory practices. In considering the religious precepts of TWU instead of the actual impact of these beliefs on the public school environment, the BCCT acted on the basis of irrelevant considerations. It therefore acted unfairly.

Per L'Heureux-Dubé J. (dissenting): This case is about providing the best possible educational environment for public school students in British Columbia. The *Teaching Profession Act* confers jurisdiction on the BCCT to consider discriminatory practices in evaluating TWU's application. The BCCT's statutory mandate gives it a broad discretion to set standards for the approval of teacher education programs, as well as for their graduates. The presence of discrimination is relevant and within the BCCT's jurisdiction.

The standard of patent unreasonableness is the appropriate standard of review for the BCCT's decision. While *Pushpanathan*'s privative clauses factor does not apply to this case, the other relevant factors all weigh in favour of patent unreasonableness. First, the BCCT has relative expertise in the area of setting standards for admission into the teaching profession. Deference should be accorded to self-governing professional bodies like the BCCT. Second, on the question of the purpose of the Act as a whole and of the particular provision at issue, the BCCT's decision concerning TWU's teacher education program goes to the heart of the *Teaching Profession Act*'s *raison d'être* and should only be disturbed by judges, who lack the specialized expertise of teachers, if it is patently unreasonable. The BCCT is entrusted with policy development. This policy-making mandate is reflected in the words of s. 4 of the Act. Moreover, the BCCT has wide discretion to review teacher training programs under the Act. Its polycentric decision in this case was made pursuant to s. 21(i) of the Act, which involves the application of vague, open-textured principles, requiring curial deference. Finally, the BCCT's decision is fact-based, concerning an issue the nature of which implicates the tribunal's expertise. Determining how TWU's program may affect its graduates' preparedness to teach in the public schools is a factual rather than a legal inquiry and requires the specialized expertise of the BCCT's members, the majority of whom have classroom experience.

The BCCT fulfills the role of gatekeeper to the profession of public school teaching. Statutory interpretation of the BCCT's "public interest" responsibilities should be purposive and contextual, not nebulous. It is a misconception to characterize the BCCT's decision as being a balancing or interpretation of human rights values, an exercise that is beyond the tribunal's expertise. Equality is a central component of the public interest that the BCCT is charged with protecting in the classrooms of the province. The BCCT was required to consider the value of equality in its assessment of the impact TWU's program will have on the classroom environment. The BCCT was not acting as a human rights tribunal and was not required to consider other *Charter* or human rights values such as freedom of religion which are not germane to the public interest in ensuring that teachers have the requisites to foster supportive classroom environments in public schools. The

BCCT's inquiry was reasonably limited to its area of educational expertise.

The BCCT's decision not to accredit a free-standing TWU teacher-training program should be upheld. The BCCT's conclusion that TWU's Community Standards embodies a discriminatory practice is not patently unreasonable. Signing the contract makes the student or employee complicit in an overt, but not illegal, act of discrimination against homosexuals and bisexuals. It is not patently unreasonable for the BCCT to treat TWU students' public expressions of discrimination as potentially affecting the public school communities in which they wish to teach. Although tolerance is also a fundamental value in the Community Standards, the public interest in the public school system requires something more than mere tolerance.

The BCCT was not patently unreasonable in concluding that, without spending a year under the auspices of SFU, TWU graduates, due to their signature of the Community Standards contract, could have a negative impact on the supportive environment required in classrooms. The BCCT could reasonably find that without a fifth year of training outside the supervision of TWU there would be an unacceptable pedagogical cost in terms of reduced exposure of TWU students to diversity and its values. It is reasonable to insist that graduates of accredited teacher training programs be equipped to provide a welcoming classroom environment, one that is as sensitive as possible to the needs of a diverse student body.

The modern role of the teacher has developed into a multi-faceted one, including counselling as well as educative functions. Evidence shows that there is an acute need for improvement in the experiences of homosexual and bisexual students in Canadian classrooms. Without the existence of supportive classroom environments, homosexual and bisexual students will be forced to remain invisible and reluctant to approach their teachers. They will be victims of identity erasure. The students' perspective must be the paramount concern and, even if there are no overt acts of discrimination by TWU graduates, this vantage point provides ample justification for the BCCT's decision. The BCCT's decision is a reasonable proactive measure designed to prevent any potential problems of student, parent, colleague, or staff perception of teachers who have not completed a year of training under the supervision of SFU, but have signed the Community Standards contract. The courts, by trespassing into the field of pedagogy, deal a setback to the BCCT's efforts to ensure the sensitivity and empathy of its members to all students' backgrounds and characteristics.

The respondents' *Charter* claims should be dismissed. The effect of the BCCT's decision is to restrict TWU students' expression. Assuming that TWU's expression is also fettered, these violations are saved under s. 1. First, the objective behind the BCCT's decision to protect the classroom environment in public schools is pressing and substantial. Second, the BCCT's decision satisfies the proportionality test. The burden placed on expression is rationally connected to the BCCT's goal of ensuring a welcoming and supportive atmosphere in classrooms. By falling within an acceptable range of solutions, the BCCT's decision also minimally impairs s. 2(*b*). The extent of the violation's deleterious effects on TWU and its students is more than offset by the salutary gains that will plausibly accrue in classrooms. With respect to s. 2(*d*), since no unjustified individual rights violations were found in this case, and since TWU students are not unconstitutionally restrained from exercising their individual rights collectively, the respondent student's s. 2(*d*) claim must also fail.

Assuming without deciding that TWU can advance a s. 2(*a*) claim, the impugned state action does not offend religious freedom but accommodates it. The BCCT's decision permits the existence of schools such as TWU which have a religious orientation. There is also no impairment of the respondent student's s. 2(*a*) rights. Her assertion of religious freedom should be appraised under s. 15. Based on the guidelines assembled and applied in *Law*, no violation of the student's s. 15 equality rights has been established. The distinction and differential treatment resulting from the BCCT's decision are not based on the student's religion. There is every indication that the BCCT would be as concerned if a private secular institution were to require a discriminatory practice. Furthermore, a subjective-objective examination of *Law*'s four contextual factors reveals that the student's human dignity is not demeaned by the BCCT's decision to attach consequences to TWU students' signature of the Community Standards contract.

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By Iacobucci and Bastarache JJ.

Applied: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; **referred to:** *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048;

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Egan v. Canada*, [1995] 2 S.C.R. 513; *M. v. H.*, [1999] 2 S.C.R. 3; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Khalil v. Canada (Secretary of State)*, [1999] 4 F.C. 661; *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, aff'd [1994] 3 S.C.R. 1100.

By L'Heureux-Dubé J. (dissenting)

Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825; *R. v. Jones*, [1986] 2 S.C.R. 284; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Casson v. British Columbia College of Teachers*, [2000] B.C.J. No. 1038 (QL); *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Lindsay v. Manitoba (Motor Transport)* (1989), 62 D.L.R. (4th) 615; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Egan v. Canada*, [1995] 2 S.C.R. 513; *M. v. H.*, [1999] 2 S.C.R. 3; *Brillinger v. Brockie* (2000), 37 C.H.R.R. D/15; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48; *R. v. Oakes*, [1986] 1 S.C.R. 103; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Adler v. Ontario*, [1996] 3 S.C.R. 609; *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Corbiere v. Canada (Minister of Indian and Nothern Affairs)*, [1999] 2 S.C.R. 203; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451.

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Nichols, Sharon L. "Gay, Lesbian, and Bisexual Youth: Understanding Diversity and Promoting Tolerance in Schools" (1999), 99 *Elementary School Journal* 505.

APPEAL from a judgment of the British Columbia Court of Appeal (1998), 59 B.C.L.R. (3d) 241, 116 B.C.A.C. 1, 190 W.A.C. 1, 169 D.L.R. (4th) 234, 58 C.R.R. (2d) 189, [1999] 7 W.W.R. 71, [1998] B.C.J. No. 3029 (QL), dismissing the appellant's appeal from a judgment of the British Columbia Supreme Court (1997), 41 B.C.L.R. (3d) 158, 2 Admin. L.R. (3d) 12, 47 C.R.R. (2d) 155, [1998] 4 W.W.R. 550, [1997] B.C.J. No. 2076 (QL), granting the respondents' application for judicial review. Appeal dismissed, L'Heureux-Dubé J. dissenting.

Thomas R. Berger, *Q.C.*, *Gary A. Nelson* and *Erin F. Berger*, for the appellant.

Robert G. Kuhn, *Kevin G. Sawatsky* and *Kevin L. Boonstra*, for the respondents.

David M. Brown and *Adrian C. Lang*, for the intervener the Evangelical Fellowship of Canada.

Susan Ursel and *Maurice A. Green*, for the intervener the Ontario Secondary School Teachers' Federation.

William J. Sammon, for the intervener the Canadian Conference of Catholic Bishops.

Timothy J. Delaney and *James Gopaulsingh*, for the intervener the British Columbia Civil Liberties Association.

Kenneth W. Smith and *Pam MacEachern*, for the intervener EGALE Canada Inc.

Dallas K. Miller, *Q.C.*, and *Corina Dario*, for the intervener the Christian Legal Fellowship.

Gerald D. Chipeur and *Barbara B. Johnston*, for the intervener the Seventh-Day Adventist Church in Canada.

Andrew K. Lokan and *Heather E. Bowie*, for the intervener the Canadian Civil Liberties Association.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ. was

delivered by

1 IACOBUCCI AND BASTARACHE JJ. — Trinity Western University ("TWU") is a private institution located in Langley, British Columbia and incorporated under the laws of British Columbia. It succeeded Trinity Western College in 1985; that junior college was itself the successor of a private society founded in 1962. TWU is associated with the Evangelical Free Church of Canada. It is an accredited member of the Association of Universities and Colleges of Canada and the Council for Christian Colleges and Universities. TWU confers six baccalaureate degrees and offers four masters programs. Donna Lindquist was a third year student at TWU who had planned to attend the Teacher Education Program at TWU in January of 1998.

2 In 1985, TWU established a teacher training program offering baccalaureate degrees in education upon completion of a five-year course, four years of which were spent at TWU, the fifth year being under the aegis of Simon Fraser University. In 1987, TWU applied to B.C.'s Minister of Education for permission to assume full responsibility for the teacher education program. Although there appears to have been approval in principle in Cabinet, the Minister did not act on the request because of the creation in that year of the British Columbia College of Teachers ("BCCT") which would become the appropriate body to consider the application. TWU applied to the BCCT in January of 1988, but the College was not ready to consider the application. The application was therefore withdrawn and presented again in January of 1995. One of the reasons for assuming complete responsibility for the program was the desire of TWU to have the full program reflect the Christian world view of TWU.

3 The philosophy of TWU is specifically described in a document entitled "Responsibilities of Membership in the Community of Trinity Western University". It is implemented through the adoption of "Community Standards" which are intended to reflect the preferred lifestyle of persons belonging to the TWU community; they apply both off and on campus and are the object of a statement of acceptance by students, faculty and staff. An extract of the application made in 1995 is instructive:

> Trinity Western is a relatively unique Canadian university in that it offers academically responsible education within a distinctive Christian context. Its mission is to equip Christians to serve God and people throughout society. TWU's educational program, like those in public universities, is based on aparticular worldview perspective. At TWU, that worldview is a Christian one. It includes (but is not limited to) a deep respect for integrity and authenticity, responsible stewardship of resources, the sanctity of human life, compassion for the disadvantaged, and justice for all. This provides a framework for the leadership development that is emphasized throughout TWU's program. Although its program is oriented towards those who profess the Christian faith, the university welcomes anyone who wishes to pursue a liberal arts education and is willing to be part of the Trinity Western community. While maintaining structural ties with its founding denomination, the Evangelical Free Church, the university serves the needs of the whole Christian community. Both the faculty and the student body represent a wide range of denominational backgrounds.

4 The "Community Standards" document that students attending TWU must sign contains the following paragraph, which is at the root of the present controversy:

> REFRAIN FROM PRACTICES THAT ARE BIBLICALLY CONDEMNED. These include but are not limited to drunkenness (Eph. 5:18), swearing or use of profane language (Eph. 4:29, 5:4; Jas 3:1-12), harassment (Jn 13:34-35; Rom. 12:9-21; Eph. 4:31), all forms of dishonesty including cheating and stealing (Prov. 12:22; Col. 3:9; Eph. 4:28), abortion (Ex. 20:13; Ps. 139:13-16), involvement in the occult (Acts 19:19; Gal. 5:19), and sexual sins including premarital sex, adultery, homosexual behaviour, and viewing of pornography (I Cor. 6:12-20; Eph. 4:17-24; I Thess. 4:3-8; Rom. 2:26-27; I Tim. 1:9-10). Furthermore married members of the community agree to maintain the sanctity of marriage and to take every positive step possible to avoid divorce. [Emphasis added.]

Faculty and staff are required to sign a "Community Standards" document that contains a similar paragraph, including the prohibition of homosexual behaviour.

5 Following established policies, the BCCT appointed a program approval team ("PAT") to assess the TWU application. The PAT recommended the approval of the application for accreditation with conditions on March 21, 1996. On April 19, 1996, the Teacher Education Programs Committee ("TEPC") approved the PAT report but modified some of the conditions. On May 17, 1996, the Council of the BCCT rejected the report and recommendations. The motion was passed on two grounds: TWU did not meet the criteria stated in the BCCT bylaws and policies; and approval would not be in the public interest because of discriminatory practices of the institution. TWU applied for a reconsideration. After obtaining a legal opinion on the issue, the Council confirmed its denial of the application on June 29, 1996. The motion adopted on June 29 gives the following reason for the denial:

> That Trinity Western University's appeal in regard to the College's denial of its application for approval of a Teacher Education Program be denied because Council still believes the proposed program follows discriminatory practices which are contrary to the public interest and public policy which the College must consider under its mandate as expressed in the *Teaching Profession Act*.

6 The BCCT gave no written reasons explaining its initial denial of the application or rejection on reconsideration. The May 22, 1996 letter of the Registrar of the BCCT to TWU however refers to discriminatory practices and "specifically the requirement for students to sign a contract of 'Responsibilities of Membership in the Trinity Western University Community'". The only other written explanation for denial of the application comes from the Fall 1996 quarterly newsletter of the BCCT, where the whole matter becomes abundantly clear. The BCCT writes:

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

7 On application for judicial review of the BCCT decision, Davies J. of the Supreme Court of British Columbia ((1997), 41 B.C.L.R. (3d) 158) found that it was not within the BCCT's jurisdiction to consider whether the program follows discriminatory practices under the public interest component of the *Teaching Profession Act*, R.S.B.C. 1996, c. 449. He was of the view that matters of public interest in the Act relate to teaching standards and could not be extended to cover religious beliefs. Davies J. also found that there was no reasonable foundation to support the decision of the BCCT with regard to discrimination. The decision of the Supreme Court of British Columbia was affirmed by a majority of the Court of Appeal ((1998), 59 B.C.L.R. (3d) 241), Rowles J.A. dissenting.

8 The appellant before this Court describes the nature of the appeal in these terms:

> This case is really an administrative law case. Did the Council exceed its jurisdiction, when it denied approval to TWU's five-year B.Ed. program, by taking into account TWU's discriminatory practices? Was this an extraneous consideration? This is a question of law, and the standard of correctness applies.
>
> If the Council was entitled to consider "discriminatory practices", was there evidence of such practices and of discriminatory ramifications . . . ? Here the test is whether the decision of the Council was patently unreasonable.

We believe this approach is convenient and will adopt it, except for the determinations of the applicable standards of review.

I. Relevant Constitutional, Statutory and Non-Statutory Provisions

9 *Canadian Charter of Rights and Freedoms*

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;

. . .

(*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.

Teaching Profession Act, R.S.B.C. 1996, c. 449

4 It is the object of the college to establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members, persons who hold certificates of qualification and applicants for membership and, consistent with that object, to encourage the professional interest of its members in those matters.

21 Subject to this Act, the council must govern and administer the affairs of the college and, without limiting that duty, the council may do the following:

. . .

(b) appoint an employee of the college as an evaluator with authority to evaluate and decide whether persons applying for a certificate of qualification or for membership in the college have complied with this Act and the bylaws of the college;

(c) delegate to a committee of the college the authority set out in paragraph (b), either in addition to or in substitution for one or more evaluators appointed under that paragraph;

. . .

(i) approve, for certification purposes, the program of any established faculty of teacher education or school of teacher education.

23 (1) The council may make bylaws consistent with this Act and the *School Act* as follows:

. . .

(d) respecting the training and qualifications of teachers and establishing standards, policies and procedures with respect to the training and qualifications including, but not limited to, professional, academic and specialist standards, policies and procedures;

(e) respecting the issue of certificates of qualification . . .

(f) respecting the standards of fitness for the admission of persons as members of the college;

. . .

(l) giving effect to and implementing the powers of the council set out in this Act;

24 (1) The registrar of the college must file with the minister a copy of each bylaw made by the council, certified under the seal of the college, within 10 days after it is made.

(2) The Lieutenant Governor in Council may disallow a bylaw respecting the training, qualification or certification of teachers within 60 days after the filing of it under subsection (1).

40 A member may appeal to the Supreme Court any decision, determination or order of the qualifications committee, discipline committee or council that affects the member and, from a decision, determination or order of the Supreme Court, may appeal to the Court of Appeal with leave of a justice of that court.

School Act, R.S.B.C. 1996, c. 412

171(1) The minister must appoint an education advisory council to advise the minister on policy matters respecting education.

. . .

174(1) The Lieutenant Governor in Council may appoint one or more boards of examiners consisting of 2 or more members, and a board of examiners so appointed must include at least one representative of the Ministry of Education, Skills and Training and one person appointed to represent the universities named in the *University Act* and the *Trinity Western University Act*.

School Regulation, B.C. Reg. 265/89

11 The Education Advisory Council may advise the minister on overall policies of the education system including, without limitation, the following areas:

(a) curriculum and assessment;

(b) the teaching profession;

(c) system governance;

(d) finance.

Bylaws of the British Columbia College of Teachers, Bylaw 5 – Teacher Education Program Committee

5.C. Approval of Teacher Education Programs

5.C.01 Pursuant to the *Teaching Profession Act*, the Council of the College may approve for certification purposes the teacher education programs or revision to the programs of the Faculties of Education at universities recognized by statute in British Columbia as degree granting institutions.

5.C.02 The Council shall establish criteria for the approval for certification purposes of teacher education programs.

5.C.03 For existing teacher education programs that meet or are working towards meeting the criteria for approval established under Bylaw 5.C.02, approval may be granted on a continuing basis on the recommendation of the Teacher Education Programs Committee.

5.C.04 The Council may from time to time review the teacher education programs of Faculties of Education approved under Bylaw 5.C.03.

5.C.05 For new teacher education programs offered by institutions recognized by statute in British Columbia as

degree granting institutions, approval may be granted on an interim basis for a maximum of five years and will be based on:

(a) the criteria for approval established under Bylaw 5.C.02;

(b) the recommendation of the Teacher Education Programs Committee following a review process.

Policies of the British Columbia College of Teachers

P5.C *Approval of Teacher Education Programs*

P5.C.01 Criteria for the Approval for Certification Purposes of Teacher Education Programs

. . .

(b) Programs must meet the following criteria:

1.0 Context

1.1 Have an appropriate institutional setting in terms of depth and breadth of personnel, research and other scholarly activity and commitment to teacher education.

2.0 Selection

2.0 Have defined selection and admission policy that recognizes the importance of academic standing, interest in working with young people and suitability for entrance into the profession of teaching.

3.0 Content

. . .

3.2 Have content which provides for a minimum of 36 credit/semester hours of professional education and pedagogical course work. This must include a minimum of 12 weeks of supervised student teaching, the major part of which normally must be undertaken in public schools. Theprogram should recognize the advantages of an extended practicum in one school.

3.3 Have content which provides a base of pedagogical knowledge informed by current research.

3.4 Have content which provides a base of pedagogical skills that is informed by principles of effective practice and current research.

3.5 Have content which recognizes the diverse nature of our society and which addresses throughout the program philosophical, ethical, and societal concerns with specific attention to the following areas:

3.5.1 English as a Second Language (ESL)
3.5.2 First Nations Issues
3.5.3 Gender Equity
3.5.4 Multiculturalism and Racism
3.5.5 Students with Special Needs

. . .

4.0 Integration of Theory and Practice

. . .

4.3 Recognizes that the integration of theory and practice is enhanced by:

. . .

4.3.2 Ensuring that those who teach pedagogical skills and supervise practica have recent experience or significant involvement in school classrooms.

. . .

P5.C.03 Process for the Approval for Certification Purposes of New Teacher Education Programs

1. The Teacher Education Programs Committee shall oversee the process of program approval.

2. A Program Approval Sub-Committee consisting of three members of the Teacher Education Programs Committee shall meet as needed to prepare recommendations concerning program approval.

3. Approval of New Programs:

a. Each proposal will be reviewed by the Program Approval Sub-Committee and the Teacher Education Programs Committee. Following a satisfactory initial review, a separate Program Approval Team will be established to consider the proposal. Each Program Approval Team shall be appointed by Council upon recommendation of the Teacher Education Programs Committee.

b. Each Program Approval Team shall consist of three members including:

i. A member of the Teacher Education Programs Committee.

ii. A teacher educator, who is not an employee or part of the governing structure of the institution making the application, appointed in consultation with the Deans of the Faculties of Education with approved programs and the institution making the application.

iii. A member of the College of Teachers named in consultation with the British Columbia Teachers' Federation.

A staff person or consultant will be assigned to assist the team.

c. The Program Approval Team will make a recommendation for approval or denial of approval to the Teacher Education Programs Committee. If approval is recommended, the Program Approval Team will also recommend a term for interim approval as defined in Bylaw 5.C.05 and may recommend conditions that must be met prior to consideration of continuing program approval.

d. In the final year of interim approval, the College shall establish a Program Approval Team to make recommendations regarding further interim approval or approval on a continuing basis.

II. Relevant Provisions in TWU Documents

10 *Responsibilities of Membership in the Community of Trinity Western University* (Student version; Otherwise Referred to as Community Standards)

PREAMBLE

Trinity Western is a Christian university distinguished by a clear mission:

> The mission of Trinity Western University, as an arm of the church, is to develop godly Christian leaders: positive, goal-oriented university graduates with thoroughly Christian minds; growing disciples of Jesus Christ who glorify God through fulfilling The Great Commission, serving God and people in the various marketplaces of life.
>
> . . .
>
> Membership in the Trinity Western community is obtained through application and invitation. Those who accept an invitation to join the community agree to uphold its standards of conduct. . . .
>
> . . .
>
> Individuals who are invited to become members of this community but cannot with integrity pledge to uphold the application of these standards are advised not to accept the invitation and to seek instead a living-learning situation more acceptable to them.
>
> CORE VALUES AND COMMUNITY STANDARDS
>
> . . .
>
> Because the Community Standards are intended to reflect a preferred lifestyle for those who belong to this community rather than "campus rules", they apply both on and off campus. All members of the community are responsible to:
>
> - CONDUCT THEMSELVES AS RESPONSIBLE CITIZENS.
> - ENGAGE IN AN HONEST PURSUIT OF BIBLICAL HOLINESS.
> - MAKE THE UNIVERSITY'S MISSION THEIR OWN MISSION.
> - LIMIT THE EXERCISE OF THEIR CHRISTIAN LIBERTY IN ACCORDANCE WITH THE UNIVERSITY'S MISSION AND THE BEST INTEREST OF OTHER MEMBERS OF THE COMMUNITY.
>
> APPLICATION OF THE COMMUNITY STANDARDS TO STUDENTS
>
> -
>
> It is recognized that not every student will have personal convictions wholly in accord with the following application of these standards. However, all students are responsible to:
>
> . . .
>
> - OBEY JESUS' COMMANDMENT TO HIS DISCIPLES . . . ECHOED BY THE APOSTLE PAUL . . . TO LOVE ONE ANOTHER. In general this involves showing respect for all people regardless of race or gender and regard for human life at all stages. It includes making a habit of edifying others, showing compassion, demonstrating unselfishness, and displaying patience.
> - REFRAIN FROM PRACTICES THAT ARE BIBLICALLY CONDEMNED. These include but are not limited to drunkenness (Eph. 5:18), swearing or use of profane language (Eph. 4:29, 5:4; Jas 3:1-12), harassment (Jn 13:34-35; Rom. 12:9-21; Eph. 4:31), all forms of dishonesty including cheating and stealing (Prov. 12:22; Col. 3:9; Eph. 4:28), abortion (Ex. 20:13; Ps. 139:13-16), involvement in the occult (Acts 19:19; Gal. 5:19), and sexual sins including premarital sex, adultery, homosexual behaviour, and viewing of pornography (I Cor. 6:12-20; Eph. 4:17-24; I Thess. 4:3-8; Rom. 2:26-27; I Tim. 1:9-10). Furthermore married members of the community agree to maintain the sanctity of marriage and to take every positive step possible to avoid divorce.

. . .

This application of the Community Standards is not offered as a legalistic definition of right and wrong. Rather, it provides concrete examples of a commitment to the mission of Trinity Western University and a commitment to fellow members of this academic community. Certain expectations may not be commanded by Scripture, but nonetheless, they are desirable and essential if all members of the community are to achieve their personal goals. Consequently, all students are required to commit themselves to follow this application of the Community Standards and maintain the integrity of that commitment.

Responsibilities of Membership in the Community of Trinity Western University (Faculty and staff version; Otherwise Referred to as Community Standards)

The Community Standards are essentially the same as those for students, however the Application provision differs as follows:

APPLICATION OF THE COMMUNITY STANDARDS
TO FACULTY, STAFF AND ADMINISTRATION

The University asserts from the outset that the existence of separate application statements is not for the purpose of creating different standards for different community groups. Thus, the same core values and biblical principles underlie both statements. This portion of the Community Standards statement applies these common values and principles in an appropriate manner to the situations which present themselves to employees which may differ from those of students. Employees will at all times affirm and support the application statement for students.

Consistent with the Preamble and Core Values of this document, employees are expected to:

. . .

- OBEY JESUS' COMMANDMENT TO HIS DISCIPLES . . . ECHOED BY THE APOSTLE PAUL . . . TO LOVE, CHERISH, AND SERVE THE NEEDS OF ONE ANOTHER. This command requires total respect for all people regardless of race, gender, location, status, or stage of life and of course, precludes harming another person physically or maligning another's character through gossip, slander, or careless talk. It also includes making a habit of edifying others, showing compassion, demonstrating unselfishness, and displaying patience.

- REFRAIN FROM PRACTICES WHICH ARE BIBLICALLY CONDEMNED. These would include such matters as drunkenness (Eph. 5:18) and other forms of substance abuse, use of profane or unedifying language (Eph. 4:29, 5:4; Jas. 3:1-12), all forms of harassment (Jn 13:34-35; Rom. 12:9-21; Eph. 4:31), all forms of dishonesty including cheating, stealing and misrepresentation (Prov. 12:22; Col. 3:9; Eph. 4:28), abortion (Ex. 20:13; Ps. 139:13-16), gluttony, involvement in the occult (Acts 19:19; Gal. 5:19), and sexual sins including immodesty, the viewing of pornography, premarital and extramarital sex, common law relationships, and homosexual behaviour (I Cor. 6:12-20; Eph. 4:17-24; I Thess. 4:3-8; Rom. 2:26-27; I Tim. 1:9-10). Furthermore, married members of the community agree to maintain the sanctity of marriage and to take every positive step possible to avoid divorce.

- TREAT WITH UTMOST SERIOUSNESS THE POSITION OF TRUST AND INFLUENCE WHICH AN EMPLOYEE HOLDS IN HIS/HER RELATIONSHIPS WITH STUDENTS, AND TO MODEL AT ALL TIMES WISE, DISCREET AND RESPECTFUL BEHAVIOUR. This is especially important for faculty whose direct relationship of authority with students must be exercised with an attitude of integrity and service. Employees agree as well to affirm the application of the University's Community Standards to students.

Explanation of Community Standards Code Provided to Students

When you decided to attend TWU you signed on to live by different standards than the rest of the world does. The "rules", or Community Standards, are not meant to be the bane of your existence, but to create an

> atmosphere that is consistent with our profession of faith.
>
> You might not absolutely agree with the Standards. They might not be consistent with what you believe. However, when you decided to come to TWU, you agreed to accept these responsibilities. If you cannot support and abide by them, then perhaps you should look into UIG [University of Instant Gratification] or AGU [Anything Goes University].

Statement of Faith (for Faculty)

> As a Christian university, Trinity Western openly espouses a unifying philosophical framework to which all faculty and staff are committed without reservation. The University identifies with and is committed to historic orthodox Christianity as expressed by the official Statement of Faith. . . .
>
> . . .
>
> □ I agree without reservation with the above Statement of Faith and agree to support that position at all times before the students and friends of Trinity Western University.
>
> □ I agree with reservation with the above Statement of Faith. (Specify all reservations on separate sheet.)
>
> Date_____ Signed_____
>
> □ I feel I cannot sign the above Statement of Faith for the reasons specified. (Specify all reasons on separate sheet.)

TWU Statement of Academic Freedom

> Accordingly, Trinity Western University maintains that arbitrary indoctrination and simplistic, prefabricated answers to all questions are incompatible with a Christian respect for truth, a Christian understanding of human dignity and freedom, and quality Christian educational techniques and objectives.
>
> On the other hand, Trinity Western University rejects as incompatible with human nature and revelational theism a definition of academic freedom which arbitrarily and exclusively requires pluralism without commitment, denies the existence of any fixed points of reference, maximizes the quest for truth to the extent of assuming it is never knowable, and implies an absolute freedom from moral and religious responsibility to its community.
>
> Rather, for itself, Trinity Western University is committed to academic freedom in teaching and investigation from a stated perspective, i.e., within parameters consistent with the confessional basis of the constituency to which the University is responsible, but practised in an environment of free inquiry and discussion and of encouragement to integrity in research. Students also have freedom to inquire, right of access to the broad spectrum of representative information in each discipline, and assurance of a reasonable attempt at a fair and balanced presentation and evaluation of all material by their instructors. Truth does not fear honest investigation.

III. Analysis

(1) *Is Consideration of Discriminatory Practices within the Jurisdiction of the BCCT?*

11 The BCCT is empowered under s. 4 of the *Teaching Profession Act* (the "Act") to "establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members, persons who hold certificates of qualification and applicants for membership and . . . to encourage the professional interest of its members". It is this reference to the public interest that is invoked by the BCCT as justification for considering the TWU admissions policy in deciding on the certification of its teacher education program. The BCCT argues that teaching programs must be offered in an environment that reflects human rights values and that those values can be used as a guide in the assessment of the impact of discriminatory practices on pedagogy. Although the BCCT did not take into account the existence of special institutions such as TWU in designing its bylaws and policies, it claims that all institutions who wish to train teachers for entry into the public education system must satisfy the BCCT that they will provide an institutional setting that appropriately prepares future teachers for the public school environment, and in particular for the diversity of public school students.

12 TWU argues that the BCCT was not created to render judgment on the acceptability of religious beliefs nor to enforce human rights legislation in an attempt to eradicate potential discrimination in the school system. It is of the view that a contextual interpretation of the words "public interest" in s. 4 indicates that the powers of the BCCT are limited to establishing standards ensuring that teachers are properly trained, competent and of good character. According to TWU, the BCCT is not authorized to decide whether the religious beliefs of TWU students and staff may give rise to a risk of discrimination or to a perception within the public that those students will discriminate when employed within the public education system.

13 Our Court accepted in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, that teachers are a medium for the transmission of values. It is obvious that the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers because they are the fabric of the society within which teachers operate and the reason why there is a need to respect and promote minority rights. The suitability for entrance into the profession of teaching must therefore take into account all features of the education program at TWU. We agree with Rowles J.A. that "[i]t is clear from the terms 'professional responsibility and competence of its members' that the College can consider the effect of public school teacher education programs on the competence and professional responsibility of their graduates" (para. 197). The power to establish standards provided for in s. 4 of the Act must be interpreted in light of the general purpose of the statute and in particular, the need to ensure that "the fulfilment of public functions is undertaken in a manner that does not undermine public trust and confidence" (*Ross*, *supra*, at para. 84). Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance. It would not be correct, in this context, to limit the scope of s. 4 to a determination of skills and knowledge.

14 We are therefore of the view that the BCCT had jurisdiction to consider discriminatory practices in dealing with the TWU application. All parties accepted that the standard of correctness applied to this decision because it was determinative of jurisdiction and beyond the expertise of the members of the Council.

(2) *Was the Decision of the BCCT Council Justified?*

(a) The Standard of Review

15 Before this question can be answered, we must decide what is the appropriate standard of review in these circumstances. As mentioned earlier, the appellant is of the view that the standard of patent unreasonableness applies. There is no substantive argument made in the appellant's factum on this issue, but its position is basically the same as that of the intervener, the Ontario Secondary School Teachers' Federation. In essence, the view of these parties is that the BCCT is a specialized tribunal with considerable expertise in the field of education. It is expressly granted wide discretion in deciding what factors to take into account when approving education programs. Determining criteria as to whether a program is appropriate for the public school system is a polycentric policy decision involving balancing multiple factors and competing interests. The Legislature contemplated that such decisions should be left to the Council. The respondent TWU argues that a correctness standard applies because the purpose of the decision is the protection of minorities and promotion of human rights. The expertise of the Council does not extend to human rights issues; the Council is predominantly comprised of school teachers with no experience in balancing competing interests in society. Furthermore, there is no privative clause applicable and s. 40 of the Act provides for a right of appeal. The Act also allows the Lieutenant Governor in Council to disallow a bylaw passed by the BCCT.

16 In the Court of Appeal, Goldie J.A. considered the pragmatic and functional approach first adopted in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, and held that the lack of a privative clause, the lack of expertise in human rights issues of the BCCT and the purpose of the legislation indicated a standard of correctness. He nevertheless found that the misconception of TWU's world view and the error in finding intolerant behaviour were errors of fact and patently unreasonable. Rowles J.A., in her dissent, divided the question of jurisdiction and the existence of discriminatory practices generally, which were questions of law, and the effects of discriminatory practices, or whether the certification was in fact contrary to the public interest, which were questions of fact, applying different standards in each case. She applied the correctness standard to the first division and the reasonableness *simpliciter* standard to the

second.

17 In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, Bastarache J. summarized the recent jurisprudence of the Court on the standards of review to provide a framework for easy reference by judges and lawyers. Bastarache J. insisted on the fact that, under the pragmatic and functional approach, the focus of the inquiry is still on the particular provision being interpreted by the tribunal and that some provisions will require more deference than others, although they are found in the same Act. *Pushpanathan* did not modify *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, and *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748. It proposes the use of the same four basic factors. Dealing for instance with the expertise factor, it is worth noting that *Pezim* was concerned with the discretion of a securities commission to determine what was in the public interest; in that case, the Court found that, where the tribunal plays an important policy development role, a higher degree of judicial deference is warranted. In the present instance, we are also dealing with the discretion of an administrative body to determine the public interest. The present context is, however, very different. We have already mentioned that s. 171(1) of the *School Act* states that the Minister of Education must appoint an education advisory council to "advise the minister on policy matters respecting education". Section 11 of the *School Regulation* expands upon the role of the education advisory council and provides that it may advise the minister on "overall policies of the education system including, without limitation, the following areas: . . . (b) the teaching profession". Even if bylaws on discriminatory practices were adopted by the BCCT by virtue of the s. 4 public interest provision, pursuant to s. 24 of the *Teaching Profession Act*, these bylaws would have to be filed with the minister within 10 days and would be subject to disavowal. Therefore, the BCCT is not the only government actor entrusted with policy development. Furthermore, its expertise does not qualify it to interpret the scope of human rights nor to reconcile competing rights. It cannot be seriously argued that the determination of good character, which is an individual matter, is sufficient to expand the jurisdiction of the BCCT to the evaluation of religious belief, freedom of association and the right to equality generally. As mentioned in *Pushpanathan*, the expertise of the tribunal must be evaluated in relation to the issue and the relative expertise of the court itself. The BCCT asked for a legal opinion before its last denial of the TWU application; it relied on someone else's expertise with regard to the issue before us. It has set standards for teachers, but this has never included the interpretation of human rights codes. The absence of a privative clause, the expertise of the BCCT, the nature of the decision and the statutory context all favour a correctness standard.

18 We mentioned earlier that a lower standard had been applied by the Court of Appeal on the findings of the BCCT with regard to the existence of discriminatory practices and, if they are present, whether they have created a perception that the BCCT condones this discriminatory conduct. The lower standard was also applied to the BCCT finding that the school system has or has not created a risk that graduates of TWU will not provide a discrimination-free environment for all students. We do not believe that different standards should apply in these circumstances. The existence of discriminatory practices is based on the interpretation of the TWU documents and human rights values and principles. This is a question of law that is concerned with human rights and not essentially educational matters.

19 The perception of the public regarding the religious beliefs of TWU graduates and the inference that those beliefs will produce an unhealthy school environment have, in our view, very little to do, if anything, with the particular expertise of the members of the BCCT. We believe it is particularly important to note here that we are not in a situation where the Council is dealing with discriminatory conduct by a teacher, as in *Ross*. The evidence in this case is speculative, involving consideration of the potential future beliefs and conduct of graduates from a teacher education program taught exclusively at TWU. By contrast, in *Ross* the actual conduct of the teacher had, on the evidence, poisoned the atmosphere of the school (*Ross*, *supra*, at paras. 38-40 and 101). More importantly, the Council is not particularly well equipped to determine the scope of freedom of religion and conscience and to weigh these rights against the right to equality in the context of a pluralistic society. The public dimension of religious freedom and the right to determine one's moral conduct have been recognized long before the advent of the *Charter* (see *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 329) and have been considered to be legal issues. The accommodation of beliefs is a legal question discussed in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, and *Ross*. Perceptions were a concern in *Ross*, but they were founded on conduct, not simply beliefs. The respondent in this case argued that the refusal of accreditation would create the perception that the BCCT does not value freedom of religion and conscience and endorses stereotypical attributes with regard to TWU graduates. All this to say that even if it was open to the BCCT to base its decision on perception rather than evidence of actual discrimination or of a real risk of discrimination, there is no reason to give any deference to that decision.

(b) The Evidence of Discrimination

20 There are in reality two elements to be considered under this heading: Are the internal documents of TWU illustrative of discriminatory practices? If so, are these discriminatory practices sufficient to establish a risk of discrimination sufficient to justify that graduates of TWU should not be admitted to teach in the public schools?

21 The BCCT relied on the internal documents of TWU as evidence of discrimination against homosexuals. It concluded that the inclusion of homosexual behaviour in the list of biblically condemned practices demonstrates intolerance and that this cannot be overridden by the adoption of other values. Both the program and the practices of TWU, the declarations required of students and faculty in particular, were condemned because they reflected the beliefs of the signatories. According to the BCCT, discrimination against homosexuals had been institutionalized; see majority decision of Goldie J.A., at para. 58.

22 The majority of the Court of Appeal was of the view that the BCCT misapprehended the evidence at the first stage by defining the world view of the TWU too narrowly. It pointed out that the TWU documents make no reference to homosexuals or to sexual orientation, but only to practices that the particular student is asked to give up himself, or herself, while at TWU. These practices include drunkenness, profanity, harassment, dishonesty, abortion, the occult and sexual sins of a heterosexual and homosexual nature. There is no evidence before this Court that anyone has been denied admission because of refusal to sign the document or was expelled because of non-adherence to it. On the other hand, there is evidence that not all students admitted to TWU adhere to the Christian world view.

23 The appellant argues that there is no distinction between homosexual persons and homosexual behaviour, and that reference to sinners is a condemnation of anyone who engages in homosexual practices; practices and identity are related. The BCCT points out that stealing and cheating are a behavioural choice, while sexual orientation is not. The question therefore is not whether students have been denied admission to TWU on the basis of their sexual orientation, but whether a homosexual student could in good faith sign the declaration and consider that he or she is accepted by the TWU community on an equal basis.

24 The respondent says that the position of the BCCT is simply based on moral disapprobation of the religious beliefs of TWU students and faculty. It ignores the record of graduates and especially the fact that the TWU Community Standards require students and faculty to show respect to all people, to become aware of all different philosophical and social perspectives, and to teach tolerance as a first principle; see factum, at para. 79.

25 Although the Community Standards are expressed in terms of a code of conduct rather than an article of faith, we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost. TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions. That said, the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence. It is important to note that this is a private institution that is exempted, in part, from the British Columbia human rights legislation and to which the *Charter* does not apply. To state that the voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution, is sufficient to engage s. 15 would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality.

26 This is not to say that the BCCT erred in considering equality concerns pursuant to its public interest jurisdiction. As we have already stated, concerns about equality were appropriately considered by the BCCT under the public interest component of s. 4 of the *Teaching Profession Act*. The importance of equality in Canadian society was discussed by Cory J. for the majority of this Court in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 67:

> The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society. When universal suffrage was granted it recognized to some extent the importance of the individual. Canada by the broad scope and fundamental fairness of the provisions of s. 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual. That it has done so is not only praiseworthy but essential to achieving the magnificent goal of equal dignity for all. It is the means of giving Canadians a sense of pride. In order to achieve equality the

> intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or other characteristics of the person. This in turn should lead to a sense of dignity and worthiness for every Canadian and the greatest possible pride and appreciation in being a part of a great nation.

27 The equality guarantees in the *Charter* and in B.C.'s human rights legislation include protection against discrimination based on sexual orientation. In *Egan v. Canada*, [1995] 2 S.C.R. 513, this Court unanimously affirmed that sexual orientation is an analogous ground to those enumerated in s. 15(1) of the *Charter*. In addition, a majority of this Court explicitly recognized that gays and lesbians, "whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage" (para. 175, *per* Cory J.; see also para. 89, *per* L'Heureux-Dubé J.). This statement was recently affirmed by a majority of this Court in *M. v. H.*, [1999] 2 S.C.R. 3, at para. 64. See also *Vriend*, *supra*, and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69. 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.

28 At the same time, however, the BCCT is also required to consider issues of religious freedom. Section 15 of the *Charter* protects equally against "discrimination based on . . . religion". Similarly, s. 2(*a*) of the *Charter* guarantees that "[e]veryone has the following fundamental freedoms: . . . freedom of conscience and religion". British Columbia's human rights legislation accommodates religious freedoms by allowing religious institutions to discriminate in their admissions policies on the basis of religion. The importance of freedom of religion in Canadian society was elegantly stated by Dickson J., as he then was, writing for the majority in *Big M Drug Mart*, *supra*, at pp. 336-37:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority".

It is interesting to note that this passage presages the very situation which has arisen in this appeal, namely, one where the religious freedom of one individual is claimed to interfere with the fundamental rights and freedoms of another. The issue at the heart of this appeal is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system, concerns that may be shared with their parents and society generally.

29 In our opinion, this is a case where any potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute. As L'Heureux-Dubé J. stated in *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at p. 182, writing for the majority on this point:

> As the Court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practise the religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the parents' freedom of religion. [Emphasis added.]

30 Similarly, Iacobucci and Major JJ. concluded in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 226, that:

> Just as there are limits to the ambit of freedom of expression (e.g. s. 2(*b*) does not protect violent acts: *R. v. Zundel*, [1992] 2 S.C.R. 731, at pp. 753 and 801; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 732 and 830), so are there limits to the scope of s. 2(*a*), especially so when this provision is called upon to protect activity that threatens the physical or psychological well-being of others. In other words, although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower, and it is the latter freedom at issue in this case. [Emphasis added.]

31 In addition, the *Charter* must be read as a whole, so that one right is not privileged at the expense of another. As Lamer C.J. stated for the majority of this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 877:

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict . . . *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

32 Therefore, although the BCCT was right to evaluate the impact of TWU's admission policy on the public school environment, it should have considered more. The *Human Rights Code*, R.S.B.C. 1996, c. 210, specifically provides for exceptions in the case of religious institutions, and the legislature gave recognition to TWU as an institution affiliated to a particular Church whose views were well known to it. While the BCCT says that it is not denying the right to TWU students and faculty to hold particular religious views, it has inferred without any concrete evidence that such views will limit consideration of social issues by TWU graduates and have a detrimental effect on the learning environment in public schools. There is no denying that the decision of the BCCT places a burden on members of a particular religious group and in effect, is preventing them from expressing freely their religious beliefs and associating to put them into practice. If TWU does not abandon its Community Standards, it renounces certification and full control of a teacher education program permitting access to the public school system. Students are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers unless they attend a public university for at least one year. These are important considerations. What the BCCT was required to do was to determine whether the rights were in conflict in reality.

33 TWU's Community Standards, which are limited to prescribing conduct of members while at TWU, are not sufficient to support the conclusion that the BCCT should anticipate intolerant behaviour in the public schools. Indeed, if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church. The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected. The BCCT did not weigh the various rights involved in its assessment of the alleged discriminatory practices of TWU by not taking into account the impact of its decision on the right to freedom of religion of the members of TWU. Accordingly, this Court must.

34 Consideration of human rights values in these circumstances encompasses consideration of the place of private institutions in our society and the reconciling of competing rights and values. Freedom of religion, conscience

and association coexist with the right to be free of discrimination based on sexual orientation. Even though the requirement that students and faculty adopt the Community Standards creates unfavourable differential treatment since it would probably prevent homosexual students and faculty from applying, one must consider the true nature of the undertaking and the context in which this occurs. Many Canadian universities, including St. Francis Xavier University, Queen's University, McGill University and Concordia University College of Alberta, have traditions of religious affiliations. Furthermore, s. 93 of the *Constitution Act, 1867* enshrined religious public education rights into our Constitution, as part of the historic compromise which made Confederation possible. Section 17 of the *Alberta Act*, R.S.C. 1985, App. II, No. 20, and *Saskatchewan Act*, R.S.C. 1985, App. II, No. 21, s. 22 of the *Manitoba Act, 1870*, R.S.C. 1985, App. II, No. 8, and Term 17 of the Terms of Union of Newfoundland with Canada as confirmed by the *Newfoundland Act*, R.S.C. 1985, App. II, No. 32, were to the same effect. Although the constitutional protections were altered by constitutional amendment in Newfoundland in 1998 and eliminated in Quebec in 1997, they remain in effect in Ontario, Alberta, Saskatchewan and Manitoba.

35 Another part of that context is the *Human Rights Act*, S.B.C. 1984, c. 22, referred to by the Court of Appeal and the respondents (now the *Human Rights Code*), which provides, in s. 19 (now s. 41), that a religious institution is not considered to breach the Act where it prefers adherents of its religious constituency. It cannot be reasonably concluded that private institutions are protected but that their graduates are *de facto* considered unworthy of fully participating in public activities. In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 554, McIntyre J. observed that a "natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act within reason to protect it". In this particular case, it can reasonably be inferred that the B.C. legislature did not consider that training with a Christian philosophy was in itself against the public interest since it passed five bills in favour of TWU between 1969 and 1985. While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers. In addition, there is nothing in the TWU Community Standards that indicates that graduates of TWU will not treat homosexuals fairly and respectfully. Indeed, the evidence to date is that graduates from the joint TWU-SFU teacher education program have become competent public school teachers, and there is no evidence before this Court of discriminatory conduct by any graduate. Although this evidence is not conclusive, given that no students have yet graduated from a teacher education program taught exclusively at TWU, it is instructive. Students attending TWU are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others. Their freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society. Clearly, the restriction on freedom of religion must be justified by evidence that the exercise of this freedom of religion will, in the circumstances of this case, have a detrimental impact on the school system.

36 Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.

37 Acting on those beliefs, however, is a very different matter. If a teacher in the public school system engages in discriminatory conduct, that teacher can be subject to disciplinary proceedings before the BCCT. Discriminatory conduct by a public school teacher when on duty should always be subject to disciplinary proceedings. This Court has held, however, that greater tolerance must be shown with respect to off-duty conduct. Yet disciplinary measures can still be taken when discriminatory off-duty conduct poisons the school environment. As La Forest J. stated for a unanimous Court in *Ross*, *supra*, at para. 45:

> It is on the basis of the position of trust and influence that we hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system. I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. However, where a "poisoned" environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant.

In this way, the scope of the freedom of religion and equality rights that have come into conflict in this appeal can be circumscribed and thereby reconciled.

38 For the BCCT to have properly denied accreditation to TWU, it should have based its concerns on specific evidence. It could have asked for reports on student teachers, or opinions of school principals and superintendents. It could have examined discipline files involving TWU graduates and other teachers affiliated with a Christian school of that nature. Any concerns should go to risk, not general perceptions. The appellant suggested in argument that it may be that no problem was incurred because of the participation of Simon Fraser University during the fifth year. This is rather difficult to accept. After finding that TWU students hold fundamental biases, based on their religious beliefs, how could the BCCT ever have believed that the last year's program being under the aegis of Simon Fraser University would ever correct the situation? Simon Fraser University is supervising eight credit hours taken off the TWU campus. There is no evidence that this instruction is in any way related to the problem of apprehended intolerance or that there has been a change in the mandate of Simon Fraser since the last year of the program was given to it to supervise in 1985. On the evidence, it is clear that the participation of Simon Fraser University never had anything to do with the apprehended intolerance from its inception to the present. The organization of the program in 1985 required assistance because of the need to provide a professional development component for certification of future teachers (see A.R., at pp. 45, 47, 48, 62, 64, 90, 95 and 133). The cooperation was intended to support a small faculty in its start-up stage (A.R., at pp. 128, 132 and 298). There is no basis for the inference that the fifth year corrected any attitudes.

(3) *The Argument that Other Criteria Were not Satisfied by TWU*

39 The appellant has argued that there were other matters outstanding relating to the readiness of the TWU program and that this alone should have prevented the issuance of a mandamus. We disagree. In the minutes of the initial Council meeting of May 16, 1996, there is extensive discussion of the wording of the conditions and wording of the ultimate denial of accreditation. Concerns expressed refer to the discrimination issue. There is no discussion of any stated criteria not having been met. At the reconsideration stage, the criteria addressed earlier are not mentioned, discussed or included in the final decision. This is supported by the affidavit of Dr. Harro Van Brummelen wherein he states that the only issue addressed by Council was that of discriminatory practices. The Report to Members is to the same effect. In any event, the conditions imposed by the TEPC and attached to the order in the nature of mandamus granted by the trial judge adequately address all of these outstanding concerns.

(4) *Is the Mandamus Order Justified?*

40 The exercise of the discretion of the trial judge in granting the order of mandamus must be quashed if he did not act judicially. In practical terms, the order of mandamus will be invalidated if the trial judge made an error in principle, significantly misapprehended the evidence, acted on irrelevant considerations or ignored relevant ones, lacked foundation for the exercise of his discretion, or otherwise made an error in law (see *Khalil v. Canada (Secretary of State)*, [1999] 4 F.C. 661 (C.A.)). The BCCT has argued that there was no foundation for the exercise of the discretion in the present case. We disagree.

41 The appellant relies on *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, affirmed by this Court at [1994] 3 S.C.R. 1100, to support the argument that mandamus is only available where a specific duty must be performed by operation of law, without discretion. In fact, *Apotex* clearly acknowledges that bodies having a discretionary decision-making power may still be faced with a court order for mandamus in certain circumstances. The appellant also argues that, in the present circumstances, even if the discriminatory practices as a basis for refusal are set aside, the BCCT still had to determine whether other criteria had been met. Having rejected the report of its committee, Council must therefore now be allowed to determine if TWU has met all relevant criteria. It must, it is argued, considering "TWU's sectarian nature", determine whether the degree of monitoring and evaluation recommended by the TEPC is appropriate, and whether library and faculty preparation concerns have been met.

42 We have already dealt with the satisfaction of criteria other than discrimination. We would add that the continuing focus of the BCCT on the sectarian nature of TWU is disturbing. It should be clear that the focus on the sectarian nature of TWU is the same as the original focus on the alleged discriminatory practices. It is not open to the

BCCT to consider the sectarian nature of TWU in determining whether its graduates will provide an appropriate learning environment for public school students as long as there is no evidence that the particularities of TWU pose a real risk to the public educational system. The actual impact of the sectarian nature of TWU on the educational environment is what was examined in these reasons. The conditions attached to the five-year approval by the TEPC remain in place and provide for monitoring of the program to ensure that a proper teaching environment, in particular one that is free of discrimination, is provided by TWU graduates. The BCCT has the responsibility of assuring that programs in place in all private and public teacher training institutions continue to serve the public interest and it has all of the powers required to fulfil its obligations in that regard.

43 The order of mandamus was justified because the exercise of discretion by the BCCT was fettered by s. 4 of the Act and because the only reason for denial of certification was the consideration of discriminatory practices. In considering the religious precepts of TWU instead of the actual impact of these beliefs on the school environment, the BCCT acted on the basis of irrelevant considerations. It therefore acted unfairly. There is no reason to return the matter of accreditation to the BCCT in the present circumstances. We would like to add that, although it is difficult to establish a relationship between the requirement of a fifth year of study under the aegis of Simon Fraser University and the assertion, at para. 58 of the reply factum of the appellant, that "all students wishing to teach in the public schools are required to do a professional year through a public university", we want to stress that the above affirmation is simply wrong. The BCCT is, by this affirmation, stating that it will deny a full program to all private institutions regardless of circumstances. This is contrary to its mandate.

44 In light of all of these considerations, we see no merit in returning the matter to the BCCT and thereby interfering with the exercise of discretion of the trial judge. There is no interference with the discretion of the BCCT where all of its concerns have been met or dealt with according to law.

45 Given our conclusions on the main issue, it will not be necessary for us to deal with the question of the breach of the individual *Charter* rights of the respondent Donna Gail Lindquist.

46 The appeal is dismissed with costs to the respondents.

The following are the reasons delivered by

47 L'HEUREUX-DUBÉ J. (dissenting) -- At its core, this case is about providing the best possible educational environment for public school students in British Columbia. As our Court stated in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 42:

> A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. [Emphasis added.]

La Forest J. also remarked in *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 299, that: "No proof is required to show the importance of education in our society or its significance to government. The legitimate, indeed compelling, interest of the state in the education of the young is known and understood by all informed citizens." In short, there is a vital public interest in maintaining and improving supportive environments in the classrooms of our country, which are the intellectual incubators of Canada's most vulnerable and impressionable citizens. The educational process "awakens children to the values a society hopes to foster and to nurture": *Ross*, *supra*, at para. 82.

48 The present controversy stems from a 1996 decision by the Council of the British Columbia College of Teachers ("BCCT"), which refused to approve an application for teacher training accreditation submitted by Trinity Western University ("TWU"). On May 17, 1996, the Council adopted a motion stating

> [t]hat the application for a new teacher education program by Trinity Western University be denied because it does not fully meet the criteria and because it is contrary to the public interest to approve a teacher education program offered by a private institution which appears to follow discriminatory practices that public institutions

are, by law, not allowed to follow.

On May 22, 1996, the BCCT's Registrar wrote an assistant dean at TWU explaining that "Council members considered all or some of these issues when voting on the recommendation":

> · Discriminatory practices at Trinity Western University, specifically the requirement for students to sign a contract of "Responsibilities of Membership in the Trinity Western University Community."
>
> ...
>
> · The suitability and preparedness of graduates to teach in the diverse and complex social environments found in the public school system.
>
> ...
>
> · The ability of the faculty to provide a program of sufficient breadth and depth. . . .

TWU appealed the BCCT's decision and a hearing was held on June 14, 1996. On June 29, 1996, the BCCT upheld its denial of accreditation, passing a motion stating "[t]hat Trinity Western University's appeal in regard to the [BCCT's] denial of its application for approval of a Teacher Education Program be denied because Council still believes the proposed program follows discriminatory practices which are contrary to the public interest and public policy which the [BCCT] must consider under its mandate as expressed in the *Teaching Profession Act*".

49 TWU petitioned for judicial review of the BCCT's decision. Davies J. of the Supreme Court of British Columbia ((1997), 41 B.C.L.R. (3d) 158) ordered it quashed and directed the Council to approve TWU's program with stipulated conditions. He found that it was beyond the BCCT's jurisdiction to consider discriminatory practices. Davies J. added that there was no reasonable foundation for the BCCT's decision. A majority of the Court of Appeal (Goldie and Braidwood JJ.A.) affirmed the trial judgment, with Rowles J.A. dissenting: (1998), 59 B.C.L.R. (3d) 241. Like Davies J., the majority considered the BCCT to have exceeded its jurisdiction. In the alternative, "the decisions of Council embodied in the resolutions under review reflect an error in law and are factually patently unreasonable. They are not entitled to deference" (para. 115).

I. BCCT's Jurisdiction

50 This appeal raises two administrative law issues: a threshold question of jurisdiction and a subsequent determination of the appropriate standard of review of the BCCT's decision. On the question of jurisdiction, I agree with my colleagues that s. 4 of the *Teaching Profession Act*, R.S.B.C. 1996, c. 449, confers jurisdiction on the BCCT to consider discriminatory practices as part of its evaluation of TWU's application. In the words of Madam Justice Rowles, at para. 200:

> The statutory mandate of the [BCCT] under the Act gives the College a broad discretion to approve teacher education programs and to set standards for the programs themselves, as well as their graduates. Those standards must relate ultimately to the 'education, professional responsibility and competence' of future public school teachers, but within that jurisdiction is a fairly broad discretion to consider what factors are relevant to those standards. The presence of discrimination is certainly relevant to any of those areas within the [BCCT's] jurisdiction.

II. Standard of Review

51 As to the appropriate standard of review for the BCCT's decision, my colleagues and I differ, however. An application of *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, supports a standard of patent unreasonableness. The Court's decision in that case sets out four categories of factors to consider when determining the standard of review. I note at the outset that *Pushpanathan* indicates that the "absence of a

privative clause does not imply a high standard of scrutiny, where other factors bespeak a low standard" (para. 30). The first factor of privative clauses does not apply to this case, in which the other three factors, namely expertise; what the purpose of the act as a whole and the provision in particular are; and whether the question at issue is one of law or fact, all weigh in favour of patent unreasonableness.

52 *Pushpanathan* emphasized the primary importance of assessing the tribunal's specialized expertise, at para. 33:

> Making an evaluation of relative expertise has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise.

All these factors point to a high degree of curial deference in this case. As the Supreme Court of British Columbia has recognized, the BCCT has "relative expertise in the area of setting standards for admission into the teaching profession": *Casson v. British Columbia College of Teachers*, [2000] B.C.J. No. 1038 (QL), at para. 29 and at paras. 22-25. The BCCT, a majority of which is composed of teachers, also represents a self-governing profession. In *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, this Court emphasized at p. 890 the deference that should be accorded to self-governing professions: "a large part of effective self-governance depends upon the concept of peer review" (emphasis added). In the context of the legal profession, the Court stated at p. 888 that "the Manitoba Legislature has spoken, and spoken clearly. The *Law Society Act* manifestly intends to leave the governance of the legal profession to lawyers and, unless judicial intervention is clearly warranted, this expression of the legislative will ought to be respected." The *Teaching Profession Act* is also a clear statement of legislative intent and the BCCT is a similar self-governing body. As stated by the majority of the Court of Appeal, "[t]he scheme of the *Teaching Profession Act* suggests [that] the legislature considered [that] teachers needed little guidance in determining the standards applicable to the training of prospective teachers" (para. 97).

53 On the question of the purpose of the Act as a whole, the third *Pushpanathan* factor, that case states at para. 36:

> In *Southam*, the Court found (at para. 48) that the "aims of the Act are more 'economic' than they are strictly 'legal' because the broad goals of the Act 'are matters that business women and men and economists are better able to understand than is a typical judge". This conclusion was reinforced by the creation in the statute of a tribunal with members having a special expertise in those domains. Also of significance is . . . thefact that an administrative commission plays a "protective role" *vis-à-vis* the investing public, and that it plays a role in policy development; *Pezim*, *supra*, at p. 596.

Each of these aspects is present here. The BCCT's decision concerning TWU's teacher education program goes to the heart of the *Teaching Profession Act*'s *raison d'être* and should only be disturbed by judges, who lack the specialized expertise of teachers, if it is patently unreasonable. As La Forest J. noted in *Jones*, *supra*, at p. 304: "The province cannot, in my view, be faulted for adopting the philosophy frequently applied in the courts of the United States, namely, that 'The courtroom is simply not the best arena for the debate of issues of educational policy and the measurement of educational quality'". Moreover, vulnerable schoolchildren are in need of much greater protection by the BCCT than was the investing public in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557. Further, individual decisions under the purview of the BCCT, such as the one at issue concerning teacher training program accreditation, are central to the development of educational policy. There is a division of policy-making labour whereby the BCCT complements other policy-making bodies. As observed by Madam Justice Rowles, at para. 173:

> This policy-making mandate is reflected in the words of s. 4 of the Act. The statutory provision requires the [BCCT] to have 'regard to the public interest' in the setting of standards.

54 *Pushpanathan*, *supra*, indicates that the purpose of the particular provision of the statute at issue is relevant to the determination of the standard of review. The BCCT's decision was made pursuant to s. 21(i) of the Act, permitting it to "approve, for certification purposes, the program of any established faculty of teacher education or

school of teacher education". This provision involves the application of "vague, open-textured" principles, requiring curial deference under *Pushpanathan* (para. 36). The BCCT has wide discretion to review teacher training programs under the Act. Its decision was, moreover, a polycentric one taking into account the educational interests of teachers, students, parents, and the public. *Pushpanathan* noted that "some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint" (para. 36).

55 The BCCT's decision is also fact-based, concerning an issue the nature of which implicates the tribunal's expertise. This feature addresses the fourth *Pushpanathan* factor, which asks whether the question addressed by the tribunal is legal or factual. Determining how TWU's program may affect its graduates' preparedness to teach in the public schools is a factual inquiry requiring the specialized expertise of the BCCT's members, the majority of whom have classroom experience. I agree with Madam Justice Rowles, who wrote that: "With respect to the factual question of the effect of the practices, I am of the view that the Council's decision is entitled to deference. The question as to whether the discriminatory practices were contrary to the public interest in terms of the education, professional responsibility and competence of public school teachers appears to me to come clearly within the expertise and jurisdiction of the [BCCT]" (para. 150).

56 The BCCT's public interest jurisdiction was carefully described by Madam Justice Rowles (at para. 173): "The 'public interest' is not to be defined nebulously but in relation to the particular policy interest that the [BCCT] has jurisdiction over, that is, establishing in the public interest standards for the education, professional responsibility and competence of its members who teach in public schools" (emphasis added). Her wording paraphrases s. 4 of the *Teaching Profession Act*. Other sections of this legislation similarly support a contextual approach to understanding the meaning of "public interest". The BCCT fulfills the role of gatekeeper to the profession of public school teaching and is responsible for ensuring that its members meet the expertly determined requisites for qualifying to teach in the classrooms of the province. Thus, ss. 23(1)(d) and 23(1)(f) of the Act state that the BCCT may adopt bylaws:

> (d) respecting the training and qualifications of teachers and establishing standards, policies and procedures with respect to the training and qualifications including, but not limited to, professional, academic and specialist standards, policies and procedures;
>
> . . .
>
> (f) respecting the standards of fitness for the admission of persons as members of the [BCCT]; [Emphasis added.]

57 Statutory interpretation of the BCCT's "public interest" responsibilities should be purposive, not nebulous. As the Manitoba Court of Appeal stated in *Lindsay v. Manitoba (Motor Transport)* (1989), 62 D.L.R. (4th) 615, at p. 626: "The meaning of those words, neither precise nor unambiguous in themselves, must be construed in the context of the statute in which they are found". Philp J.A. went on to observe that: "I think there can be no doubt that the determination of what constitutes the public interest is not 'a matter of policy' entirely within the jurisdiction of the Board, nor is it a finding of fact. It is the formulation of an opinion and, when acting within its jurisdiction, it is a determination within the exclusive administrative jurisdiction of the Board" (p. 628 (emphasis added)).

58 The BCCT is obligated by the *Teaching Profession Act* to assess any component of a teacher training program that may affect "the education, professional responsibility and competence of its members". It is irrelevant that private religious institutions are protected under British Columbia's *Human Rights Code*, R.S.B.C. 1996, c. 210. The BCCT must review all teacher training programs in the same light, using its own expertly determined standards. It never found or considered TWU graduates to be "unworthy of fully participating in public activities", as my colleagues imply (para. 35). To the contrary, the BCCT provided a route for these students to attain the requisites for teaching in public schools. These actions are fully consistent with the College's contextualized mandate to establish and implement standards for its members "having regard to the public interest".

59 It is a misconception to characterize the BCCT's decision as being a balancing or interpretation of human rights values, an exercise that is beyond the tribunal's expertise. The BCCT's decision employed one relevant and

undisputed *Charter* or human rights value, that of equality, in the narrow context of appraising the impact on the classroom environment of TWU's proposal. Equality is a central component of the public interest that the BCCT is charged with protecting in the classrooms of the province. As Cory J. wrote in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 92, the *Canadian Charter of Rights and Freedoms* is "a restatement of the fundamental values which guide and shape our democratic society" (emphasis added). The BCCT was entitled, indeed required, to consider the value of equality in its assessment of the effect TWU's program will have on the classroom environment. In *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, the Court held at pp. 13-14 that "the Constitution, as the supreme law, must be respected by an administrative tribunal called upon to interpret law". I agree with Madam Justice Rowles, who asked at para. 171: "When that is so, why would an administrative tribunal not also be expected to consider *Charter* values?"

60 The BCCT was not acting as a human rights tribunal and was not required to consider other *Charter* or human rights values such as freedom of religion, which are not germane to the public interest in ensuring that teachers have the requisites to foster supportive classroom environments in public schools. Thus, it is not relevant to the standard of review that "the Council is not particularly well equipped to determine the scope of freedom of religion and conscience and to weigh these rights against the right to equality in the context of a pluralistic society" (Iacobucci and Bastarache JJ., at para. 19). The BCCT's equality based approach, focussed on supportive atmospheres in public school classrooms, merits a standard of review of patent unreasonableness because it directly engages the specialization of the tribunal.

61 If the BCCT were to have applied a value that is clearly not an accepted *Charter* or human rights value, or one irrelevant to the decision at hand, or if it failed to apply a clearly relevant value, then its decision would be patently unreasonable. None of these scenarios occurred here. Iacobucci and Bastarache JJ. write that "The BCCT has the responsibility of assuring that programs in place in all private and public teacher training institutions continue to serve the public interest. . . ." (para. 42). The BCCT has the expertise to determine the relevant criteria for this supervisory exercise and its assessment of these factors deserves significant deference. See generally *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 65: "Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision. . . . (D. Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy , in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.)"

62 The circumstances of this case are analogous to those of *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, in which a freedom of religion claim was opposed to a child's best interests in the context of parental access rights. In my reasons, I noted at p. 181 that "in ruling on a child's best interests, a court is not putting religion on trial nor its exercise by a parent for himself or herself, but is merely examining the way in which the exercise of a given religion by a parent through his or her right to access affects the child's best interests". See also *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 228, *per* Iacobucci and Major JJ.:

> . . . in *P. (D.) v. S. (C.)*, *supra*, L'Heureux-Dubé J. (writing for the majority on this point) held at p. 182 that:
>
> > As the Court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practise the religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the parents' freedom of religion. [Emphasis added by Iacobucci and Major JJ.]

There is a similar intersection between the asserted private religious beliefs and the public interest in the present appeal. Actions in the private sphere can have effects in the public realm. Everyone must assume the legal consequences of his or her private beliefs, so long as these consequences do not violate fundamental rights. The BCCT's expert attention to the classroom environment means that public school students' best interests, like those of children in custody and access disputes, are the focal point. In neither situation should a religiously based risk fall on children.

63 The BCCT's inquiry was reasonably limited to its area of educational expertise. Nothing in the impugned decision suggests that the respondents' religious faith influenced the result. The BCCT's statutory mandate is to act in

the public interest by accrediting only teachers who are adequately prepared for the rigours of the public school classroom. The religion of a teacher or group of teachers is never at issue before the BCCT since religion cannot be a criterion for its certification decisions. Whatever the religion of the institution or individual concerned, all candidates must satisfy the BCCT that they possess the requisites for public school teaching. Indeed, if the BCCT had considered the respondents' religion in making its decision, this would have been not only discriminatory, but also a jurisdictional error of law. The BCCT's concern was with the impact on public school classrooms of a discriminatory practice; whether or not this practice is based on religion was immaterial to their decision. The mandate of the BCCT to have regard for the public interest in its accreditation of teachers requires such scrutiny of any discriminatory practice.

64 The freedom of religion of the prospective teacher is thus not implicated in this case at the administrative law stage. I will examine TWU's and Donna Lindquist's *Charter* claims near the end of these reasons. At the time this litigation commenced, Ms. Lindquist was a student at TWU who intended to apply for admission to the teacher training program in September 1998, if the program were approved. She voluntarily signed the Community Standards contract, discussed below, on September 4, 1996.

65 I disagree with my colleagues, who believe that it was incumbent on the BCCT to "reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system" (para. 28). Their reasoning amounts to changing the statutory mandate and function of the BCCT into those of a human rights body. It supposes that the BCCT should have resolved what my colleagues have retrospectively identified as a conflict of rights. I find no such conflict in this case. Donna Lindquist was not a party to the BCCT's decision and in any event her freedom of religion did not need to be considered. Nor were B.C. public school students' equality interests considered for the sake of protecting their *Charter* rights. Rather, the *Charter* or human rights value of equality was applied only as it pertains to the classroom environment. I find it problematic to force an appraisal by an administrative tribunal of the allegedly dueling *Charter* rights or values of TWU students like Donna Lindquist and unnamed B.C. public school students. It is more appropriate, in my view, to respect the *Pushpanathan* test and to consider third-party *Charter* claims in a proper *Charter* analysis that is subsequent to, rather than conflated with, judicial review of an administrative law decision.

66 *Ross* emphasized precisely this point at para. 32. La Forest J. wrote that "the administrative law standard and the *Charter* standard are not conflated into one. When the issues involved are untouched by the *Charter*, the appropriate administrative law standard is properly applied as a standard of review. . . . As Dickson C.J. noted [in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038], the more sophisticated and structured analysis of s. 1 is the proper framework within which to review *Charter* values." Thus, in these reasons, I employ a two-stage approach of, first, considering administrative law, a sphere in which the *Pushpanathan* factors indicate that deference is due to BCCT, and, then, assessing the *Charter* claims advanced by TWU and third parties affected by the BCCT's decision.

III. Application of Patent Unreasonableness to this Case

67 I turn now to the application of the patent unreasonableness standard to the BCCT's decision. As Cory J. observed in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, "if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test". Earlier, Dickson J. (later Chief Justice) in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at p. 237, put the question in these terms: was the tribunal's "interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?"

68 The BCCT's finding of discriminatory practices is related to the Council's consideration of the "suitability and preparedness of graduates to teach in the diverse and complex social environments found in the public school system" (see para. 48 of these reasons). These two elements, amounting to cause and effect, will be discussed in turn. First, the BCCT expressed a concern that the TWU Community Standards contract, mandatory for students, faculty, and staff to sign, embodied discrimination against homosexuals. All students, faculty, and staff must

> REFRAIN FROM PRACTICES THAT ARE BIBLICALLY CONDEMNED. These include but are not limited to drunkenness (Eph. 5:18), swearing or use of profane language (Eph. 4:29, 5:4; Jas 3:1-12), harassment (Jn 13:34-35; Rom. 12:9-21; Eph. 4:31), all forms of dishonesty including cheating and stealing (Prov. 12:22; Col. 3:9; Eph. 4:28), abortion (Ex. 20:13; Ps. 139:13-16), involvement in the occult (Acts 19:19; Gal. 5:19), and sexual sins including premarital sex, adultery, homosexual behaviour and viewing of pornography (I Cor. 6:12-20; Eph. 4:17-24; I Thess. 4:3-8; Rom. 2:26-27; I Tim. 1:9-10). [Emphasis added. This wording is taken from the student version of the Code, which is almost identical to that provided to employees.]

I note in passing that "homosexual behaviour" is undefined and could be interpreted to include a wide range of activity falling short of sexual intercourse. The preamble to the Community Standards Code states that "[i]ndividuals who are invited to become members of this community but cannot with integrity pledge to uphold the application of these standards are advised not to accept the invitation and to seek instead a living-learning [or employment] situation more acceptable to them" (emphasis added).

69 I am dismayed that at various points in the history of this case the argument has been made that one can separate condemnation of the "sexual sin" of "homosexual behaviour" from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin. But, in the words of the intervener EGALE, "[r]equiring someone not to act in accordance with their identity is harmful and cruel. It destroys the human spirit. Pressure to change their behaviour and deny their sexual identity has proved tremendously damaging to young persons seeking to come to terms with their sexual orientation" (factum, at para. 34). The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected, as *per* Madam Justice Rowles: "Human rights law states that certain practices cannot be separated from identity, such that condemnation of the practice is a condemnation of the person" (para. 228). She added that "the kind of tolerance that is required [by equality] is not so impoverished as to include a general acceptance of all people but condemnation of the traits of certain people" (para. 230). This is not to suggest that engaging in homosexual behaviour automatically defines a person as homosexual or bisexual, but rather is meant to challenge the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood.

70 As another preliminary matter, I would emphasize the relevance of the United States Supreme Court's decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983). In that case, the court denied tax-exempt status to a religious institution that at the time prohibited interracial dating and marriage based on apparently sincerely held religious beliefs. Burger C.J. for the court wrote that "there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice" (p. 592). He added that "Bob Jones University . . . contends that it is not racially discriminatory. It emphasizes that it now allows all races to enroll, subject only to its restrictions on the conduct of all students, including its prohibitions of association between men and women of different races, and of interracial marriage" (p. 605). This American case provides an example, namely a ban on interracial dating and marriage, that is difficult to distinguish in a principled way from the ban on homosexual behaviour at issue here. In my view, to paraphrase Burger C.J., there can no longer be any doubt that sexual orientation discrimination in education violates deeply and widely accepted views of elementary justice.

71 It was not Bob Jones University faculty or students' religious beliefs that led to the American Supreme Court decision, but rather a disciplinary rule of conduct prohibiting interracial dating and marriage. Similarly, in this case, where the salient difference is the ground of discrimination, namely sexual orientation, it is the Code of Community Standards that is at issue. See B. MacDougall, "Silence in the Classroom: Limits on Homosexual Expression and Visibility in Education and the Privileging of Homophobic Religious Ideology" (1998), 61 *Sask. L. Rev.* 41, at p. 78: "Once the religious characterization is removed from an issue of racial or gender discrimination, the issue becomes much more straightforward. So it should be with homosexuality." I thus find it alarmist for my colleagues to suggest that "if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church" (para. 33).

72 It is far from patently unreasonable for the BCCT to have concluded that TWU's Code of Community Standards embodies discriminatory practices. The Code is not a proxy for belief; TWU students' beliefs are not the issue here. Indeed, it is impossible to know what individual students believe since, as recognized in the Code, ultimately convictions are a personal matter. Signing the Community Standards contract, by contrast, makes the student or employee complicit in an overt, but not illegal, act of discrimination against homosexuals and bisexuals. With respect, I

do not see why my colleagues classify this signature as part of the freedom of belief as opposed to the narrower freedom to act on those beliefs (para. 36). In *Ross*, *supra*, the Board of Inquiry noted that human rights legislation "does not prohibit a person from thinking or holding prejudicial views. The *Act*, however, may affect the right of that person to be a teacher when those views are publicly expressed in a manner that impacts on the school community or if those views influence the treatment of students in the classroom by the teacher" (para. 39 (emphasis added)). Whether or not TWU students' signatures on the Community Standards contract reflect their true beliefs, it is not patently unreasonable for the BCCT to treat their public expressions of discrimination as potentially affecting the public school communities in which TWU graduates wish to teach.

73 There are manifold repercussions to this requirement that TWU students and employees affirm a policy that discriminates against those who practice the "sexual sin" of "homosexual behaviour." As my colleagues acknowledge at para. 25, "a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost". To this it should be added that homosexual or bisexual faculty and staff would also in practice be excluded from the campus. This is an important supplementary fact because "faculty must actually endorse those standards as correct and agree to teach in accordance with the principles of the school" (Madam Justice Rowles, at para. 265). The negative impact on campus diversity and pluralism is patently reasonable to assume. This is especially true considering the BCCT Program Approval Team's recommendation that TWU faculty associates be seconded from the public school system to "ensure a broad worldview", since they "significantly influence the development of the student teacher" (A.R., at pp. 250 and 249). I agree with Madam Justice Rowles that "the 'message' sent by TWU's Community Standards Contract not only to gays and lesbians but also to every member of the TWU Community is discriminatory in a way that may be viewed as contrary to the public interest" (para. 226).

74 I acknowledge that tolerance is also a fundamental value in the Community Standards, which include an admonition for students to show "respect for all people regardless of race or gender". This and like statements, such as those contained in the slightly different faculty and staff document, may well implicitly encompass tolerance for those of homosexual and bisexual orientations and lead to discrimination-free interactions. I share the view of Madam Justice Rowles, however, that "the public interest in the public school system may also require something more than mere tolerance. As was stated in [*Ross*], *supra*, public school teachers and those who administer and regulate the public school system may have a positive duty to ensure nondiscrimination in our public schools" (para. 230). See *Ross*, *supra*, at para. 50: "it is not sufficient for a school board to take a passive role. A school board has a duty to maintain a positive school environment for all persons served by it and it must be ever vigilant of anything that might interfere with this duty."

75 The BCCT's decision answers a more complex question than that of whether TWU graduates would be intolerant and engage in overt discrimination in public schools. The BCCT's accreditation ruling was based, in part, on consideration of whether the discriminatory practices of TWU have the potential to cause deleterious effects on the classroom environment because of graduates' lack of preparedness. As stated in the BCCT's Fall 1996 Report to Members, the BCCT was concerned about "the integrity and the values of the public school system and the institutions and programs which will prepare graduates to teach in the public system". The Report added that

> [t]he motion made by Council reflects the majority belief that Trinity Western University's Community Standards contract discriminates on the basis of sexual orientation.
>
> . . .
>
> Labelling homosexual behaviour as sinful has the effect of excluding persons whose sexual orientation is gay or lesbian.
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> . . .
>
> Councillors also expressed concern that the particular world view held by Trinity Western University with reference to homosexual behaviour may have a detrimental effect in the learning environment of public schools. A teacher's ability to support all children regardless of race, colour, religion or sexual orientation within a respectful and nonjudgmental relationship is considered by the [BCCT] to be essential to the practice of the profession.

Thus, the only institutional expression of discriminatory practices by TWU concerning homosexual behaviour, namely the Community Standards contract, was thought by the BCCT to have the potential to affect the classroom environment negatively.

76 All TWU graduates to this point have been asked to complete their fifth year Professional Development Program under the auspices of Simon Fraser University ("SFU"). There is, therefore, no track record to assess with respect to the way in which TWU graduates would behave without this fifth year. Aside from this methodological problem, I do not believe that incidents of overt discriminatory behaviour are the evidentiary basis on which to test the BCCT's decision. The BCCT's concern is about the classroom environment and it is patently reasonable for it to have concluded that there could be ulterior consequences for the classroom environment if TWU students were allowed to do all five years of their training within their university's program. It is within the realm of reasonableness for the BCCT to be apprehensive about whether TWU graduates may be less than fully prepared to teach in diverse public school classrooms.

77 My colleagues ask: "After finding that TWU students hold fundamental biases, based on their religious beliefs, how could the BCCT ever have believed that the last year's program being under the aegis of Simon Fraser University would ever correct the situation?" (para. 38). With respect, I cannot agree that the BCCT made any such finding of "fundamental biases, based on . . . religious beliefs". Nor were "[b]oth the program and the practices of TWU, the declarations required of students and faculty in particular . . . condemned because they reflected the beliefs of the signatories" (para. 21). I reiterate that consideration of TWU students' beliefs did not enter into the decision at issue (see paras. 63 and 72 of these reasons). The BCCT simply found discriminatory practices based on the signing of the Community Standards contract. I also object to the idea that the fifth year is somehow ineffective in "correct[ing] the situation". That is a matter for educators, not judges, to determine. Beliefs do not have to be "corrected", in Orwellian fashion, but it is reasonable to conclude that teachers must be equipped to deal with diverse classroom environments.

78 Without taking a position on the efficacy of the fifth year requirement, I would for the record like to enumerate potential reasons that the BCCT could have for mandating it. This is not a matter of policy debate, but rather an exercise to show that the requirement itself is not irrational and does not render the BCCT's decision patently unreasonable. Withdrawing the Simon Fraser University-supervised fifth year requirement would mean that SFU would no longer be the institution recommending students for certification, but rather TWU, an institution that mandates a discriminatory practice, would. TWU students would be exempted from engaging in reflection on why, as under the present program, they cannot complete their training at their own university before entering the public school system. The SFU year could be seen to be symbolically important as a catalyst for this introspection. More significantly, the BCCT could reasonably find that without the fifth year there would be an unacceptable pedagogical cost in terms of reduced exposure of TWU students to diversity and its values. At present, SFU students attend courses at TWU run under their own university's aegis. The SFU year involves both SFU faculty and students coming to the TWU campus (and TWU students going to the SFU campus). It exposes TWU students to a diversity of people and values that they might not encounter at TWU. The fifth year also ensures supervision by SFU associates for the teaching practicum.

79 In the fifth year, TWU students now spend seven weeks at TWU, six weeks at SFU, and 19 weeks practice teaching, all under the supervision of SFU personnel. The BCCT could rationally find that this promotes interaction between TWU students and the purportedly more diverse faculty, staff and student body of SFU. We should not question what appears to be the expert opinion of the BCCT: that this time is valuable for inculcating teachers with the skills needed to promote and enhance diverse classroom environments. Beliefs do not have to change, but it is not patently unreasonable to hope that awareness and attitudes will become broader. This is a vital concern, for "[t]eacher attitudes can provide the validation for a gay student's self-acceptance or self-rejection": J. H. Fontaine, "The Sound of Silence: Public School Response to the Needs of Gay and Lesbian Youth", in M. B. Harris, ed., *School Experiences of Gay and Lesbian Youth: The Invisible Minority* (1997), 101, at p. 105.

80 Instead of immersing themselves in the scholastic context, those who urge us to dismiss this appeal give short shrift to the pressing need for teachers in public schools to be sensitive to the concerns of homosexual and bisexual students. It is reasonable to insist that graduates of accredited teacher training programs be equipped to provide a welcoming classroom environment, one that is as sensitive as possible to the needs of a diverse student

body. The modern role of the teacher has developed into a multi-faceted one, including counselling as well as educative functions. The Court noted in *Ross*, *supra*, that "[t]eachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions" (para. 43).

81 As the intervener EGALE pointed out, it is vital to remember in the context of the case at bar that "[b]ecause lesbian, gay, and bisexual youth are almost always 'minorities' in their own families, they do not enter the school environment with the same level of family support and understanding that other members of minority groups do. Thus schools are an important second line of support for students dealing with issues of sexuality, and can counter the effect of a hostile family environment" (factum, at para.14). See also MacDougall, *supra*, at p. 44: "Many families make it clear that discovering that their child is gay or lesbian is the worst possible news they could have, and this can lead to exclusion from the family group", and K. A. Lahey, *Are We "Persons" Yet? Law and Sexuality in Canada* (1999), at p. 197: "[Queer] [y]ouths who are ostracized from their families receive inadequate emotional and social support, and completely lose their families as 'social safety nets.' This leaves them to the streets, vulnerable to involvement in the sex trades, use of drugs, and unhealthy relationship patterns."

82 Evidence shows that there is an acute need for improvement in the experiences of homosexual and bisexual students in Canadian classrooms. Health Canada, in a review of literature on *The Experiences of Young Gay Men in the Age of HIV* (1996), noted at p. 19 that:

> Implicit and explicit discrimination runs throughout the education system. Schools often fail in their responsibility to lesbian, bisexual and gay youth. Whether it is the invisibility of gay role models in the curricula or derogatory epithets in school hallways, many gay youth see school as a frightening and hostile place.
>
> A self-identified gay youth, or one uncertain of his sexual identity, is bombarded by obvious and subtle messages that homosexuality is not valued. The heterosexual bias in educational materials and the lack of information regarding homosexuality leaves many gay youth with little support for many of their special interests and needs.
>
> This leads many youth to deny their gay identity and stay closeted at school. . . .
>
> Most teachers and counsellors have a low comfort level with homosexuality and lack the skills necessary to help an adolescent who approaches with questions about homosexuality. A lack of expertise among school staff creates missed opportunities to help lesbian, bisexual and gay youth before a crisis develops.

See also I. T. Kroll and L. B. Warneke, "The Dynamics of Sexual Orientation & Adolescent Suicide" (1995), at p. 40: "Because of the added burdens of anomie, rejection, and violence, school drop-out among homosexually oriented youth remains a big problem."

83 In an April 3, 2000 article, the Chief Commissioner of the British Columbia Human Rights Commission, Mary-Woo Sims, wrote that "[g]ay, lesbian, bisexual and transgender students face isolation, harassment, intimidation and violence at school. . . . [They] need to know they have other students and teachers they can turn to for support and understanding": see "Gay/Straight Alliance Clubs - Understanding Our Differences" <http://www.bchumanrights.org/text_only/PressReleases2000.asp#Gaystraightallianceclubs-understandingourdifferences>. She discussed the results of a study, *Being Out: Lesbian, Gay, Bisexual & Transgender Youth in B.C.: an Adolescent Health Survey* (1999). Importantly, this British Columbia survey found that 39 percent of participants "told a teacher or school counsellor that they are gay or lesbian" (p. 6). Such a result demonstrates the imperative nature of assuring that homosexual and bisexual students do not perceive a barrier to approaching their teachers for counselling. The BCCT was not patently unreasonable in concluding that, without spending a year under the auspices of SFU, TWU graduates, due to their signature of the Community Standards pledge, could have a negative impact on the supportive environment required in classrooms. It is not patently unreasonable for the BCCT to believe that a component of the noble effort to eradicate public school homophobia, whether perceived or actual, is to require TWU students to take a fifth year of training outside the supervision of that institution.

84 The B.C. report also showed that 37 percent of the gay and lesbian youth questioned feel like outsiders at

school. None of the youth gave high ratings to the quality of his or her family relationships. Almost 40 percent have dramatically low self-esteem. Two-thirds often hear homophobic remarks made by other students at school. Nearly one in five had been physically assaulted at school in the past year.

85 The study found that 46 percent of the gay and lesbian youth had attempted suicide at least once. Their average age at the first suicide attempt was 13 years. See also *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 174, *per* Cory J.: "a study by the Quebec Human Rights Commission has indicated that the isolation, harassment and violence imposed by the public and the rejection by their families has caused young homosexuals to have a higher rate of attempted and successful suicide than heterosexual youths" and Kroll and Warneke, *supra*: "Canada has one of the highest youth suicide rates in the world. . . . Of all teens who commit suicide, about one third appear to be homosexual in orientation. Many such youth become depressed in the ongoing struggle with social fear and rejection. . . . Cognitive, emotional and social isolation, ongoing external and internalized homophobia and lack of support may lead homosexually oriented adolescents to perceive suicide as their only means of escape. . . . 'Closeted' adolescents who are aware of their same-sex attraction but who have not yet established a positive homosexual identity, are at particular risk for suicide" (see introduction and pp. 1 and 4).

86 With these statistics and observations in the foreground, the assertion that "[h]omophobia . . . is one lesson students (both gay and straight) learn in the informal curriculum" is eminently plausible: see S. L. Nichols, "Gay, Lesbian, and Bisexual Youth: Understanding Diversity and Promoting Tolerance in Schools" (1999), 99 *Elementary School Journal* 505, at p. 514. See also MacDougall, *supra*, at p. 41: "The most important factor in the perpetuation of homophobia and the marginalization of homosexuals, including self-hatred in homosexuals, is the intense indoctrination in heterosexism that children experience. A great deal of this indoctrination occurs in educational institutions". In this context, the BCCT's decision to refuse to accredit TWU unconditionally is a reasonable proactive measure designed to prevent any potential problems of student, parent, colleague, or staff perception of teachers who have not completed a year of training under the supervision of SFU, but have signed the Community Standards contract. As the intervener the Ontario Secondary School Teachers' Federation stated in oral argument:

> To suggest that we must await harm is to suggest that we will experiment upon children when, in fact, within our power is the power to expose the students at TWU before they enter into the public school system to that range of values that they are expected to extricate and live by while working within that public education system.

87 I agree with Madam Justice Rowles that "it is open to the Council to concern itself with whether graduates from an applicant program will be perceived as upholding discriminat[ion]-free values in the public classroom" (para. 197 (emphasis added)). See also *Ross*, *supra*, at para. 44:

> By their conduct, teachers as "medium" must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to "choose which hat they will wear on what occasion" (see *Re Cromer and British Columbia Teachers' Federation* (1986), 29 D.L.R. (4th) 641 (B.C.C.A.), at p. 660); teachers do not necessarily check their teaching hats at the school yard gate and may be perceived to be wearing their teaching hats even off duty. [Allison] Reyes affirms this point in her article, ["Freedom of Expression and Public School Teachers" (1995), 4 *Dal. J. Leg. Stud.* 35], at p. 37:
>
> > The integrity of the education system also depends to a great extent upon the perceived integrity of teachers. It is to this extent that expression outside the classroom becomes relevant. While the activities of teachers outside the classroom do not seem to impact *directly* on their ability to teach, they may conflict with the values which the education system perpetuates. [Emphasis added by Reyes.]

88 It is not patently unreasonable for the BCCT to have denied accreditation when the audience perceiving public school teachers includes homosexual and bisexual students, parents, colleagues, and staff, students with homosexual and bisexual relatives and friends, and also adolescents exploring their sexual identities. As this Court

stated in *Ross*, at para. 82, "[t]he importance of ensuring an equal and discrimination free educational environment, and the perception of fairness and tolerance in the classroom are paramount in the education of young children. This helps foster self-respect and acceptance by others" (emphasis added). At para. 43 of that case, La Forest J. also found that:

> Teachers are inextricably linked to the integrity of the school system. . . . The conduct of a teacher bears directly upon the community's perception of the ability of the teacher to fulfil such a position of trust and influence, and upon the community's confidence in the public school system as a whole. [Emphasis added.]

The conduct at issue in this case is simply the signing of the Community Standards contract by TWU students and its potential impact on the learning environment in public schools.

89 Considering the importance of perceptions for the healthy functioning of the classroom, I find my colleagues' emphasis on the need for positive proof of discriminatory conduct sadly ironic. *Ross* took a broader view than this of the school environment (at para. 100): "In order to ensure a discrimination-free educational environment, the school environment must be one where all are treated equally and all are encouraged to fully participate" (emphasis added). Moreover, the principal metaphor for the homosexual and bisexual experience of discrimination has been that of the closet, an isolated refuge of invisibility often enveloped in fear. Indeed, the history of struggles against sexual orientation discrimination has been described as a battle against "the apartheid of the closet", W. N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (1999). See generally *M. v. H.*, [1999] 2 S.C.R. 3, at para. 64, *per* Cory J.: "In *Egan* . . . a majority of this Court explicitly recognized that gays, lesbians and bisexuals, 'whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage' (para. 175, *per* Cory J.; see also para. 89, *per* L'Heureux-Dubé J.)."

90 As one commentator has written, "[g]ay and lesbian students at all ages and stages of schooling share an identity that has been bumped, bruised, or completely ignored. That this personal identity crosses all ethnic, cultural, economic, geographic, and gender boundaries makes gay and lesbian students universally present, yet easily invisible": C. Mathison, "The Invisible Minority: Preparing Teachers to Meet the Needs of Gay and Lesbian Youth" (1998), 49 *Journal of Teacher Education* 151, at p. 154. I believe that the students' perspective must be the paramount concern and that, even if there are no overt acts of discrimination by TWU graduates, this vantage point provides ample justification for the BCCT's decision.

91 Without the existence of supportive classroom environments, homosexual and bisexual students will be forced to remain invisible and reluctant to approach their teachers. They will be victims of identity erasure, forced to endure what Professor Kathleen Lahey has called "a 'spiral of silence' in which lesbians and gays modify their behaviour to avoid the impact of prejudice": see *Brillinger v. Brockie* (2000), 37 C.H.R.R. D/15, at para. 35. The BCCT's decision that TWU graduates are more likely to foster a welcoming classroom environment after participating in SFU's program for one year is not patently unreasonable. Most of the relevant evidence in this case is the reality of hostile school environments faced by homosexual and bisexual students. The courts, by trespassing into the field of pedagogy, deal a setback to the efforts of the BCCT to ensure the sensitivity and empathy of its members to all students' backgrounds and characteristics.

IV. *Charter* Claims

92 Having concluded my analysis of administrative law, which found that the BCCT's decision was not patently unreasonable, I turn now to the *Charter* claims advanced by the respondents. They presented arguments concerning alleged s. 2(*b*), (*d*), (*a*), and 15 violations.

93 I agree with Madam Justice Rowles, the only member of the Court of Appeal who considered *Charter* claims, that: "Signing TWU's Community Standards Contract may well be an expressive activity protected by s. 2(b), but it does not follow that the consequences of the exercise of that expression are immune from consideration by the certifying body" (para. 270). *Ross* stated that courts assessing alleged s. 2(*b*) violations must determine "whether the purpose or effect of the impugned government action is to restrict the individual's freedom of expression" (para. 64). The purpose in this case, by way of contrast to *Ross*, is not to restrict expression. Rather, the purpose of the BCCT's

decision is to ensure the existence of supportive classroom environments. The effect of the decision is to restrict Ms. Lindquist's expression, however, since TWU students who sign the Community Standards contract lose the opportunity to be certified automatically as public school teachers. Having found an individual rights violation, I will assume without deciding that TWU's expression is also fettered. I find these violations to be saved under s. 1.

94 My colleagues write that "this is a case where any potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case" (para. 29). I believe that a s. 1 analysis is more appropriate considering the facts before us; the Court in *Ross*, *supra*, encouraged and itself undertook the s. 1 inquiry in similar circumstances (see para. 66 of these reasons). See also *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 153, *per* L'Heureux-Dubé, Gonthier and Bastarache JJ.: "Where courts are asked to consider whether a violation is justified under s. 1, they must be sensitive to the competing rights and values that exist in our democracy."; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, *supra*, at para. 118, *per* La Forest J.: "I am happy to see that my colleagues concede that the balancing of the competing rights could be integrated in a s. 1 analysis, since apart from specific provisions such as 'fundamental justice', that is the only balancing mechanism provided under the *Charter*. The *Charter* makes no provision for directly balancing constitutional rights against one another. It is aimed rather at governmental and legislative intrusion against the protected rights; see s. 32 of the *Charter*." Section 1's contextual approach protects all the interests involved and ensures careful consideration of all the implications of the impugned state action: see Madam Justice Wilson's opinion in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1355-56 ("The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1."). My following analysis of the s. 2(*b*) violation stays true to this imperative and meaningful attention to context.

95 This case presents a context that calls for deference to the impugned decision based on the public educational setting and the vulnerability of the group that is being protected: see *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 87, "context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right". As the Court stated in *Ross*, *supra*, at para. 82: "There can be no doubt that the attempt to foster equality, respect and tolerance in the Canadian educational system is a laudable goal. But the additional driving factor in this case is the nature of the educational services in question: we are dealing here with the education of young children." See also *Sharpe*, *supra*, at para. 169, *per* L'Heureux-Dubé, Gonthier and Bastarache JJ.: "Because of their physical, mental, and emotional immaturity, children are one of the most vulnerable groups in society"; and *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48, at para. 73: "children are vulnerable and depend on their parents or other caregivers for the necessities of life, as well as for their physical, emotional and intellectual development and well-being. Thus, protecting children from harm has become a universally accepted goal: see the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, now ratified by 191 states, including Canada."

96 My review in the administrative law section of the objective behind the BCCT's decision, namely to protect the classroom environment in public schools by ensuring that teachers meet the BCCT's requisite standards, shows that it is pressing and substantial, as required by *R. v. Oakes*, [1986] 1 S.C.R. 103. I find that the BCCT's decision also satisfies the proportionality test of *Oakes*. The burden placed on expression is rationally connected to the BCCT's goal of ensuring a welcoming and supportive atmosphere in classrooms. The expression at issue, namely the signing of the Community Standards contract, is itself the source of the BCCT's concern about the educational implications of teachers completing TWU's training without the SFU year. Therefore a burden on this expression is a rational response to the BCCT's mandate to protect the public interest. As indicated in my administrative law analysis, the BCCT had a reasonable apprehension of harm to the classroom environment; there is no need for scientific proof of cause and effect between the objective and the means: see *Ross*, *supra*, at para. 101.

97 Further, I agree with Madam Justice Rowles that "[i]t would be inappropriate for this Court to suggest or endorse a particular set of conditions to meet the Council's compelling objective in the public school system" (para. 291). As Madam Justice McLachlin (now Chief Justice) wrote for the majority in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, "[i]f the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement". See also *Adler v. Ontario*, [1996] 3 S.C.R. 609, at para. 220, *per* McLachlin J.:

> Where social issues are at stake, courts approach the legislature's decision as to what infringement is required to achieve the desired end with considerable deference. It is not difficult to conjure up hypothetical solutions which might infringe the right in question less than the solution chosen by the legislature. This alone is insufficient to allow the courts to declare that the legislature's solution violates the *Charter*. As long as the measure falls within a range of acceptable solutions to the problem, it will pass the minimal impairment test: *Edwards Books*, *supra*, *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Chaulk*, [1990] 3 S.C.R. 1303.

By falling within the acceptable range of solutions, the BCCT's decision satisfies the minimal impairment prong of the *Oakes* test. Finally, the extent of the deleterious effects on TWU and its students like Ms. Lindquist is more than offset by the salutary gains that will plausibly accrue in classrooms. I find, therefore, that the violation of s. 2(*b*) caused by the BCCT's decision is justified under s. 1.

98 Because in these reasons I find no unjustified individual rights violation, Ms. Lindquist's s. 2(*d*) claim also fails since TWU students are not unconstitutionally restrained from exercising their individual rights collectively: see *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367, at p. 403, *per* Sopinka J. My comments in that case are also apposite here, but only with respect to the Community Standards contract: "Though the pursuit of them may be lawful, the objects of some associations may be either sexist or racist or in some other fashion contemptible. To my mind it is difficult to suggest that the freedom envisaged by s. 2(*d*) was ever meant to embrace these objects" (p. 393).

99 In addition, the respondents claim violations of their freedom of religion. TWU's claim must confront the obstacle that this Court has not yet decided whether a religiously based corporation may initiate a s. 2(*a*) claim or whether in challenging the BCCT's decision TWU qualifies for standing as of right: see *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157. I will assume without deciding that TWU can advance a s. 2(*a*) claim. I find it without merit, however. I agree with Madam Justice Wilson's analogous analysis of religious school certification in *Jones*, *supra*, at p. 312. Here, as there, the impugned state action "does not offend religious freedom; it accommodates it. It . . . permits the existence of schools such as the [respondent TWU's] which have a religious orientation. It is a flexible piece of legislation which seeks to ensure one thing -- that all children receive an adequate education."

100 With respect to Ms. Lindquist's individual s. 2(*a*) claim, I adhere to the analysis of s. 2(*a*) expressed in my dissenting reasons in *Adler*, *supra*, at para. 72:

> While s. 2(*a*) of the *Charter* is primarily concerned with the necessary limits to be placed on the state in its potentially coercive interference with the original, objectively perceived religious "choice" that individuals make, s. 15 ensures that consequences in behaviour and belief, which flow from this initial choice and are not perceived by the rights claimant as optional, not be impacted upon by state action in such a way as to attack the inherent dignity and consideration which are due all human persons. The protections afforded in s. 15 may thus be of greater scope than those in s. 2(*a*), as our concern moves from the coercive aspect of the state action to its impact on the individuals' and groups' sense of dignity and worth in the socio-economic context of the day.

I will therefore confine my appraisal of Donna Lindquist's religious *Charter* rights to her s. 15 claim. There is no impairment of her s. 2(*a*) rights.

101 Madam Justice Rowles found that in this case "the burden on students for attending the religious school of their choice would be the exclusion from the automatic certification process for teaching in the public schools. This constitutes an adverse impact and is related to the students' religious conviction" (para. 276). She thus found a violation of s. 15. This decision preceded our Court's judgment in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. Based on the guidelines assembled and applied in that case and in subsequent jurisprudence, I find that no s. 15 violation has been established by Ms. Lindquist.

102 The *Law* guidelines ask whether the challenged state action draws a formal distinction between the claimant and others on the basis of one or more personal characteristics. They further inquire whether the claimant is subject to differential treatment based on one or more enumerated and analogous grounds. The distinction and differential treatment resulting from the BCCT's decision are not based on Ms. Lindquist's religion, but on the act of signing the Community Standards contract performed by TWU students. There is every indication that the BCCT would be as concerned if a private secular institution were to require a discriminatory practice (assuming for the sake of argument that this hypothetical secular equivalent to TWU were also shielded from human rights legislation). The impugned decision is neutral with regard to the claimant's religion. I understand this case to be an example of a type of s. 15 challenge predicted by the Court in *Law*. There, Iacobucci J. described "adverse effects discrimination . . . cases where a law which applies identically to all fails to take into account the claimant's different traits or circumstances, yet does not infringe the claimant's human dignity in so doing. In such cases, there could be said to be substantively differential treatment between the claimant and others, because the law has a meaningfully different effect upon the claimant, without there being discrimination for the purpose of s. 15(1)" (para. 86 (emphasis added)).

103 *Law*, *supra*, at para. 53, described the inquiry into human dignity as follows:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law? [Emphasis added.]

Importantly, as my reasons stated in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, "I would emphasize that the 'reasonable person' considered by the subjective-objective perspective [on human dignity] understands and recognizes not only the circumstances of those like him or her, but also appreciates the situation of others. Therefore, when legislation impacts on various groups, particularly if those groups are disadvantaged, the subjective-objective perspective will take into account the particular experiences and needs of all of those groups" (para. 65 (last emphasis added)). In my view, the disadvantaged group in this case is that composed of homosexual and bisexual public school students, who have generally experienced "pre-existing disadvantage, vulnerability, stereotyping, or prejudice" (*Law*, *supra*, at para. 63). It is their human dignity that is truly at stake.

104 *Law* enumerated three other contextual factors to guide the inquiry into whether state action has violated human dignity. Before delving into these, I would like to state that I recognize that Ms. Lindquist may herself feel singled out on the basis of religious belief. Nevertheless, I believe that a subjective-objective examination of *Law*'s contextual factors reveals that her human dignity is not demeaned by the BCCT's decision to attach consequences to TWU students' signature of the Community Standards contract. A reasonable person with similar characteristics to the claimant, who is fully informed of the circumstances and context and rationally takes them into account, as posited by *Law*, at para. 61, would not feel less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration: see *Law*, *supra*, at para. 49, quoting *Egan*, *supra*, at para. 39, *per* L'Heureux-Dubé J.

105 She would take note of the fact that a public institution could not require students to engage in the discriminatory practice of TWU. This mandatory discrimination insulates the BCCT's focus on TWU students' complicity with it from attack as a stereotype. According to *Law*, *supra*, at para. 64, "[a] stereotype may be described as a misconception whereby a person or, more often, a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess." In this case, the undeniable fact is that TWU students sign their names to a discriminatory document.

106 Our reasonable person would further observe that while the religious exemption from human rights legislation allows for religious teacher training institutions in British Columbia to self-regulate without state interference, once graduates ask to be accredited for public school teaching, the public interest comes to the fore and reasonable secular requirements can be imposed without infringing the freedom of religion: see *Jones*, *supra*. If the religious exemption were allowed to shield TWU graduates from complete scrutiny of their abilities to work and to be perceived to work effectively in diverse classrooms, then an advantage would be conferred on these students as compared with public institution graduates, suggested as the appropriate comparator group by the respondents. Depriving TWU students of such an advantage is not an affront to their human dignity.

107 The four contextual factors identified in *Law* all militate against finding a violation of Ms. Lindquist's human dignity. I have already discussed the fact that the historically disadvantaged group in this case is that composed of homosexual and bisexual public school students. The second relevant *Law* factor examines whether the state action takes into account a claimant's actual situation. The BCCT's decision was tailored to the fact that students like Ms. Lindquist signed the Community Standards contract. Yet due to the irrelevance of the enumerated ground, namely religion, to the decision, and to the absence of Ms. Lindquist from the proceedings, the BCCT did not take her religious circumstances into consideration. I do not find this to be an affront to Ms. Lindquist's human dignity, however, since her *Charter* rights could not have been properly considered in the BCCT's deliberations.

108 The third *Law* factor looks for ameliorative purpose or effects: "An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation" (para. 72). See also *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37, at para. 95, discussing the interpretive assistance provided for s. 15(1) by the language of s. 15(2) and quoting with approval Madam Justice Wilson's statement in *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, at pp. 474-75: "By its terms s. 15(2) informs us that measures aimed at ameliorating the conditions of those who are disadvantaged . . . (those in other words who have been the victims of discrimination) are constitutionally permissible. In this way subsection (2) strengthens the notion adopted by this Court in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, that what lies at the heart of the equality guarantee is protection from discrimination". In these reasons, I have discussed why homosexual and bisexual students have an acute need for welcoming and supportive classroom environments. The BCCT's decision attempts to alleviate the effects on this disadvantaged group of a discriminatory practice engaged in by the group represented by the s. 15 claimant. This is clearly an ameliorative purpose, one which does not violate Ms. Lindquist's human dignity.

109 The fourth *Law* factor examines the nature of the interest affected and also indicates to me that there is no cognizable affront to Ms. Lindquist's human dignity. *Law* quoted with approval the pertinent section of my reasons in *Egan*, *supra*. There I wrote that "a group's interests will be more adversely affected in cases involving complete exclusion or non-recognition than in cases where the legislative distinction does recognize or accommodate the group, but does so in a manner that is simply more restrictive than some would like" (para. 64 (emphasis in original)). See also *Lovelace*, *supra*, at para. 88. I do not consider the impact of the BCCT's decision on Ms. Lindquist to be severe enough to conclude that its effect on her interest in not studying at all under the auspices of SFU violates her human dignity. She remains free to apply to the BCCT for individual certification and the requirement to spend one year at SFU is not overly onerous for her or for the future of TWU's educational community. The BCCT's decision merely maintains the *status quo ante* for TWU students. What was affected by it was only Ms. Lindquist's interest in automatic certification for TWU students, since there is no right for TWU to receive such accreditation from the BCCT. The BCCT seeks not to penalize future teachers from TWU, but to ensure that they possess the requisites to teach in British Columbia's public schools.

110 I therefore close my *Charter* analysis by holding that no violation of Ms.

Lindquist's s. 15 equality rights has been demonstrated.

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V. Conclusion

111 I have found that the BCCT had jurisdiction to consider TWU's discriminatory practices. Using a standard of review of patent unreasonableness, I then demonstrated why the BCCT's decision not to accredit a free-standing TWU

teacher training program should be upheld. Lastly, I rejected *Charter*-based challenges to the decision. For these reasons, I would allow the appeal and set aside the orders of the trial judge.

Appeal dismissed with costs, L'HEUREUX-DUBÉ J. *dissenting.*

Solicitors for the appellant: Nelson & Vanderkruyk, Vancouver.

Solicitors for the respondents: Kuhn & Company, Abbotsford, British Columbia.

Solicitors for the intervener the Evangelical Fellowship of Canada: Stikeman, Elliott, Toronto.

Solicitors for the intervener the Ontario Secondary School Teachers' Federation: Green & Chercover, Toronto.

Solicitors for the intervener the Canadian Conference of Catholic Bishops: Barnes, Sammon, Ottawa.

Solicitors for the intervener the British Columbia Civil Liberties Association: Lindsay Kenney, Vancouver.

Solicitors for the intervener EGALE Canada Inc.: Elliott & Kim, Toronto.

Solicitors for the interveners the Christian Legal Fellowship and the Seventh-Day Adventist Church in Canada: Fraser Milner Casgrain, Calgary.

Solicitors for the intervener the Canadian Civil Liberties Association: Gowling, Strathy & Henderson, Toronto.