Date: 19981230
Docket: CA023720
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

TRINITY WESTERN UNIVERSITY and DONNA GAIL LINDQUIST

PETITIONERS
(RESPONDENTS)

AND:

THE BRITISH COLUMBIA COLLEGE OF TEACHERS

RESPONDENT
(APPELLANT)

AND:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

RESPONDENT
(INTERVENER)

AND:

BRITISH COLUMBIA CATHOLIC CIVIL RIGHTS LEAGUE

RESPONDENT
(INTERVENER)

Before: The Honourable Mr. Justice Goldie
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Braidwood

T. R. Berger, Q.C. and E. F. Berger — Counsel for the Appellant

J.D. Baker, Q.C., K. G. Sawatsky and K.L. Boonstra — Counsel for the Respondents

T. J. Delaney — Counsel for the Respondent Intervener British Columbia Civil Liberties Association

L.T. Doust, Q.C. and J.L. Owen — Counsel for the Respondent Intervener Catholic Civil Rights League

Place and Date of Hearing — Vancouver, British Columbia June 15, 16 and 17, 1998

Place and Date of Judgment — Vancouver, British Columbia December 30, 1998

Written Reasons by:
The Honourable Mr. Justice Goldie

Concurred in by:
The Honourable Mr. Justice Braidwood

Dissenting Reasons by:
The Honourable Madam Justice Rowles (Page 49, Paragraph 128)

Reasons for Judgment of the Honourable Mr. Justice Goldie:

[1] Upon the petition of Trinity Western University ("TWU") and Donna Gail Lindquist Mr. Justice Davies made an order in the nature of certiorari quashing decisions of the Council of the British Columbia College of Teachers (the "Council"). These decisions denied approval of TWU's proposed teacher education program. In the nature of mandamus the chambers judge then remitted the cause to the Council with a direction to approve the proposed program with stipulated conditions. The College of Teachers, to which I will refer as the "College", seeks to have these orders set aside.

[2] The particular reason for Council's action was a belief on the part of a majority of its members that TWU discriminated against homosexuals. The chambers judge concluded Council acted without evidence.

[3] The College maintains here the chambers judge erred in his understanding of the evidence before him and so failed to accord the proper weight to the decisions of Council.

[4] Before considering the substantive questions raised in this appeal it will be convenient to describe the parties, and to provide some historical context.

[5]

- I. The Parties before the Court
  1. Trinity Western University, paragraphs [6] to [10];
  2. Donna Gail Lindquist, paragraph [11];
  3. The College of Teachers, paragraphs [12] to [16];
  4. British Columbia Civil Liberties Association, paragraph [17];
  5. The Catholic Civil Rights League, paragraphs [18] to [21].
- II. The Events preceding TWU's Petition
  1. 1985 - 1987, paragraphs [22] to [28];
  2. 1987 to 29 June 1996, paragraphs [29] to [62].
- III. Standard of Review Applicable to the College's Council
  1. The Charter and the Human Rights Code, paragraphs [63] to [65];
  2. The Standard of Review
     a. Section 4 of the Teaching Profession Act, paragraphs [66] to [89];
     b. Jurisdiction of Council, paragraphs [90] to [115];
- IV. The Charter Challenge on behalf of Donna Gail Lindquist, paragraphs [116] to [119].
- V. Nature of the Order in this Court, paragraphs [120] to [127].

I. The Parties before the Court

1. Trinity Western University

[6] TWU is the successor to a private society which was subsequently incorporated by an act of the Legislative Assembly of British Columbia - S.B.C. 1969, c. 44. At that time its name was Trinity Junior College and its objects included the provision of the first two years of university education in the arts and sciences. Its institutional philosophy was distinctively Christian. The General Conference of the Evangelical Free Church appointed its governing body.

[7] By amendments to its incorporating act the junior college became Trinity Western College and in 1985, Trinity Western University. Changes have taken place in its structure of governance. The role of the General Conference of the Evangelical Free Church has been largely assumed by a board of governors and this denomination in Canada is now known as the Evangelical Free Church of Canada ("EFCC").

[8] TWU is now an accredited member of the Association of Universities and Colleges of Canada conferring five baccalaureate degrees and offering two masters programs. In 1997 its student body numbered approximately 2,500; its full and part-time faculty numbered 132; and its administrative and support staff 224. It does not depend on public funds.

[9] The following, from the preamble to a document prepared by TWU entitled "Responsibilities of Membership in the Community

of Trinity Western University", sums up its philosophy and present relationship with the EFCC:
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.

In order to accomplish this mission, members of the community need to engage in an unhindered pursuit of knowledge, personal growth, and spiritual maturity (Hebrews 12:1-3). Consequently, the University strives to maintain a distinctly Christian living and learning environment conducive to a rigorous study of the liberal arts and sciences from the perspective of a biblical world view.

I have appended a copy of this document to these reasons.

[10] An affidavit filed by the president of the EFCC contains the following description of its tenets - doctrinal and otherwise:
5. The EFCC is a member of a 28 nation International Federation of Free Evangelical Churches with member nations in Europe, the Americas, and Asia. The EFCC functions within the framework of historic Christianity, subscribing to the early councils and the creeds of the Church from the early centuries AD. A fundamental element of this creed is that the Bible, and only the Bible, should be the foundation, source, and authority for faith and practice. This is a core value of the Evangelical Free Church to this day and this belief is universally held by all Federation members throughout the world.

6. In Canada, the first Evangelical Free church was organized in Alberta in 1917. Until 1984 both the Canadian and American Free churches were administratively joined as one Evangelical Free Church of America. In that year the Evangelical Free Church of Canada, chartered federally by means of letters patent in 1967, began functioning autonomously with its own national leadership. In 1997 there are about 1200 Free Churches in the US and about 140 in Canada.

and of its sponsorship of TWU:
8. In 1962 TWU was founded in Langley, B.C. by the Evangelical Free Church. TWU continues to maintain close ties with EFCC while serving the evangelical Christian community as a whole. Two-thirds of the Board of Governors of TWU must be members of the Evangelical Free Church.

2. Donna Gail Lindquist

[11] When the petition for judicial review was filed in October, 1996, Ms. Lindquist was a third year student at TWU who intended to apply for admission to the teacher education program in September, 1998 if that program was approved. In her name counsel for the respondents advanced constitutional arguments based on s.2 of the Canadian Charter of Rights and Freedoms.

3. The College of Teachers

[12] Under the Teaching Profession Act, R.S.B.C. 1996, c. 449, enacted in 1987 as c. 19 of S.B.C. 1987, the College is continued, having been established as a corporation under s. 2 of the 1987 statute. Unless the context otherwise requires, when I refer to the Teaching Profession Act it is to the 1996 consolidation.

[13] The members of the College consist of those holding certificates of qualification entitling them to teach in the public school system and of those employed by boards of school trustees as a superintendent or assistant superintendent of schools. The object of the College is stated in s. 4 of the Teaching Profession Act:

Object

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.

[14] The College is governed by Council, consisting of 15 elected members; two appointees of the Lieutenant Governor in Council; two of the Minister of Education and one of the Minister of Education on the recommendation of the Deans of the Faculties of Education in the province. Each elected member is elected in and is the representative of one of 15 zones, each zone consisting of a stipulated number of school boards. The right to vote in the election of a member to Council is confined to teachers employed as teachers by the school boards in the zone or who, not so employed, reside in the zone.

[15] The Council is empowered to "... approve for certification purposes, the program of any established faculty of teacher education or school of teacher education" and to make by-laws respecting the training of teachers. Certification means certification of an individual as qualified to teach.

[16] Council must appoint from its number the members of three statutory committees: a qualifications committee; a teacher education programs committee (referred to as "TEPC" in some of the documents) and a discipline committee.

4. British Columbia Civil Liberties Association

[17] The Association was granted leave to intervene in the Supreme Court. Its position in support of TWU is stated in its factum:

... that even if one does not agree with the views of the Christians at Trinity Western University ("TWU"), they should nevertheless be free to hold and express such views, and limit participation in the university to those who share their views, without being denied a benefit or disadvantage by state actions.

5. The Catholic Civil Rights League

[18] The Catholic Civil Rights League was also granted leave to intervene in the court below. As stated in its factum it is:

... a national non-profit organization of lay Catholics incorporated under federal legislation. Faithful to the Magisterium of the Roman Catholic Church (the "Catholic Church"), the CCRL is dedicated to the orthodox expression of the faith in the public affairs of Canada for the common good.

[19] There are some 14,000 students in 48 Catholic schools employing 860 teachers in the Archdiocese of Vancouver.

[20] These schools are independent schools as that term is defined in the Independent School Act, R.S.B.C. 1996, c. 216. They and other denominational and non-denominational private schools operate outside the public schools system. Teaching certification under the Independent School Act entitles the holder to teach in an independent school but not in a public school. When otherwise qualified under this Act these Catholic schools are entitled to a per pupil grant of public funds. Presently, this amounts to 50% of the per pupil grant to public schools.

[21] The Catholic Civil Rights League supports TWU, asserting that religious freedom, tolerance and equality are the underlying principles of the Canadian polity.

II. The Events Preceding TWU's Petition

1. 1985 - 1987

[22] In the two years prior to the creation of the College in October 1987 TWU had established a teacher training program offering baccalaureate degrees in education upon successful completion of a five year course, four years of which were spent at TWU and the fifth under the aegis of Simon Fraser University. Classroom teaching experience was obtained in the fifth year. Credits earned at Simon Fraser, when transferred to TWU, completed the requirements for the education degrees granted by TWU.

[23] Subsequent to its creation, the College granted certification to graduates of this joint TWU - Simon Fraser program, enabling them to teach in the public school system.

[24] By May 1987 TWU had developed plans for its own teacher education program. In substance, these contemplated that TWU's fifth year of professional teacher education would take the place of what had been conducted by Simon Fraser University.

[25] When TWU applied to the Minister of Education for approval of its proposal his reply on 26 June 1987 contained the following:

> As you are aware, the College of Teachers will be assuming full responsibility for teacher certification, and teacher education program approval, effective January 1, 1988. The legislation clearly identifies these professional issues as falling within the terms of reference of the new College and it would be inappropriate at this time for me to comment on a program not scheduled to commence until September, 1988.

[26] The Minister was unsuccessfully urged to use his existing powers in light of what appears to have been approval in principle by the Cabinet. In his letter of 8 November 1987 in response to the president of TWU he said in part:

> The change in focus of responsibility for certification, and its relationship to program approvals, may cause unique difficulties for your institution. I urge you to make early contact with the College in order to determine what impact its policies and procedures may have on your teacher education program.

[27] The Minister had introduced the bill to incorporate the College on 2 April 1987. Royal assent was given 26 May 1987.

[28] Transitional and now spent sections in the Teaching Profession Act as enacted in 1987 made several changes in the School Act, R.S.B.C. 1996, c. 410 and the Industrial Relations Act, now Labour Relations Act, R.S.B.C. 1996, c. 144. The apparent effect was to replace membership in the British Columbia Federation of Teachers, formerly a prerequisite to teaching in the public system with certification by the College. Thus, teacher training and the determination of qualifications to teach in the public school system were separated from the labour relations role which became the primary purpose of the Federation.

2. 1987 to 29 June 1996

[29] TWU applied to the College for approval of its teacher training program in January 1988. The College was not then ready to consider the application. In September 1989 TWU withdrew its application, stating it would continue the then existing arrangement with Simon Fraser University for a further five years.

[30] Five years passed. In January 1995 TWU applied to the College for approval of its revised teacher training program. The original proposal was brought up to date but no change was made in a principal feature - the fifth year as determined by TWU would be substituted for that under the supervision of Simon Fraser University.

[31] Part 1 of the 1995 application described the current program and contained the following:

> 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 a particular 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.

(Emphasis added.)

I have emphasized the description of TWU's "world view" in the above and in the next extract. As will be later seen, Council had a different understanding of TWU's world view.

[32] In Part 2 of the 1995 application TWU offered three reasons for departing from the existing arrangement with Simon Fraser University. The first two reasons are unrelated to the issues raised in this appeal. The third reason is elaborated on at some length. The following excerpts provide some relevant insight into this reason:

A third reason that TWU wishes to proceed with its own program is that its educational milieu brings a unique contribution to our pluralistic British Columbian society. Like their counterparts in public institutions, TWU's teacher candidates become well acquainted with diverse current learning and curriculum theories and practices. TWU also encourages them to arrive at informed and independent choices about their own personal approaches. ... Education is never neutral. TWU will strive to have a teacher education program that maintains sound academic and professional standards and that does so within the contours of a Christian worldview that encompasses an ethos of caring, justice and responsibility.

All teacher education programs have distinctive philosophical underpinnings. TWU's teacher education program is not unique in that respect. Where TWU's program is distinctive, however, is that one of its aims is that its graduates possess a Christian understanding of educational philosophy, issues and practices. This means that its program intends to prepare teachers who are committed to helping children grow in moral sensitivity and inclination; in love, compassion and tolerance for people and their views; in creativity and intellectual curiosity; and in constructive citizenship. Without imposing their views on their students, TWU's education professors take the position, for instance, that a Christian view of knowledge implies that learning calls for a personal, responsible and creative response to the phenomena of life and culture.

(Emphasis added.)

[33] The 1995 application was in substance that which was finally denied by Council on 29 June 1996. I will summarize what preceded this event.

[34] The starting point is the Teaching Profession Act. Section 4 refers, amongst other things, to the establishment of standards for the education of applicants for membership in the College. Section 21 provides that in its governance and administration of the affairs of the College Council may approve, for certification purposes, existing teacher training programs.

[35] Subsection 23(1) empowers Council to make bylaws consistent with the Teaching Profession Act and the School Act including those:

(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;

and in paragraph (a) of s-s. 27(4) the teacher education programs committee (TEPC) may:

(4) ...

(b) in cooperation with the qualifications and discipline committees, develop specific programs to assist individual teachers.

[36] Between 1988 and 1994 Council made bylaws respecting approval of new teacher education programs. Specifically, bylaw 5.C.05 stipulated that approval for new teacher education programs would be based upon criteria established for that purpose. Pursuant to these bylaws, it approved guidelines. Appended to the guidelines was the following summary of the College's approval procedure:

APPENDIX B: DESCRIPTION OF APPROVAL PROCEDURE

The College's approval procedure is contained in policy P5.C.03. The steps are described below:

1. Institution submits a proposal for a new teacher education program to the College. College staff will be available for consultation to institutions preparing a proposal.

2. The Program Approval Sub-Committee reviews the proposal and prepares recommendations to the Teacher Education Programs Committee.

3. The Teacher Education Programs Committee considers the recommendations from the Program Approval Sub-Committee and may make the decision to establish a Program Approval Team.

4. The Council appoints the members of the Program Approval Team.

5. The Program Approval Team visits the institution, normally over two days. A further visit may follow if necessary.

6. The Program Approval Team prepares a report with recommendations which may include a term for interim approval and conditions for continuing approval.

7. The institution is given the opportunity to respond to the report.

8. The Teacher Education Programs Committee reviews the report and prepares recommendations to Council.

9. The Council considers the recommendations concerning program approval.

10. An institution which is dissatisfied with a decision regarding its proposal may, within 30 days of the decision, ask the Council of the College of Teachers to reconsider the decision.

The sequence thus summarized was adhered to in the case at bar.

[37] To assess TWU's 1995 application a program approval team (sometimes referred to as "PAT") was appointed, presumably on the recommendation of the program approval sub-committee of TEPC. PAT prepared a 26 page report which recommended conditional approval of TWU's program. This completed steps 2 to 7 of the above summary.

[38] Under step 8 the TEPC reviewed PAT's report and TWU's comments in response to the latter and on 19 April 1996 recommended approval with some changes in the conditions. Step

9 took place on 17 May 1996 when Council rejected TEPC's report and recommendations. Step 10 took place on 29 June 1996 when Council, after meeting on 14 June and adjourning to obtain a legal opinion, confirmed its denial of TWU's application.

[39] The motion adopted by a majority of Council on 17 May 1996 was:

That 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.
. . . . carried

and on 29 June:

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.
. . . . carried

[40] A third resolution that a statement of reasons offered in debate be prepared does not appear to have been acted on, at least so far as the record before us indicates.

[41] Council gave no written reasons explaining either its initial rejection or its rejection on reconsideration. The basis for its actions must be gleaned from a number of sources.

[42] We were referred to a letter dated 22 May 1996 from the College's Registrar to TWU listing eight issues raised in Council's debate. Most of these relate to the so-called discriminatory practices and their alleged effects.

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 adequacy of library resources: Council members expressed the view that resources should be improved prior to the inception of the program.

Recommendations in the report of the Program Approval Team for monitoring several aspects of the program raised doubts about the overall readiness of the program for approval.

The suitability and preparedness of graduates to teach in the diverse and complex social environments found in the public school system.

The difficulty of adequately monitoring the application of admissions policy to ensure that discrimination does not occur.

The ability of the faculty to provide a program of sufficient breadth and depth.

The limited extent of public school experience of the faculty.

A concern that the presentation and consideration of social issues would be limited by the requirement of the program for commitment to a homogeneous world view.

(Emphasis added.)

[43] We were also referred to the fall 1996 issue of Council's quarterly newsletter which is circulated throughout the teaching community. The lengthy explanation for the denial of

TWU's application included the following:

Public Policy and the Public Interest

The stated object of the College under the Teaching Profession Act obliges Council to be primarily concerned with 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. Therefore in reviewing a program application, the College must consider whether the institution offering the program discriminates against persons entitled to protection according to the fundamental values of our society. These values are embedded in the Charter of Rights and in human rights statutes enacted by Parliament and the British Columbia legislature. They represent the public interest referred to in Section 4 of the Teaching Profession Act.

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.

The Professional Standard

In determining the standards for the profession, the Council must make decisions about suitable and appropriate preparation for teaching in the B.C. public school system.

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 with a respectful and nonjudgemental relationship is considered by the College to be essential to the practice of the profession.

(Emphasis added.)

[44] I will examine the legal and factual basis of the first portion of these excerpts later. In the second portion, under the heading, "The Professional Standard" use is made of the expression "world view". I wish to refer to this briefly.

[45] This phrase appears to have been used by TWU as a shorthand expression encompassing the whole range of its particular ethos. I refer to the excerpts from TWU's 1995 application set out in paragraphs [31] and [32] of these reasons.

[46] I earlier referred to the document appended to these reasons, "Responsibilities of Membership in the Community of Trinity Western University". The sidelined paragraph on page 3 contains the passages relied on by the College as evidence of discrimination against homosexuals. I understand from the reported use of "world view" that Council concluded the inclusion of homosexual behaviour in the list of practices said to be biblically condemned demonstrates intolerance which overshadows all else. I note TWU does not distinguish one proscribed form of behaviour from another. Nor does the meaning of the phrase "world view", as ascribed by members of Council to TWU, bear any similarity to the meaning given that phrase by TWU. In my view, this misunderstanding materially contributed to error on the part of Council.

[47] I am unaware of any evidence supporting the conclusion that TWU's world view, as I have described it, is defined by or

confined to its characterization of homosexual behaviour as sinful. Those of Council who expressed their concern in the terms quoted in the newsletter either misapprehended or overlooked the evidence in the record which persuaded the TEPC to recommend with conditions approval of TWU's proposed program. We were told TWU accepts those conditions. It could not do so if its world view was as narrowly circumscribed as appears to have been thought by some members of Council.

[48] There is one further preliminary point. A comparison of Council's two resolutions of 17 May and 29 June suggests concerns over meeting the established criteria disappeared upon Council's reconsideration and that the primary concern was and remained the so-called discriminatory practices.

[49] Turning then to the principal issues, it is apparent Council's motions were based on its belief that both the proposed program and TWU discriminated against homosexuals.

[50] I propose now to examine the factual basis for that belief and then to consider what relevance that belief had to TWU's application for approval of its proposed teacher education program.

[51] The allegation with respect to the program itself is literally unfounded. There are no references in it to homosexuals or to sexual orientation.

[52] The majority of members of Council appear to have viewed the program in light of the document I have appended, sometimes referred to as a contract or the community standards contract. This is the basis for the concern over institutional bias or discrimination.

[53] It is from this document that I extracted the mission of TWU quoted in paragraph [9] of my reasons and it is the document referred to in the first listed issue in the Registrar's letter of 22 May 1996 from which I have quoted in paragraph [42] of these reasons.

[54] That which is condemned are "practices", and the "sin" said to attach to homosexuality is homosexual behaviour. The practices a student is asked to give up while at TWU are said to include drunkenness, profanity, harassment, dishonesty, abortion, the occult and sexual sins of a heterosexual and homosexual nature.

[55] Students and faculty at TWU are asked to signify their adherence to these precepts. There is, however, no evidence that anyone has been denied admission because he or she refused to sign this document or was expelled because of non-adherence. There is some evidence that not all students of TWU have made a commitment in its terms. All are asked to do so and it is reasonably clear a hedonist would be encouraged to pursue his or her studies elsewhere.

[56] The evidence on the record before us can be summarized as follows:

1. Students do not have to subscribe to TWU's statement of faith, nor are they obliged to accept any particular position in class discussions or assignments.
   - A.B.2, p.204 and 297
2. Students do not have to adhere to TWU's statement of faith but they are familiarized with its mission and aims during the admission process.
   - A.B. 2, p.234
3. On one occasion when limited facilities restricted enrollment, up to 10% of the number which could be accepted would be reserved for students "... not adhering to a Christian world view".
   - A.B. 2, p.293.
4. While TWU maintains structural ties with the EFCC "... both the faculty and the student body represent a wide range of denominational backgrounds."
   - A.B. 1, p.123

[57] Before its visit PAT requested TWU to provide further information under some 17 heads, mostly of a technical character. The last item, however, reads as follows:
E.

In addition to the issues raised in the preceding list, we feel it is necessary to raise another issue not covered in our criteria. There appears to be an inherent contradiction between the necessity to prepare teachers who are going to work with colleagues and students from diverse ethnic and value backgrounds and a program based on a common vision or world view including a requirement to abide by Trinity Western's code of conduct.

(Emphasis added.)

[58] From the portion I have emphasized the approval team's concern, originating in its erroneous belief that acceptance of TWU's world view was a "requirement", appears to reflect a concern over the suitability of the teaching environment where discrimination against homosexuals had been institutionalized.

[59] In its response TWU answered this query in a manner which, with the information gathered on the visit, satisfied PAT. The response included copies of the document I have appended and of a document entitled "Academic Freedom".

[60] From what I have summarized so far it appears the majority of members of Council:

1. concluded both the proposed program and TWU discriminated against homosexuals as individuals;
2. assumed such discrimination was part of the religious beliefs espoused by TWU and that acceptance of those beliefs was a prerequisite to admission to the program; and
3. construed the Teaching Profession Act as entitling it to apply its view of the principles of the Canadian Charter of Rights and Freedoms and the provincial human rights legislation to an evaluation of TWU's proposed program.

[61] With respect to the first two items the chambers judge concluded it was apparent Council failed to consider the evidence before it. I agree.

[62] Consideration of the third item brings me to an analysis of the standard of review to be applied to Council as a tribunal.

III. Standard of Review Applicable to the College's Council

1. The Charter and the Human Rights Code.

[63] As a preliminary matter I doubt if the Charter has any direct application in the present circumstances of the case at bar. While this is acknowledged by the College in its factum reliance is placed upon values said to be reflected in the Charter and in human rights legislation.

[64] As to the latter the Legislative Assembly has exempted institutions such as TWU from contravention of the Human Rights Code, now R.S.B.C. 1996, c. 210, if arising from a preference given members of an identifiable group characterized by a common religion. Until a person or class of persons challenges this exemption I think it would be an unnecessary extension of these reasons to consider the authorities, including those from the United States developed under different conditions and a different constitution, that are conceivably relevant.

[65] As to the Charter I will assume, in the appellant's favour and as a generalization, that discrimination based on sexual orientation would fall foul of s. 15(1) of the Charter. However, that is of little, if any, assistance in the case at bar. I very much doubt whether there is in the circumstances disclosed in the record before us discrimination in the sense of what was discussed in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 165. The thrust of the College's submissions was that the teaching environment at TWU would render its graduates unfit to teach in the public school systems.

2. The Standard of Review
   a. Section 4 of the Teaching Profession Act

[66] Under the Teaching Profession Act the Council functions in two capacities: first, as the governing body of the teaching

profession setting standards and passing upon the fitness of an individual for admission to the profession and second, as a quasi judicial tribunal when required to sit in judgment on the competence or conduct of a member.

[67] In general terms the Teaching Profession Act requires that when an issue of competence or conduct arises a two-stage process is to be followed: an inquiry or hearing before a panel or the Council resulting in a finding, and if the finding is adverse, action by the Council. By bylaw a somewhat analogous process was adopted by the College when approval of a new teacher training program was sought by an institution whose program had not been approved. In the case of TWU this process, as I have indicated, was followed: a fact finding body visited and reported; the report was commented on by TWU; the report and comments were sent to TEPC with recommendations and TEPC adopted, with four of the 12 members of that committee against, the following recommendation to Council:

"That the teacher education program proposed by Trinity Western University be approved for a 5-year interim period on the basis of the report of the program Approval Team and subject to the following conditions:

1. That the B.C. College of Teachers monitor the program annually so that the context of the program meets criterion P 5 C 01 (b) 1.1.

2. That Trinity Western University make substantial improvements to its library resources, particularly with reference to curriculum materials.

3. That, based on the admission policy reviewed by the Program Approval Team, the B.C. College of Teachers monitor the application of admissions policy to ensure that applicants who meet the requirements are not refused admission on the basis of a differing world view or on the basis of having completed previous course work at a public university.

4. That Trinity Western University provide a program only for grades K-7.

5. That Trinity Western University select its faculty associates from the public school system, and that the selection process involve a member of the College appointed in consultation with the College.

6. That Education 365 (Social Issues in Canadian Education) be mandatory for all education students.

7. That in the final year of the interim program approval, an in-depth evaluation will be conducted by an independent external review team selected by the College in consultation with Trinity Western University.

8. The process described by Trinity Western University for the annual ongoing review of its teacher education program is implemented and includes representation from the College."

[68] Mr. Justice Davies referred to these conditions. They are incorporated in that part of the formal order directing Council to approve the proposed program for accreditation purposes.

[69] Of these conditions only 2 and 4 clearly relate to the technical adequacy of the proposed program. The implementation of the remainder would appear to reflect what the TEPC considered necessary to underpin TWU's assurances its graduates would be fit to teach in the public school system.

[70] On behalf of the College Mr. Berger strongly contended the rejection of the TEPC's recommendation and the consequent refusal to approve the TWU program were matters within the jurisdiction of its governing body and that being so, the

courts were bound to accord its decision a high measure of deference.

[71] He agrees a standard of correctness applies to the interpretation of its constituent statute. In that respect he maintains ss. 4 and 23 of the Teaching Profession Act empower Council to consider TWU's policy of discrimination against homosexuals in which case its decision is beyond the reach of the court unless it is patently unreasonable.

[72] It is evident Council believed the "public interest" referred to in s. 4 of the Teaching Profession Act required it to consider the alleged discriminatory practices. This much is clear from the material I have reviewed.

[73] As I have reached a different view of s. 4 than that advanced by the appellant I propose considering it first. For convenience I repeat the section:

Object

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.

[74] In my view the object stated in s. 4 relates primarily to the establishment of teaching standards, that is to say, to a policy-making role. There is no reference in s. 4 to the regulatory role of Council which was invoked in the examination of TWU's application. Nothing expressly required Council to employ its views of Charter values and human rights legislation in the case at bar.

[75] What is required of Council is to have regard to the public interest in the establishment of standards for the education, professional responsibility and competence of those who teach, are qualified to teach or who wish to teach.

[76] An exception exists by virtue of the Independent Schools Act, R.S.B.C. 1996, c. 216, but as the purpose of TWU's application was to offer a program that would enable its graduates to continue to receive the College's certification this exception is not relevant in the construction to be given s.4.

[77] What I think material to the true construction of s. 4 in the wider context of the Teaching Profession Act are s-ss. 25(1)(a) and (b) of that Act:

25 (1) The college must not do any of the following:

(a) issue a certificate of qualification to a person unless the person has met the relevant standards established by bylaw under section 23;

(b) admit a person as a member unless the person

(i) meets the standards of qualifications and the standards of fitness established by bylaw under section 23, and

(ii) satisfies the council that the person is of good moral character and is otherwise fit and proper to be granted membership;

(c) ...

[78] This confirms a legislative intention and a common understanding that the creation of a standard must precede its application. I think the word "standard" as used in s. 4 has the ordinary dictionary sense of something serving as a basis or example or principle to which others conform or should conform.

[79] As has been seen a bylaw was adopted with dependent criteria and guidelines which established the relevant standard of training. In this sense, nothing remained to be done under s. 4 in respect of TWU's application.

[80] It cannot be said the College did not know about TWU. The 1988 application gave ample notice of TWU's philosophy as did the portions of the 1995 application I have quoted.

[81] The Council interpreted the clause "having regard to the public interest" as conferring upon it a continuing power to apply whatever it believed to come within the meaning of these words to matters unrelated to the establishment of standards.

[82] This is not the way the Legislature has directed references to the public interest in respect of other self regulated callings and professions.

[83] In the 1987 enactment of the Legal Profession Act (S.B.C. 1987, c. 25), continued in the 1996 consolidation, s. 3 provides:

Public interest

3. It is the object and duty of the society

(a) to uphold and protect the public interest in the administration of justice by
  - (i) preserving and protecting the rights and freedoms of all persons,
  - (ii) ensuring the independence, integrity and honour of its members, and
  - (iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and

(b) subject to paragraph (a),
  - (i) to regulate the practice of law, and
  - (ii) to uphold and protect the interests of its members.

[84] A more common form is found in the 1996 consolidation of the following acts:

Chiropractors Act, c. 48;
Dentists Act, c. 94;
Hearing Aid Act, c. 186;
Medical Practitioners Act, c. 285;
Registered Nurses Act, c. 335.

This list is not exhaustive.

[85] In each of these acts the governing body is directed "... to exercise its powers and discharge its responsibilities under all enactments in the public interest."

[86] The clause quoted above is a formula used where it is anticipated the governing body may have responsibilities under other enactments. In the case of the College the only other obvious related act is the School Act.

[87] I have been unable to find any legislative formulation which empowers a body to consider the public interest in the manner asserted by Council. In my view s. 4 of the Teaching Profession Act is confined to the public interest in the establishment of the standards named in the section and as such has little, if any, relevance to the case at bar.

[88] If I am right in this the Council erred in law when it defined its jurisdiction in the manner evident in its resolutions and attributed to it in the College's newsletter. This is a sufficient ground to dismiss the appeal with respect to the relief granted the petitioners in the nature of certiorari.

[89] However, if I am wrong in my characterization of the question Council asked itself and there is a residual element of public interest which continues beyond the establishment of standards then it is necessary to examine more closely Council's jurisdiction. In any event it is desirable to do so in light of Mr. Justice Davies' finding that the College "... is entitled to expect appropriate conduct of teachers". In this respect TWU's community standards are not wholly irrelevant.

b. Jurisdiction of Council

[90] Accordingly, I now propose examining more closely the jurisdiction of the Council and its amenability to the supervisory orders of the Supreme Court.

[91] In considering Council's jurisdiction it will be

convenient to use the analytical framework adopted in a recently decided case in the Supreme Court of Canada: Pushpanathan v. Canada (Minister of Citizenship and Immigration), (1998), 160 D.L.R. (4th) 193. At 209 Mr. Justice Bastarache, speaking for the majority, sums up the current state of the jurisprudence on this question:

27. Since U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, this Court has determined that the task of statutory interpretation requires a weighing of several different factors, none of which are alone dispositive, and each of which provides an indication falling on a spectrum of the proper level of deference to be shown the decision in question. This has been dubbed the "pragmatic and functional" approach. This more nuanced approach in determining legislative intent is also reflected in the range of possible standards of review. Traditionally, the "correctness" standard and the "patent unreasonableness" standard were the only two approaches available to a reviewing court. But in Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1 a "reasonableness simpliciter" standard was applied as the most accurate reflection of the competence intended to be conferred on the tribunal by the legislator. Indeed, the Court there described the range of standards available as a "spectrum" with a "more exacting end" and a "more deferential end" (para. 30).

28. Although the language and approach of the "preliminary", "collateral" or "jurisdictional" question has been replaced by this pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others, depending on the factors which will be described in more detail below. To this extent, it is still appropriate and helpful to speak of "jurisdictional questions" which must be answered correctly by the tribunal in order to be acting intra vires. But it should be understood that a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, "jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.

[92] I will make use of the four factors Mr. Justice Bastarache sets out as to be taken into account in determining whether or not there is jurisdictional error.

1. Privative clauses.

[93] The absence of a privative clause in the Teaching Profession Act does not of itself signal a high level of judicial scrutiny.

[94] The right of appeal given in s.40 of the Teaching Profession Act is confined to a member affected by a decision, determination or order of the qualifications committee, the discipline committee or Council. In excluding a right of appeal by persons who hold certificates of qualification and by those who are applicants for membership, both classes referred to in s. 4, the legislature appears to have contemplated s. 4 as administrative rather than regulatory.

[95] This is confirmed by s. 24. Under it, a bylaw made by Council must be filed with the Deputy Attorney General within 10 days after it is made. The Lieutenant Governor in Council may disallow a bylaw respecting the training, qualification or certification of teachers within 60 days after its filing. This suggests the arbiter of the policy issues involved in the setting of standards under s. 4 is the Lieutenant Governor in Council.

[96] In my view there is neither an express privative clause nor any provision in the Teaching Profession Act suggesting finality be accorded decisions under s. 4. The conclusion under this head suggests correctness is required of Council in its dealings with matters not falling within the appeal section or s. 24(2).

2. Expertise.

[97] In the setting of standards, Council's decisions should be accorded a high level of deference. The elected members of Council are teachers, elected by teachers. Self-evidently, they possess the confidence of those who elected them as suitable for this task. The scheme of the Teaching Profession Act suggests the legislature considered teachers needed little guidance in determining the standards applicable to the training of prospective teachers, always reserving the right of disallowance vested in the Lieutenant Governor in Council. On the other hand, issues of conduct and competence invite judicial scrutiny much more clearly.

[98] I earlier set out the reasons why I concluded Council was mistaken in believing it was mandated under s. 4 of the Teaching Profession Act to apply Charter values and to interpret the Human Rights Code as it did. As a corollary to that conclusion I am of the view Council possesses no special expertise in the interpretation of the law lying outside the core of its responsibilities. In Pushpanathan, supra, at 211 Mr. Justice Bastarache noted that expertise is a relative, not an absolute concept:

... 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.

[99] I have suggested the expertise of Council varies according to what it is doing. Again, to quote from Pushpanathan at 211:

... Many cases have found that the legislature has intended to grant a wide margin for decision-making with respect to some issues, while others are properly subject to a correctness standard.

[100] In the case at bar, the chambers judge found the majority of Council acted without evidence when it found the community standards of TWU could lead to intolerant conduct by teachers whose training took place wholly at TWU.

[101] The College seeks to uphold its decision by reliance on a purported mandate under s. 4 of the Teaching Act. A court is better fitted to determine the meaning to be given to s. 4 than Council. The highly specialized expertise of teaching experience has little relevance to statutory construction where matters arise outside the central responsibility of the tribunal.

3. Purpose of the Teaching Profession Act as a whole.

[102] I have touched on this earlier. The statutory structure reflects two aims: the establishment of standards and the fostering of a sense of professionalism in teaching on the one hand and the self-governing responsibility of dealing with individuals on the other. The first role is institutional and creative, at once complex and challenging in reconciling a variety of objectives and analyzing costs and benefits. This calls for greater care, indeed deference, in measuring the intended scope of judicial intervention.

[103] The second statutory aim requires a statutory adherence to a detailed structure of fairness. A lesser degree of judicial deference is required where, for instance, an individual's livelihood may be at stake.

[104] When one makes use of the spectrum analogy employed by Mr. Justice Iacobucci in Pezim v. B.C. (Superintendent of Brokers), [1994] 2 S.C.R. 557 beginning at 590, what is revealed is a body which, when it is setting the standards of

its profession, is entitled to a high degree of deference. That degree of deference does not extend to its interpretation of the human rights code and the Canadian Charter of Rights and Freedoms nor, in the case at bar, where it acted without an appropriate evidentiary foundation.

4. The "Nature of the Problem": A Question of Law or Fact?

[105] I have endeavoured to outline the error in law Council committed when it considered itself "mandated" to interpret and apply the Charter of Rights and the Human Rights Code by virtue of s. 4 of the Teaching Profession Act.

[106] As well, I am of the view Council committed error of fact. I have referred to its misconception of TWU's world view and what followed from that.

[107] I am also of the view that when it acted in anticipation of intolerant behaviour it acted in a patently unreasonable manner.

[108] Where a tribunal acts within its jurisdiction but without evidence the result may be patently unreasonable. In Toronto (City) Board of Education v. OSSTF District 15, [1997] 1 S.C.R. 487 the majority of the court held that an arbitration board convened to hear the grievance of a discharged teacher employee was patently unreasonable in holding the discharge was harsh because the condition warranting discharge was temporary, rather than permanent. The case has no direct bearing in the case at bar but I refer to it as jurisprudence binding on this Court illustrating what constitutes a patently unreasonable error of fact is, at best, scanty. The following is from the judgment of Mr. Justice Cory, speaking for the majority at 521:

> The evidence that Mr. Bhadauria's misconduct was not temporary appears to be overwhelming. Yet that is not sufficient in itself to base a conclusion that the decision of the majority was patently unreasonable. What does lead to that conclusion is that I can find no other evidence reasonably capable of supporting the conclusion that the misconduct was a momentary aberration. There was certainly no onus on the employee to demonstrate that his misconduct was temporary. The reasons of the majority clearly indicate, however, that they accepted the employer's evidence that just cause had been established and that the employer had discharged its onus in that regard. Quite simply, the evidence that the arbitrators stated they were relying upon to support their findings pointed to the exact opposite conclusion. The absence of such evidence renders the decision patently unreasonable, and there was simply no basis for the "leap of faith" that he could return to the classroom.
>
> [Emphasis added.]

One judge was of the view there were just grounds for discharge and the arbitration board erred in addressing the wrong question.

[109] In the case at bar, Council ignored the conditions in the recommendation of TEPC which were intended to prevent the feared situation from arising. It assumed without proof that intolerant behaviour by a teacher, professionally trained solely at TWU, would occur. It ignored past experience which appeared to rebut that assumption. Of TWU's graduates under the present program a substantial number teach in the public school system. There is not one bit of evidence that any one of them has behaved in the classroom in a manner incompatible with the standards of the Canadian community.

[110] Mr. Justice Davies quoted evidence that until the scarcity of long-term teaching positions occurred in the two years previous to 1995, about 70% of TWU's graduates obtained positions in the public schools. He pointed out the College presented no evidence of incidents indicative of intolerance. Nor had it made any effort to determine whether there have been any such incidents. Here, I think he referred to the fact that for some seven years TWU education graduates had been certified to teach in the public school system and large numbers of them had done so with apparent success.

[111] These graduates emerged from a five year program: four at TWU and the fifth under the supervision of Simon Fraser's Department of Education. That program had been approved by the College for certification purposes in 1988. No one has suggested Simon Fraser's contribution was instrumental in removing the intolerance Council has professed to find. The trial judge found Council's decision was made without any reasonable foundation. In my view this finding has not been successfully attacked.

[112] Nor is there evidence of behaviour outside the classroom of TWU-trained teachers advocating beliefs that have aroused antipathy or which have tended to subvert the values of a multicultural secular society such as was the case in New Brunswick. See: Ross v. New Brunswick School District, [1996] 1 S.C.R. 825.

[113] The unchallenged evidence supports the conclusion the beliefs reflected in TWU's community standards are held sincerely and have not been an instrument of intolerance.

[114] Mr. Doust, on behalf of the Catholic Civil Rights League, contended the pervasive value the Supreme Court of Canada has identified in resolving contests between or among the values protected in s. 2 of the Charter may be described in the one word: "tolerance". There was nothing placed before Mr. Justice Davies or this court which contradicted the statement in TWU's proposal as submitted in January 1995 from which I quoted in paragraph [32] of my reasons.

[115] In these circumstances 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.

IV. The Charter Challenge on behalf of Donna Gail Lindquist

[116] Counsel on behalf of this respondent maintained her Charter rights had been infringed by the College under all three heads of s. 2 of the Canadian Charter of Rights and Freedoms.

[117] With all respect to the contrary view, Ms. Lindquist's desire to attend TWU's teacher training program has not been denied nor am I satisfied that a proper foundation for a Charter analysis is present in her case.

[118] Such a foundation would exist if a teacher in a public school, professionally trained in whole or in part at TWU, became the subject matter of a complaint based on his or her religious belief. Until an event occurs which raises in a concrete form the degree to which religiously-based beliefs must be balanced against the need to maintain the secular or neutral school-place the issues raised on behalf of Ms. Lindquist are speculative.

[119] Counsel have called our attention to many authorities. I mean no disrespect in not commenting on each. I believe this appeal falls to be decided primarily on questions of statutory construction and the lack of any evidentiary basis for the resolutions of Council.

V. Nature of the Order in this Court

[120] Mr. Justice Davies directed Council to approve TWU's application with the conditions contained in the recommendation of TEPC.

[121] Mr. Berger contends that if there is some jurisdictional breach, the order deprived Council of its right to consider the conditions that should attach to any approval. He says no prejudice will result as the present arrangement between TWU and Simon Fraser University will continue.

[122] The question of compliance with the College's criteria was referred to in the Registrar's letter of 22 May 1996. There is no mention of criteria in the resolutions of 14 and 29 June. What was adopted on the latter date was explicitly adopted "... 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". Meeting the College's criteria appears to be no longer a live issue.

[123] Mr. Berger strongly contended Council was justified in its perception of discrimination and was reasonable in acting before there was actual proof of an individual behaving in a manner reflecting that perception.

[124] I disagree. The "perception" reflects Council's notion that TWU required students to adhere to its statement of values. That not being proven, the basis for the perception disappears, as does the validity of the argument Council should act in anticipation.

[125] I am of the view that if Council had properly instructed itself on the law and had not fallen into the error of concluding TWU required students to accept its community values there would have been neither basis for nor need of further orders beyond those contained in the TEPC's recommendation. That appears to have been the view of the trial judge and I am in agreement with him.

[126] I think the direction given by the trial judge is supported in principle by the result in Wrights' Canadian Ropes Ltd. v. Minister of National Revenue, [1947] A.C. 109 (J.C.P.C.). There, the statute empowered the Minister at his discretion to disallow certain expenditures in assessing the taxpayer's liability to tax. The Supreme Court of Canada found there was no evidence to support the disallowance and remitted the matter to the Minister to reconsider and re-assess. The Judicial Committee held the assessments were bad but the matter should be referred back to the Minister only for the purpose of having him adjust the assessments to reflect the decision of the courts.

[127] I would dismiss the appeal with one set of costs to the respondents.

"The Honourable Mr. Justice Goldie"

I AGREE: "The Honourable Mr. Justice Braidwood"

[The appendix inserted at the end of electronic copy should be located in between Mr. Justice Goldie's judgment and that of Madam Justice Rowles.]

Dissenting Reasons for Judgment of
the Honourable Madam Justice Rowles:

[128] I have had the advantage of reading in draft the reasons for judgment of Mr. Justice Goldie. With deference, I am unable to agree with my colleague's analysis and conclusion on the issue of the jurisdiction of the Council to consider whether the proposed teacher education program of Trinity Western University ("TWU") involves discriminatory practices that are contrary to the public interest and public policy.

I. Overview

[129] The appeal is brought from the judgment of the Honourable Mr. Justice Davies pronounced 11 September 1997, quashing the decisions of the Council of the British Columbia College of Teachers (the "College") dated 17 May 1996 and 29 June 1996 to deny an application by TWU for approval of its five-year teacher education program.

[130] Mr. Justice Davies held that the Council was without jurisdiction to make its decision based on the ground "that the proposed program follows discriminatory practices which are contrary to the public interest and public policy".

[131] The following paragraphs from the College's factum summarize the foundation for the Council's decision for refusing to approve TWU's five-year teacher education program:

The Council's decision to refuse to approve TWU's five-year teacher education program was based on TWU's policy of discriminating against homosexual persons, expressed in the contracts that TWU requires students and faculty to sign.

The contract that students must sign says that "students who cannot with integrity support those standards [set out in the contract] should seek a living-learning situation more acceptable to them". This means that a student or faculty member whose sexual orientation is not heterosexual must in good faith accept that homosexual behaviour is a sin, that it falls generally into the category of "dishonest or dishonourable practices such as cheating or stealing": The Biblical references in the contract categorize it as unnatural, perverted and an abomination. It is reasonable to assume that neither faculty nor students of homosexual orientation could in good faith sign the contract and study or teach at TWU.

[132] Mr. Justice Davies found that it was not within the Council's jurisdiction under the Teaching Profession Act, R.S.B.C. 1996, c. 449 (the Act) to consider whether TWU's proposed teacher education program follows discriminatory practices which are contrary to the public interest and public policy because the Act does not provide scope for such a consideration. He found that the meaning of "public interest" had to be limited in some way and could not provide for the making of public policy. He held that only those matters of "public interest" that relate to teaching standards were relevant. While the chambers judge was of the opinion that the Council could consider the pluralistic nature of society and diversity issues under s. 4 of the Act, he concluded that this jurisdiction would not include consideration of an applicant's religious beliefs and that, in the end, if TWU graduates were qualified to teach in independent Christian schools, those same graduates should be equally qualified to teach in the public school system.

[133] The College appeals the order quashing the Council's decisions on these grounds:

1. The judge at first instance erred in failing to accept that the Council was entitled to consider whether graduates of a complete five-year teacher education program at TWU would be perceived to be upholding Canadian values, in particular impartiality and tolerance towards students of homosexual orientation and other persons of homosexual orientation.

2. The judge erred in holding that the Council acted without evidence in deciding not to approve TWU's five-year teacher education program.

3. The judge erred in granting an order of mandamus directing that the Council approve TWU's five-year teacher education program.

II. Background

[134] Mr. Justice Goldie has made reference, in paras. 12-16 of his reasons, to the history of the statute establishing the College and to the legislative provisions regarding the object of the College, its membership and governance. In paras. 22-43 of his reasons, my colleague has set out the events which preceded TWU's petition for judicial review which came before Mr. Justice Davies. I agree with the content of those paragraphs and I need not repeat them here.

[135] In his reasons for judgment, Mr. Justice Davies made reference to the "Community Standards" to which faculty and students at TWU are expected to adhere while at TWU:

[12] All faculty members are required annually to endorse a twelve-point statement of faith approved by the Evangelical Free Church of Canada. Within this

statement of faith is the declaration that TWU "is committed to academic freedom in teaching and investigation".

[13] The members of the TWU "community" - students and faculty - are expected to live by a set of Community Standards. These, as they stood in April 1995 when they were forwarded to the Program Approval Team, are as follows:

RESPONSIBILITIES OF MEMBERSHIP IN THE COMMUNITY OF TRINITY WESTERN UNIVERSITY

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.

CORE VALUES

The Community Standards reflect our University's core values and help preserve its distinctly Christian character. Members of the community rightly expect each other to behave in accordance with these:

* THE INSPIRATION AND AUTHORITY OF THE BIBLE Members of the community voluntarily submit to its teaching.

* THE PURSUIT OF PERSONAL HOLINESS Members of the community strive to live distinctly Christian lives.

* THE UNIVERSITY'S MISSION Members of the community are determined to let nothing stand in the way of becoming "godly Christian leaders."

* THE COMMUNITY Members of the community place the welfare of the community above their personal preferences.

THE 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 THE LAW AND CONDUCT THEMSELVES AS

RESPONSIBLE CITIZENS WHO CONTRIBUTE TO THE WELFARE OF THE GREATER COMMUNITY (Rom. 13:1-7). Among other things, this precludes the use of marijuana and drugs for non-medical purposes and conduct that disrupts classes or the general operation of the University. It also includes demonstrating respect for the property of others and of the University.

* OBEY JESUS COMMANDMENT TO HIS DISCIPLES (Jn. 13:34-35) ECHOED BY THE APOSTLE PAUL (Rom. 14; 1 Cor. 8, 13) 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 viewing of pornography, premarital sex, adultery, and homosexual behaviour (I Cor. 6:12-20; Eph. 4:17-24; I Thess. 4:3-8; Rom. 2:26-27 [sic: actually Rom 1:26-27]; 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.

* * *

[14] The Community Standards are presented to the students as a code of conduct. Unlike the faculty, students may have any beliefs as long as they are willing to promise to adhere to the code of conduct while at TWU.

III. Standard of Review

[136] The majority judgment in Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193, provides the framework for an analysis of the degree of deference, if any, to be accorded a decision of an administrative tribunal such as the Council in this case.

[137] The College and TWU are in accord that whether the Council could consider discriminatory policies or practices when asked to approve a teacher education program is a matter that goes to the scope of the Council's jurisdiction and that the proper standard of review on that issue is correctness.

[138] The College goes on to argue that if the Council has jurisdiction to consider discriminatory policies or practices in approving a teacher education program, the Council's decision could only be overturned if it were found to be patently unreasonable.

[139] In TWU's submission, if the issue of discrimination is within the jurisdiction of the Council (which TWU argues it is not), any decision based on a finding of discrimination would be reviewable on a correctness standard.

[140] The chambers judge found that the standard of review regarding the jurisdictional issue was correctness. Because he found that the Council did not have jurisdiction to consider whether TWU's policies were discriminatory, the chambers judge did not consider what standard of review would apply to the Council's decision not to approve TWU's five-year teacher education program.

[141] In support of the "patently unreasonable" standard, the College argues that the issue of the suitability of a teacher education program was intended by the Legislature to be decided

by the College. To support its argument, the College referred to Pearlman v. Manitoba Law Society Judicial Committee, [1991] 2 S.C.R. 869, 84 D.L.R. (4th) 105; and Elias v. Law Society of British Columbia (1996), 26 B.C.L.R. (3d) 359 (B.C.C.A). Those cases discuss the nature of the Law Society as the agent of a self-governing profession in the context of disciplinary proceedings. In Pearlman, Iacobucci J. emphasizes the importance of the autonomy granted to professional bodies by the legislatures to discipline and regulate their members, quoting with approval, from p. 25, the study paper of the Ministry of the Attorney General of Ontario entitled, "The Report of the Professional Organizations Committee" (1980), at 886-887:

In the government of the professions, both public and professional authorities have important roles to play. When the legislature decrees, by statute, that only licensed practitioners may carry on certain functions, it creates valuable rights. As the ultimate source of those rights, the legislature must remain ultimately responsible for the way in which they are conferred and exercised. Furthermore, the very decision to restrict the right to practise in a professional area implies that such a restriction is necessary to protect affected clients or third parties. The regulation of professional practice through the creation and the operation of a licensing system, then, is a matter of public policy: it emanates from the legislature; it involves the creation of valuable rights; and it is directed towards the protection of vulnerable interests.

On the other hand, where the legislature sees fit to delegate some of its authority in these matters of public policy to professional bodies themselves, it must respect the self-governing status of those bodies. Government ought not to prescribe in detail the structures, processes, and policies of professional bodies. The initiative in such matters must rest with the professions themselves, recognizing their particular expertise and sensitivity to the conditions of practice. In brief, professional self-governing bodies must be ultimately accountable to the legislature; but they must have the authority to make, in the first place, the decisions for which they are to be accountable. [Emphasis [of Iacobucci J.].]

[142] The College argues that these cases establish that the legislature's decision to make the teaching profession self-governing is a clear indication of a legislative intention to allow that profession to control itself, including public policy issues that affect the profession, with as little interference as possible.

[143] TWU argues that any decision based on a finding of discrimination would be reviewable on a correctness standard because such a decision would be essentially a human rights determination and ancillary to the Council's jurisdiction. TWU submits that the deference suggested in Pearlman, supra, is inapplicable in this case because it involves a human rights issue, not a disciplinary issue. TWU referred to Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658; and Gould v. Yukon Order of Pioneers, [1996] 1 S.C.R. 571, 133 D.L.R. (4th) 449, to support its argument that when human rights issues are determined by administrative tribunals, they generally receive no deference and are reviewed on a standard of correctness. TWU also argues that expertise is the most decisive factor in considering the spectrum of standards of review available and points out that the College has no expertise in the area of human rights. Finally, TWU submits that this case involves a general question of law or the interpretation of a statute external to the Council's mandate and thus requires review on a correctness standard.

[144] Underpinning the positions of the parties is the question of whether the Council's decision not to certify on the basis of a discriminatory policy or practice is primarily a decision about the suitability of a teacher education program, which would be entitled to some deference, or whether it is a decision primarily about the existence or meaning of discrimination, in which case it a human rights issue to which

courts generally do not defer.

[145] The decision of the Council has elements of both. If it is within the Council's jurisdiction to consider whether a proposed teacher education program has discriminatory practices, then the issue of how those discriminatory practices would affect the teaching environment in public schools must be recognized as within the competence of the College. The determination does involve, however, the consideration of human rights and Charter values.

[146] The Council's decision involved two components: first, it had to consider whether TWU's practices are discriminatory in that they are inconsistent with Charter or human rights values; and, second, if the practices were discriminatory, the Council had to consider whether the certification of the program was contrary to the public interest. The standards of review applicable to those two components of the Council's decision may be considered separately.

[147] As to the first, a finding of discrimination by the Council under either the Human Rights Code, R.S.B.C. 1996, c. 210, (previously the Human Rights Act, S.B.C. 1984, c. 22) or the Charter would require a review on a correctness standard. While administrative boards are often obliged to consider Charter issues, they are generally not entitled to deference in regard to their findings under the Charter. Similarly, a board making a finding under the Human Rights Code would not be entitled to deference in the interpretation of an external statute. In this case, however, the Council did not purport to make such a finding under either statute. In refusing certification, the Council invoked the values inherent in s. 15 of the Charter and the Human Rights Code without actually making a finding of discrimination under the Act.

[148] We were not referred to any cases which specifically consider the appropriate standard of review for an administrative tribunal's decision that applies Charter values, but not the Charter itself. It is well settled, however, that administrative tribunals must be correct with respect to determinations under the Charter. In Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825, 133 D.L.R. (4th) 1, Mr. Justice La Forest notes, at 847, in the context of findings of discrimination by a human rights board: "In relation to general questions of law, courts must be supposed to be competent, and a standard of correctness is appropriate."

[149] Based on that reasoning, a tribunal would have to be correct to the extent that it identified a practice as inconsistent with human rights or Charter values. Whether the practices identified by the Council as discriminatory were capable of being described as discriminatory or inconsistent with Charter values is a question of law, not directly within the Council's jurisdiction and upon which the Council must be correct.

[150] 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 College. The appropriate standard of review would therefore be either reasonableness simpliciter, or patently unreasonable.

[151] Findings of fact within a board's jurisdiction are generally only reviewed where the finding cannot reasonably be supported on the evidence: Douglas Aircraft Co. of Canada v. McConnell, [1980] 1 S.C.R. 245. The finding that the discriminatory practices would have a negative effect on the public education system is a finding primarily of fact, which would tend to support a patently unreasonable standard.

[152] Nevertheless, I am not persuaded that the patently unreasonable standard is the appropriate standard of review for the Council's findings of discriminatory effect. In Ross v. New Brunswick School District No. 15, supra, La Forest J. identified reasonableness as the standard of review in relation to issues of discrimination while recognizing that a finding of discrimination is "impregnated with facts". Mr. Justice

La Forest (at 847) fixes the standard at "reasonableness" for "fact-finding and adjudication in a human rights context". The Council's finding that discriminatory practices are contrary to the public interest because they will have discriminatory effects constitutes "fact-finding and adjudication in a human rights context" even though it is not a human rights decision per se.

[153] For those reasons, I am of the view that the Council's decision regarding the effects of any discriminatory practices on the public school system is subject to review on a reasonableness standard.

IV. Jurisdiction

[154] The object of the College is set out in s. 4 of the Teaching Profession Act:

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.

[155] The position of the College is that under the Teaching Profession Act, it has a responsibility to ensure that the fundamental values of our society are served by teachers who enter the public school system and that they provide a supportive environment for all students.

[156] The College argues that s. 4 of the Act requires it to consider the public interest when setting standards for "the education, professional responsibility and competence of its members" and that, under that section, the Council has jurisdiction to consider discriminatory policies or practices within teacher education programs.

[157] Section 21 of the Act sets out the general powers of the Council, including the power to approve, for certification purposes, the program of any established faculty or school of teacher education. Under s. 21(i) of the Act, the Council is given the discretionary power to "approve, for certification purposes" teacher education programs and, under s. 23(d), the Council has jurisdiction to set a broad range of "standards, policies and procedures" for the training and qualifications of teachers, "including, but not limited to, professional, academic and specialist standards, policies and procedures".

[158] Section 21 provides:

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:

* * *

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

[159] Under s. 23 of the Act, the Council may make bylaws which are consistent with the Act and the School Act. The relevant portions of s. 23 provide:

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 and classifying certificates of qualification into one or more types;

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

[Emphasis added.]

[160] The bylaws passed by the Council pursuant to s. 23(1)(d) of the Act set out guidelines for program approval. The bylaws include a provision that there should be "an appropriate institutional setting in terms of depth and breadth of personnel" and an admission policy that recognizes suitability for entrance into the teaching profession, and content that "provides a base of knowledge of sufficient breadth and depth to prepare the candidate for an appropriate teaching assignment in the school system."

[161] By s. 24, the registrar of the College must file with the minister a copy of each bylaw made by the Council, and the Lieutenant Governor in Council may disallow a bylaw respecting the training, qualification or certification of teachers within 60 days after the bylaw has been filed. A bylaw comes into force 60 days after it is filed unless it is disallowed. The bylaws passed by Council set out standards and policies with respect to teacher education programs and include standards for the institutional setting, the faculty, the admissions program, and the course content. There is no suggestion that the bylaws passed by the College were disallowed by the Lieutenant Governor in Council.

€Bó€ Section 25(1)(a) and (b) of the Act provide that the College must not admit a person as a member of the College under specified circumstances:

25 (1) The college must not do any of the following:

(a) issue a certificate of qualification to a person unless the person has met the relevant standards established by bylaw under section 23;

(b) admit a person as a member unless the person

(i) meets the standards of qualifications and the standards of fitness established by bylaw under section 23, and

(ii) satisfies the council that the person is of good moral character and is otherwise fit and proper to be granted membership;

[163] It is convenient to note here that the effect of accreditation, or approval for certification purposes, is that every graduate of an approved program is certified by the College. Without the College's approval, TWU could continue to offer its education program with a recognized Bachelor of Education degree, but its graduates would have to apply individually for certification by the College.

[164] The College argues that the language of ss. 4 and 23 of the Act, taken together, indicates that the Council's jurisdiction to consider the public interest regarding teacher "education, professional responsibility and competence" must be considered broadly. In the College's submission, these provisions may be taken to show that the Council, within its statutory mandate, may consider whether a proposed program "will produce graduates who will be perceived as representing society's fundamental values and who may be expected to provide a supportive environment for all students".

[165] Based on the foregoing, the College submits that the chambers judge erred when he found that the Council did not have the jurisdiction to consider the issue of discrimination.

[166] TWU argues that the mandate of the College, and the words "public interest" in s. 4, must be understood in the light not only of the wording of the Act, but its purpose and

the Council's area of expertise. These considerations, TWU argues, indicate that the mandate of the Council is to create and maintain professional standards but does not extend to considering human rights issues. TWU states that allegations of discrimination are not within the Council's discretion to consider.

[167] The intervenor, British Columbia Civil Liberties Association (BCCLA), made the following submissions. If the Legislature had intended the College to consider potentially discriminatory policies, it would have explicitly provided for this. The words "public interest" are so common in statutes that they cannot have as wide a meaning as that suggested by the College. The Legislature could not have intended so many tribunals to consider human rights and "Canadian values" under the rubric of "public interest". The "public interest" should be read contextually and be limited to mean the public's interest in properly trained teachers.

[168] As for the purpose of the statute, and the tribunal it creates, BCCLA argues that it is limited to ensuring teacher qualifications. BCCLA further points out that because TWU is a provincially accredited university, it cannot be said that the College would be given the power to derogate from the Province's accreditation.

[169] BCCLA also submits that since the College has no expertise in the area of human rights, determinations about discrimination are not properly within their jurisdiction.

[170] The primary difference between the position of the College and the positions of TWU and BCCLA is in the breadth of meaning that can be imparted to the word "public interest" in s. 4 of the Act.

[171] With deference, I am unable to agree with the argument that the words "public interest" cannot have been intended to confer jurisdiction to consider public policy matters because they are so common in legislative provisions that delegate powers. It is already established that administrative tribunals are subject to the Charter, and that many will have to apply the Charter: Cuddy Chicks Ltd. v. Ontario Labour Relations Board, [1991] 2 S.C.R. 5, 81 D.L.R. (4th) 121. When that is so, why would an administrative tribunal not also be expected to consider Charter values?

[172] As Pearlman v. Manitoba Law Society Judicial Committee, supra, recognized, a legislature may see fit to delegate to professional bodies some of its authority to regulate in matters of public policy. Self-governing professional bodies are regularly expected to consider or weigh the public interest in the regulation of their professions.

[173] This policy-making mandate is reflected in the words of s. 4 of the Act. The statutory provision requires the College to have "regard to the public interest" in the setting of standards. The "public interest" is not to be defined nebulously but in relation to the particular policy interest that the College 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: Lindsay v. Manitoba (Motor Transport) (1989), 62 D.L.R. (4th) 615 at 626-628 (Man C.A.).

[174] In Ross v. New Brunswick School District No. 15, supra, the Supreme Court of Canada provided some guidance as to the nature of the public interest in public school education in the area of discrimination. In Ross (at 835), La Forest J. considered "the obligation imposed upon a public school board pursuant to provincial human rights legislation to provide discrimination-free educational services". The case considered the duties of a school board where a teacher's anti-Semitic writings and opinions expressed outside the classroom were having an effect on the school environment.

[175] Of note in the context of the public interest aspect of the jurisdictional issue in the present case is Mr. Justice La Forest's discussion of the role of the public school teachers, and the duty of school regulators to maintain a discrimination-free environment (at 856-858):

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. As the Board of Inquiry stated, a school board has a duty to maintain a positive school environment for all persons served by it.

43 Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. 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. Allison Reyes considers the importance of teachers in the education process and the impact that they bear upon the system, in "Freedom of Expression and Public School Teachers" (1995), 4 Dal. J. Leg. Stud. 35. She states, at p. 42:

> Teachers are a significant part of the unofficial curriculum because of their status as "medium." In a very significant way the transmission of prescribed "messages" (values, beliefs, knowledge) depends on the fitness of the "medium" (the teacher).

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. Reyes affirms this point in her article, supra, 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 in original.]

I find the following passage from the British Columbia Court of Appeal's decision in Abbotsford School District 34 Board of School Trustees v. Shewan (1987), 21 B.C.L.R. (2d) 93, at p. 97, equally relevant in this regard:

> The reason why off-the-job conduct may amount to misconduct is that a teacher holds a position of trust, confidence and responsibility. If he or she acts in an improper way, on or off the job, there may be a loss of public confidence in the teacher and in the public school system, a loss of respect by students for the teacher involved, and other teachers generally, and there may be controversy within the school and within the community which disrupts the proper carrying on of the educational system.

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.

[176] In light of the reasoning in Ross, supra, I think it is clear that fostering a discrimination-free environment is of fundamental importance within the public school system and sets a standard to which public school teachers must adhere. Governmental bodies that regulate the public school system have a positive duty to ensure that the learning environment is discrimination free. In Ross, within the context of a school board disciplining the teacher, La Forest J. adopted this statement: (at 861):

A school board has a duty to maintain a positive school environment for all persons served by it and must be ever vigilant of anything that might interfere with this duty.

In that case, La Forest J. observed, at 861, that the School Board's "passivity signalled a silent condonation of, and support for the respondent's views".

[177] If that reasoning is applied in the present context, it appears to me that the Council, when asked to approve a teacher education program, would be obliged to consider whether the learning environment in the public schools might be affected by discriminatory policies or practices in a teacher education program.

[178] In my view, there is no sound basis for distinguishing the duty of the College in considering certification of a teacher education program for public school teachers from the duty described in Ross that rests on public school boards in the disciplinary context. Both have to consider the need to ensure a discrimination-free environment. The duty to ensure that teachers do not transmit discriminatory beliefs or create a discriminatory learning atmosphere seems to me to come squarely within the mandate of the College in this case, which is trusted with the certification and discipline of public school teachers in this Province.

[179] Based on the foregoing, I am of the opinion that the Council, when asked to approve a teacher education program, has jurisdiction to consider discriminatory policies or practices in relation to that program.

[180] A number of other arguments were advanced on the jurisdictional issue which must also be considered.

[181] As noted earlier, while the chambers judge was of the opinion that the Council could consider the pluralistic nature of society and diversity issues under s. 4 of the Act, he concluded that this jurisdiction would not include considera- tion of an applicant's religious beliefs and that if TWU graduates were qualified to teach in independent Christian schools, those same graduates should be equally qualified to teach in the public school system.

[182] In that regard, the College argues that the chambers judge erred in failing to distinguish between the professional and statutory requirements of certification for independent schools and the requirements for certification in public schools. In particular, the College points out that the Independent School Act, R.S.B.C. 1996, c. 216, sets up a separate certification system, and that many teachers qualified to teach in the independent schools are not qualified to teach in the public school system.

[183] One of the differences in certification qualification, according to the College, is that candidates for the public school system graduate from a teaching program that is consistent with the "values of Canadian society." The College has articulated this requirement in its bylaws requiring an "appropriate institutional setting" and a program whose content "recognizes the diverse nature of society". In particular, the College asserts that "exposure to Canadian secular values is a necessary element in the education of teachers who are to be considered qualified to teach in the public schools".

[184] The College further argues that this is a requirement supported by the Charter, human rights legislation, and Supreme Court of Canada jurisprudence and, in particular, by the case of Ross v. New Brunswick School District No. 15, supra, to which I have already referred.

[185] The College acknowledges that TWU, as a private institution, is not subject to the Charter. The College further conceded that TWU, as a religious school, is not subject to the prohibition in the Human Rights Code against discrimination on the basis of sexual orientation. The College argues, however, that the Charter and the Human Rights Code provide a statement of fundamental values that must be taken into account when the Council considers "the public interest" in relation to standards for education, professional responsibility and competence of its members who teach in public schools.

[186] The College relies on the decision of the Supreme Court in Ross v. New Brunswick School Distract No. 15, supra, for the proposition that one of the professional requirements of a teacher is that the teacher be "perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system", as stated in Ross at para. 44. The College argues that this decision supports its position that the Council is entitled to consider TWU's policy of discriminating against homosexuals when it considers the public interest in setting professional standards for teachers.

[187] TWU takes the position that Ross only applies to an individual teacher's conduct and not beliefs. TWU characterizes the Council's decision as "disapproval of the religious beliefs underlying the TWU community." It argues that the personal beliefs of an applicant for a public benefit are irrelevant to the applicant's entitlement, and that the statutory mandate of the College cannot include the policing of personal beliefs. For example, the College could not question applicants about their moral views about homosexuality. TWU argues that the "public interest" referred to in s. 4 of the Act therefore can only relate to a narrow jurisdiction to set standards and could not include the creation of public policies that "punish or hinder a group with certain religious convictions".

[188] The intervenor, the Catholic Civil Rights League, argues that the College does not have jurisdiction over the matter, because its jurisdiction is limited to the conduct of graduates and not the program itself. In particular, the League submits that a program's admissions policy is not within the College's jurisdiction to consider. The foundation for this argument is that any issue regarding the legitimacy of TWU's program is settled by the exemption for religious schools provided in s. 41 of the Human Rights Code.

[189] With respect to the qualifications of graduates, the League argues that the College only has jurisdiction to consider the qualifications of graduates and has no jurisdiction to consider their beliefs. In particular, the League argues that the Council's decision amounts to a finding that "religious institutions and individuals who espouse the view that homosexual behaviour is sinful are acting contrary to the public interest and public policy". The League also argues that such a conclusion is contrary to the special rights of Catholic schools guaranteed by s. 93 of the Constitution Act 1867, and s. 29 of the Charter. Furthermore, it is argued, the ramifications of such a decision would call into question public funding for independent schools and the granting of high school diplomas to graduates of Catholic high schools.

[190] In partial response to the foregoing arguments of TWU

and the League, the College made reference to some American jurisprudence in which the United States Supreme Court has concluded that the elimination of racial discrimination is a fundamental value that informed government policy to such an extent that it could be taken into account in determining the validity of tax exemptions for religious institutions.

[191] In Bob Jones University v. United States; Goldsboro Christian Schools v. United States, 461 U.S. 574, 76 L.Ed. 2d 17, 103 S.Ct. 2017 (1983), the U.S. Supreme Court considered the decision of the Internal Revenue Service to remove the tax exempt status from two religious schools on the basis that their racially discriminatory admissions policies were contrary to the "public interest" and, as a result, the schools could not qualify for the charitable tax exemption. The Supreme Court upheld the I.R.S. decision, stating at 174 (L.Ed.):

> We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not "charitable" should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice.

[192] In my opinion, the Council does have jurisdiction to consider issues of discrimination as they relate to the public school system but its jurisdiction to consider the effects of discrimination in the public school system is limited to the particular aspect of the school system that it regulates: the qualification and discipline of teachers and the certification of teacher education programs. The Council's decision in this case must relate to specific concerns that are within its jurisdiction.

[193] The parties differ fundamentally on the more specific issue of what areas the Council can consider discriminatory practices within the public interest. TWU and the intervenors argue that the College denied certification because of graduates' presumed discriminatory beliefs, and they argue that the College cannot refuse certification to an individual because of his or her religious beliefs. The chambers judge agreed. The College argues that the learned judge erred in finding that the Council had refused certification on the basis of individual applicant's beliefs.

[194] The College asserts Council's jurisdiction to consider discriminatory practices in a teacher training program on two bases:

1) the jurisdiction to ensure that certified public school teachers are not perceived as discriminatory; and
2) the jurisdiction to ensure that certified public school teachers do not discriminate in the classroom.

The first issue was characterized as a "perception" problem, and describes the concern that the certification of students coming out of a program with discriminatory practices will not be "perceived to be upholding Canadian values". The second issue was characterized as a "risk" problem: the risk that graduates will actually engage in discriminatory conduct as a result of discriminatory practices in their training.

[195] These two issues basically correspond to the characterization by the Catholic Civil Rights League as the "entry" and "exit" issues respectively with the "entry" issue having to do with TWU's anti-homosexual admissions policy, and the "exit" issue referring to the behaviour and beliefs of graduates upon leaving the program.

[196] These issues may be characterized slightly differently, however. The Council's decision in this case assumes that the Council has jurisdiction to consider discriminatory practices in several ways. The first is the setting of actual program requirements which allow the Council to consider admissions programs and curriculum content, and specifically to require that they be discrimination-free in order for the teacher education program to be approved. The second way in which the Council assumed that it could consider discrimination is in the

setting of graduation requirements. To the extent that the College is able to set requirements for the competence and conduct of graduates from a program, this jurisdiction is engaged and would allow the Council to require that graduates not discriminate in public school classrooms, or that their presence would not cause a perception of intolerance in public school classrooms.

[197] The extent to which the College can concern itself with these issues is defined by the enabling legislation. The relevant sections of the Teaching Profession Act are ss. 4, 21, and 23. Section 4 gives the College jurisdiction to set standards for the education, professional responsibility and competence of its members. It 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. On that view of the matter, the College does have jurisdiction over the requirements for graduation and it is open to the Council to concern itself with whether graduates from an applicant program will be perceived as upholding discriminatory-free values in the public classroom.

[198] This case does raise the issue of just how far the College's jurisdiction to set educational standards extends. The Catholic Civil Rights League argues that it does not extend to considering the admissions policy of a teacher education program, or at least not so far as considering any potentially discriminatory aspects of the admissions policy. However, the League bases its argument on the exemption clause in the Human Rights Code for religious schools, not any statutory lack of jurisdiction over admissions requirements generally.

[199] I note that TWU expressly accepted the recommendations and findings of the Program Approval Team and Teacher Education Programs Committee, and the trial judge ordered them enforced. Those findings explicitly considered many aspects of TWU's program, including concerns about discriminatory admissions policies, and the school's mission to teach within a "homogeneous worldview". If the Council had jurisdiction to endorse the Reports of the Program Approval Team, then the issues considered by it and the qualifications set for certification must also have been within the Council's jurisdiction.

[200] The Program Approval Team report and recommendations were within the jurisdiction of the Council to endorse and enforce. The statutory mandate of the College 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 these standards. The presence of discrimination is certainly relevant to any of those areas within the College's jurisdiction.

V. Discrimination

[201] I have determined that the Council has jurisdiction to consider:
1) whether a teacher education program has discriminatory policies or practices;
2) whether the certification of a teacher education program would create either the perception that the public school system condones discriminatory values or does not uphold Canadian values;
3) whether the certification of a teacher education program which has discriminatory policies or practices would create a risk that graduates of the program would not provide a discrimination-free or less than supportive atmosphere for all students and their families.

[202] It is now necessary to consider whether the practices the College identified as problematic were (a) discriminatory, and (b) would indeed be contrary to the public interest with respect to teacher education programs. As previously stated, the standard of review on jurisdictional questions is

correctness, whereas the standard of review with respect to the issues I am about to consider is reasonableness. I will begin by setting out the submissions of the parties and the intervenors.

[203] The College does not claim that there was a finding of discrimination made under the Charter or the Human Rights Code. However, the College does assert that TWU's Community Standards would constitute discrimination in a public school setting and are contrary to Charter values. The College also submits that the standards to which TWU students must adhere in the Community Standards Contract are based on the fundamental values on which TWU is founded.

[204] The Community Standards Contract amounts to an exclusion of certain students and faculty from TWU because a homosexual person could not sign the contract in good faith.

[205] The College argues that human rights jurisprudence clearly indicates that the exclusion or stigmatization of gays and lesbians is contrary to Canadian values. In support of this position they note that s. 2 of the Human Rights Act (now s. 7 of the Human Rights Code) prohibits discrimination on the ground of sexual orientation. The Human Rights Act was recognized as an indication of our most important values in Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145, 137 D.L.R. (3d) 219. Furthermore, in Egan v. Canada, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609, the Supreme Court of Canada unanimously recognized sexual orientation as an analogous ground for the purposes of s. 15 of the Charter. In Haig v. Canada (1992), 9 O.R. (3d) 495, 94 D.L.R. (4th) 1 (Ont. C.A.) and Vriend v. Alberta, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385, the devastating effects of anti-gay and lesbian prejudice were recognized as requiring protection.

[206] TWU made two main submissions in response to these arguments. The first was to argue that the Community Standards do not discriminate against homosexuals. The second was an argument that any discrimination against gays and lesbians arising from TWU's Community Standards is justifiable under human rights law, and therefore not contrary to the public interest or Charter values. The intervenors' submissions largely followed these two arguments.

(i) The "no prima facie discrimination" argument

[207] TWU argues that the biblical condemnation of homosexuality simply refers to an objection to any premarital sexual relations. TWU further argues that it is only a code of conduct that exists while students attend TWU and is not a general statement of faith. The Catholic Civil Rights League argues that the Catholic condemnation of homosexuality is simply one aspect of Catholicism's rejection of materialist values. Sex that is not procreative is materialistic and must be rejected on this basis. Both TWU and the League argue that the Community Standards condemn only homosexual behaviour, but that Church doctrine teaches tolerance of homosexual persons.

[208] At the root of TWU's and the intervenors' arguments on this point is a distinction between homosexual persons, who are to be tolerated and even loved, and homosexual behaviour, which is to be condemned.

[209] The College replies that the distinction between homosexual behaviour and homosexual orientation is unsound, both in the context of TWU's Community Standards, and more generally. It argues that the Community Standards do not simply state that students must refrain from engaging in homosexual sex, but that students must recognize the behaviour as biblically condemned. While heterosexual behaviour is acceptable within the confines of marriage, homosexual behaviour is never acceptable under the terms of the Community Standards Contract, for it is, in fact, equated with other biblically condemned sins.

[210] The College also argues that the Community Standards Contract has to be understood in its context, not just as a set of rules of behaviour but as a reflection of the values upon which the Free Church and TWU is founded. In that regard, counsel for the College pointed out that the affidavit evidence indicates that the condemnation of homosexuality is deeply

rooted in the faith of the Free Church, and its interpretation of the Bible. The Contract is a part of TWU's commitment to an education founded on the principles of the Free Church, and to the development of "thoroughly Christian minds".

[211] On a more general level, the College argues that homosexuality is a personal characteristic. Homosexual behaviour cannot be divorced from homosexual identity.

(ii) Prima Facie discrimination justified

[212] TWU states that a "strong connection exists between the beliefs underlying the alleged discrimination and the nature of the TWU community". A proper analysis of determining whether discriminatory practices exist at TWU would have to consider this connection as a bona fide and reasonable justification of the impugned practices.

[213] TWU argues that there is a subjective and objective component to justification of a finding of prima facie discrimination and referred to Ontario (Human Rights Commission) v. Etobicoke (Borough), [1982] 1 S.C.R. 202, 132 D.L.R. (3d) 14 in support. TWU argues that it meets the subjective component because it adopted the Community Standards honestly and in good faith. The objective criterion is met because the Community Standards are directly connected to the essential Christian character, nature and objects of TWU.

[214] In Caldwell v. Stuart, [1984] 2 S.C.R. 603, 15 D.L.R. (4th) 1, the Supreme Court of Canada considered a case in which a Catholic school had fired one of its teachers for marrying a divorced man in a civil ceremony, contrary to Church dogma. The Supreme Court of Canada found that adherence to Church dogma was a bona fide requirement for the job and thus found that there was no discrimination. It also found that the exemption in the Human Rights Act for denominational schools specifically preserved the right of the school to discriminate in this way in order to "preserve the religious basis of the schools". TWU argues that the same reasoning should apply in this case to show that there is no discrimination.

[215] BCCLA argues that the labeling of homosexuality as a sin is not, in and of itself, discriminatory. In its factum, the BCCLA states, "The jurisprudence under the Charter of Rights does not establish that homosexuality is not a sin. It simply establishes that one cannot justifiably discriminate against homosexuals." BCCLA's argument is that sincere and bona fide religious beliefs justify the discrimination. It draws a parallel with discrimination on the basis of other religions and argues that "no right thinking person would argue that such discrimination is not reasonably justified or permissible in our society. A religious institution, by its very nature, excludes other persons who do not share that religious point of view."

Analysis

[216] The issue raised by these arguments is whether a condemnation of homosexual behaviour discriminates in a way that is contrary to the public interest in public school teacher education programs and teaching qualifications.

[217] I have already determined that it was within the College's jurisdiction to consider this issue. I have determined that the standard of review with regard to whether TWU's practices were capable of being discriminatory contrary to the public interest is correctness. This issue is distinct from the second question of whether, in fact, the practices were contrary to the public interest in public school teacher education programs and teaching qualifications.

[218] The present issue, upon which the College had to be correct, is whether TWU's condemnation of homosexual behavior engages human rights and Charter values, such that it discriminates in a way contrary to the public interest. Although the issue is not whether the condemnation would be contrary to the Charter or the Human Rights Code, supra, directly, the non-discrimination provision in these statutes will be informative of the public interest in this respect.

[219] It is common ground that gays and lesbians are an

analogous group for the purposes of the equality guarantee in s. 15 of the Charter. The Human Rights Code explicitly prohibits discrimination on the grounds of sexual orientation.

[220] The condemnation of homosexual behaviour in the Community Standards is capable of discriminating against gays and lesbians in two ways:

1) through the exclusion of gay and lesbian students and faculty;
2) through the declaration that homosexual behaviour is biblically condemned and the requirement that faculty accept this statement as a fundamental article of faith.

[221] An admissions policy that excludes a group entitled to protection from discrimination is prima facie discriminatory. It is undisputed that a gay or lesbian faculty member or student could not sign the Community Standards in good conscience. Although the record discloses no incidents of expulsion on the basis of the Community Standards, the Community Standards in effect creates a bar against the admission of homosexual persons to, or their hiring by, TWU. I conclude that this practice is prima facie discriminatory in a way that could be contrary to the public interest.

[222] The value of equality does not simply require that gays and lesbians not be excluded from a benefit; it also encompasses respect for the dignity and worth of all people. A declaration that has the effect of suggesting that homosexuals are not equal in worth and dignity to others is contrary to that principle. The Supreme Court of Canada has recognized the harm that such a declaration does in Vriend v. Alberta, supra.

[223] Vriend involved a challenge to Alberta's Individual's Rights Protection Act (IRPA), R.S.A. 1980, c. I-2 (renamed Human Rights, Citizenship and Multiculturalism Act, R.S.A. 1980, c. H-11.7, by 1996, c. 25, s. 2). The applicant, Mr. Vriend, had been fired from a private religious school where he held a permanent full time position as a laboratory coordinator. When it was discovered that he was homosexual, he was fired on the basis that he was not in compliance with the College's policy against homosexual practices. When Mr. Vriend filed a human rights complain against the school, he was told that sexual orientation was not a protected ground under the Act. Mr. Vriend then challenged the IRPA on the basis that its omission of sexual orientation as a protected ground was discriminatory. The Supreme Court found that the Alberta Government was discriminating against gays and lesbians by not affording them equal protection in Alberta's human rights provisions. Justices Cory and Iacobucci considered the effect that the omission of sexual orientation had on the equality and dignity of gays and lesbians, at 549-552:

98 It may at first be difficult to recognize the significance of being excluded from the protection of human rights legislation. However it imposes a heavy and disabling burden on those excluded. In Romer v. Evans, 116 S.Ct. 1620 (1996), the U.S. Supreme Court observed, at p. 1627:

> . . . the [exclusion] imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. . . . These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

While that case concerned an explicit exclusion and prohibition of protection from discrimination, the effect produced by the legislation in this case is similar. The denial by legislative omission of protection to individuals who may well be in need of it is just as serious and the consequences just as grave as that resulting from explicit exclusion.

99 Apart from the immediate effect of the denial of

recourse in cases of discrimination, there are other effects which, while perhaps less obvious, are at least as harmful. In Haig, the Ontario Court of Appeal based its finding of discrimination on both the "failure to provide an avenue for redress for prejudicial treatment of homosexual members of society" and "the possible inference from the omission that such treatment is acceptable" (p. 503). It can be reasonably inferred that the absence of any legal recourse for discrimination on the ground of sexual orientation perpetuates and even encourages that kind of discrimination. The respondents contend that it cannot be assumed that the "silence" of the IRPA reinforces or perpetuates discrimination, since governments "cannot legislate attitudes". However, this argument seems disingenuous in light of the stated purpose of the IRPA, to prevent discrimination. It cannot be claimed that human rights legislation will help to protect individuals from discrimination, and at the same time contend that an exclusion from the legislation will have no effect.

100 However, let us assume, contrary to all reasonable inferences, that exclusion from the IRPA's protection does not actually contribute to a greater incidence of discrimination on the excluded ground. Nonetheless that exclusion, deliberately chosen in the face of clear findings that discrimination on the ground of sexual orientation does exist in society, sends a strong and sinister message. The very fact that sexual orientation is excluded from the IRPA, which is the Government's primary statement of policy against discrimination, certainly suggests that discrimination on the ground of sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination. It could well be said that it is tantamount to condoning or even encouraging discrimination against lesbians and gay men. Thus this exclusion clearly gives rise to an effect which constitutes discrimination.

101 The exclusion sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. The effect of that message on gays and lesbians is one whose significance cannot be underestimated. As a practical matter, it tells them that they have no protection from discrimination on the basis of their sexual orientation. Deprived of any legal redress they must accept and live in constant fear of discrimination. These are burdens which are not imposed on heterosexuals.

102 Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.

103 Even if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination. Thus the adverse effects are particularly invidious. This was recognized in the following statement from Egan (at para. 161):

> The law confers a significant benefit by providing state recognition of the legitimacy of a particular status. The denial of that recognition may have a

serious detrimental effect upon the sense of self-worth and dignity of members of a group because it stigmatizes them . . . . Such legislation would clearly infringe s. 15(1) because its provisions would indicate that the excluded groups were inferior and less deserving of benefits.

This reasoning applies a fortiori in a case such as this where the denial of recognition involves something as fundamental as the right to be free from discrimination.

104 In excluding sexual orientation from the IRPA's protection, the Government has, in effect, stated that "all persons are equal in dignity and rights", except gay men and lesbians. Such a message, even if it is only implicit, must offend s. 15(1), the "section of the Charter, more than any other, which recognizes and cherishes the innate human dignity of every individual" (Egan, at para. 128). This effect, together with the denial to individuals of any effective legal recourse in the event they are discriminated against on the ground of sexual orientation, amount to a sufficient basis on which to conclude that the distinction created by the exclusion from the IRPA constitutes discrimination.

[224] While the Vriend involved a different context, the principles enunciated provide some guidance in the present case. In Vriend, the direct discrimination was by the Alberta Government in how it dealt with private acts of discrimination. In this case, the alleged discrimination is on the part of a private religious school that seeks certification of its teacher education program from an administrative tribunal. While the effect of a discriminatory "message" might not be as powerful from a school or from the regulatory body in approving the program, the content of the "message" in the present case is more explicit and severe.

[225] The fact that anti-homosexual attitudes and beliefs are often endorsed by some of our most venerated institutions cannot lessen the seriousness of the discrimination. In fact, the pervasiveness of anti-homosexual attitudes in our society points to the need to identify and address it. Failure to do so risks implicitly condoning and perpetuating homophobic discrimination. In Vriend, at para. 100, the Supreme Court in fact warned that Alberta's failure to prohibit discrimination on the basis of sexual orientation could be "tantamount to condoning or even encouraging discrimination against lesbians and gay men". The Court stated, at para. 101, that, "The exclusion sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. The effect of that message on gays and lesbians is one whose significance cannot be underestimated."

[226] In Vriend, the Supreme Court found that the government was sending a "message" that gay men and lesbian women were not equal in dignity and rights through its omission to include sexual orientation as a prohibited ground of discrimination. The present case involves a biblical condemnation of homosexual behaviour that must be signed by all faculty members as reflecting their own beliefs, and which is seen as fundamental to the principles upon which TWU is founded. Students at TWU must also sign the contract, signifying their agreement to adhere to its contents while at TWU. In my respectful view, TWU's "message" is much more explicit in terms of its condemnation than the one found to be discriminatory in Vriend. I conclude, therefore, 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.

[227] In coming to this conclusion, I have considered TWU's argument, supported by the intervenors, that the Community Standards only condemn homosexual behaviour while at TWU, and do not condemn homosexual persons generally, and therefore do not discriminate or promote discrimination against homosexual persons. While the submissions of TWU and the intervenors convince me that the Free Church and the Catholic Church

distinguish between the condemnation of homosexual behaviour and the condemnation of homosexual persons, I am not convinced such a distinction is supportable within human rights law.

[228] Human rights law states that certain practices cannot be separated from identity, such that condemnation of the practice is a condemnation of the person. For example, condemnation of someone's religious practice central to his or her religious faith would be discrimination against the person on the grounds of religion. Human rights jurisprudence accepts that homosexual behaviour is as central to the personal identity of gays and lesbians as religious practices are to the religious identity of the faithful. The unanimous decision of the Supreme Court, that sexual orientation is an analogous ground of discrimination, recognized the degree to which sexual orientation is a personal trait and not simply a behavioral choice. As La Forest J. stated in Egan v. Canada, supra, at 528:

... I have no difficulty accepting the appellants' contention that whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds.

[229] Even if the Community Standards are understood only to condemn homosexual behaviour and not people, the condemnation is still a harmful one. It is an insidious type of harm because it requires people to deny, condemn, or conceal a part of their own identity. This type of harm was recognized in Vriend, supra, as one basis for the finding of discrimination:

102 Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem.

[Emphasis added.]

[230] I should add that, in my respectful view, the argument of the Catholic Civil Rights League that Charter values require only tolerance of all people generally and not necessarily support for their conduct or behaviour depends on the acceptance of a distinction between homosexual behaviour and homosexual identity. While I agree that equality requires tolerance and not necessarily active support or encouragement, the kind of tolerance that is required is not so impoverished as to include a general acceptance of all people but condemnation of the traits of certain people. Although I think it is unnecessary to go further, I would add 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 non-discrimination in our public schools.

[231] With deference, I do not accept the submission of TWU that the prohibition and condemnation of homosexual behaviour is merely a reflection of TWU's policy against pre-marital sex. The Community Standards prohibit pre-marital sex, but they also explicitly prohibit homosexuality. It would have been open to TWU to simply leave out the biblical references to the condemnation of homosexuality if its objection to the behaviour was encompassed by the injunctions against pre-marital sex. It did not. In fact, in other submissions, TWU argued that the condemnation of homosexual behavior is "fundamental" to TWU's belief system and its mission. It seems to me that this argument belies any suggestion that the reference to homosexuality in the Community Standards is not an explicit condemnation of homosexuality in particular.

[232] Finally, it is necessary to consider the submissions of TWU and the Catholic Civil Rights League that the Community Standards could not embody discriminatory practices, because the Standards do not, in fact, contravene the Charter because the Charter does not apply to a university, or contravene the Human Rights Code because religious schools are specifically permitted to discriminate on the basis of those who share their

faith.

[233] I would not accede this argument. At issue here is not the validity of TWU's right to exclude gays and lesbians from its university community, or its rights to require members of the community to sign the Community Standards Contract. The College does not argue that TWU is not entitled to make this a requirement under the exemption in the Human Rights Code. The question is whether these requirements, which are permissible within the context of the TWU community, may have discriminatory ramifications beyond that community and, in particular, in the public school system.

[234] Section 19 of the Human Rights Act, S.B.C. 1984, c. 22, (now s. 41 and s. 42(3) of the Human Rights Code) states:

> 19. (1) Where a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or group shall not be considered as contravening this Act because it is granting a preference to members of the identifiable group or class of persons.
>
> (2) The council may approve any program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups, and any approved program or activity shall be deemed not to be in contravention of this Act.

[235] Under that section, TWU is entitled to grant a preference to members of the faith it professes for the purposes of the "promotion of the interests and welfare of an identifiable group" without contravening the Human Rights Code. This provision is unrelated, however, to the Council's concerns regarding the potential effect of TWU's discriminatory policies and practices on the public school system. Prima facie discrimination may be contrary to the public's interest within the public school system. TWU's bona fide intentions and objective requirements do not pertain to the suitability of their practices for public school certification.

[236] A similar issue was addressed in Bob Jones University v. United States; Goldsboro Christian Schools v. United States, supra. The admissions policy of two private religious schools in the United States discriminated against black students and faculty based on the schools' beliefs that mixing of the races was condemned by the Bible. In that case, the issue was whether this policy was so contrary to public policy that the schools could not be eligible for tax exemption as charities. The Supreme Court found that the schools' admissions policy constituted racial discrimination that was contrary to fundamental national policy regarding public education.

[237] The Supreme Court of Canada has indicated that prejudice against gays and lesbians is as serious a problem and as worthy of condemnation as racial or sexual discrimination. In Vriend, supra, the Supreme Court held that the assertion that "discrimination on the ground of sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination" was itself discriminatory (at para. 100).

[238] As to the argument made by TWU and BCCLA that exclusion of other religious groups from a religious school would not attract the same reaction and would undoubtedly be understood as permissible, I respectfully disagree. While a requirement that students and faculty adhere to a particular religion may not be an invalid requirement under the Human Rights Code, in my opinion, such a requirement is quite different from a policy condemning the practices of another religious group. If the Community Standards Contract had listed, for example, lighting the Menorah, celebrating potlatches, or praying to Allah as biblically condemned or as being sinful practices, I think there would be no doubt that the same concerns would arise as they do with respect to the condemnation of homosexual practices in relation to the values the public school system is expected to uphold. While it is one thing to define one's

religious community, it is quite another to condemn and stigmatize another.

[239] To be upheld, the Council's decision that the condemnation of homosexuality in the Community Standards discriminates in a way contrary to the public interest in public school teacher education requirements has to be reasonable.

[240] The Council passed the following resolution in denying TWU's applications:

That 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.

[241] As my colleague, Mr. Justice Goldie, has pointed out, the Council did not issue any reasons. The basis for its conclusions must be taken from a list of issues discussed at the meeting in which TWU's application was discussed:

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 adequacy of library resources: Council members expressed the view that resources should be improved prior to the inception of the program.

Recommendations in the report of the Program Approval Team for monitoring several aspects of the program raised doubts about the overall readiness of the program for approval.

The suitability and preparedness of graduates to teach in the diverse and complex social environments found in the public school system.

The difficulty of adequately monitoring the application of admissions policy to ensure that discrimination does not occur.

The ability of the faculty to provide a program of sufficient breadth and depth.

The limited extent of public school experience of the faculty.

A concern that the presentation and consideration of social issues would be limited by the requirement of the program for commitment to a homogenous world view.

[242] TWU requested reconsideration of that decision and made further submissions. Following the reconsideration hearing, the Council approved the following resolution:

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.

[243] Again, there were no reasons issued. The College Report to Members was issued in the Fall of 1996 but it is unclear whether the article it contained about the denial of TWU's application was intended to be an official explanation. As I understood the submissions of counsel during the oral hearing, however, the resolutions and article were being accepted as the Council's reasons for the purposes of this appeal. The article stated:

The stated object of the College under the Teaching Profession Act obliges Council to be primarily concerned with 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. Therefore in reviewing a program application, the College must consider whether the institution offering the program discriminates against persons entitled to protection according to the fundamental values of our society. These values are embedded in the Charter of Rights and in human rights statutes enacted by Parliament and the British Columbia legislature. They represent the public interest referred to in Section 4 of the Teaching Profession Act.

* * *

In determining the standards for the profession, the Council must make decisions about suitable and appropriate preparation for teaching in the B.C. public school system.

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 College to be essential to the practice of the profession.

[244] It is clear from the resolutions and article that in denying TWU's application, the Council was concerned with two aspects of the "discriminatory practices":

1) that some aspects of the program were discriminatory, in particular the effect that the Community Standards Contract had on admissions and the worldview at TWU; and
2) that graduates might carry some of these discriminatory beliefs or practices into the public school system, or might otherwise not be equipped to deal with the diversity of public schools.

The question is, were these concerns reasonable on the evidence before the Council?

[245] The bases of these concerns must be found, directly or inferentially, in the evidence before the Council, which consisted of the Community Standards Contract, the reports of committees of the College, particularly the report of the Program Approval Team ("PAT") and the submissions of TWU regarding the PAT report.

[246] In the article published in the College Report to Members, as set out previously, the College stated that it was concerned with:

...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. Therefore in reviewing a program application, the College must consider whether the institution offering the program discriminates against persons entitled to protection according to the fundamental values of our society.

[247] Was it reasonable for the College, on the evidence before it, to consider that the Community Standards might affect the public interest in the "integrity and the values of the ... institutions ... which will prepare graduates to teach in the public school system" and that TWU's Community Standards might affect that integrity?

[248] In my opinion, the Council's correct identification of discriminatory aspects of the Code of Conduct justify a concern that certifying the program would not be in the public interest. The public interest engaged by this decision is that the programs that train our public school teachers not openly endorse discriminatory beliefs and practices. While it might

be argued that the public has a greater interest in having teachers trained in a religious program than in ensuring that the programs themselves are not discriminatory, it was within the expertise of the Council to balance those interests and the Council's conclusion was a reasonable one.

[249] The PAT report shows the extent to which that committee wrestled with the conflicting interests. While the Council ultimately came to a different conclusion than the Program Approval Team, the Team's report identified their concerns with TWU's proposed program. The PAT report comments that while TWU's "integration of faith and discipline is appropriate to the Christian School movement it is not suitable for the B.C. public school system". This was a problem that PAT felt could be addressed, as long as the program were properly monitored. However, it was a problem the Council ultimately had to assess in determining whether to certify TWU's five-year teacher education program.

[250] The PAT report also identified the issue of whether the admissions policy would "preclude admission to applicants who may have the required academic standing and interest in working with young children but present a different worldview." It then found that this problem could be mitigated by an annual review to ensure that the admissions policy would not discriminate on the basis of "worldview". The PAT report did not specifically consider the effect of the Community Standards in discouraging gay and lesbian students from even applying for admission. Given the finding that the admissions policy would have a negative effect on gay and lesbian students, even if they were admitted and agreed to adhere to the Code of Conduct, the Council was entitled to come to a different conclusion as to the appropriate balancing of interests with regards to TWU's admissions policy.

[251] PAT found that it was TWU's policy that all faculty associates would have to sign the Community Standards and support TWU's mission and vision. It also found that the faculty associates "significantly influence the development of the student teacher". The PAT report raised the following concerns:

Is it possible that effective pedagogical practice might assume a different shape or meaning in an environment where there may be few challenges to the developing teacher's world view?

Is it important for developing teachers to have their personal world view challenged by practising teachers in order to develop the critical skills of reflective practice?

[252] The PAT report recommended that faculty associates be seconded from the public school system to meet these concerns. However, the Council was entitled to consider that even those teachers would likely have to endorse the Community Standards and TWU's belief system. It was entitled to consider the aggravating factor that the "worldview" that might not be challenged in TWU's program condemned a fundamental aspect of gay and lesbian identity.

[253] Although the Council ultimately decided that the discriminatory practices in TWU's program could not be resolved sufficiently in the public interest through a series of conditions and monitoring, its concerns and the foundation for them were not significantly different from that of the Program Approval Team. In the end, it cannot be said that the Council's conclusion that TWU's teacher education program should not be certified was unreasonable.

[254] The Council also identified a concern that the certification of TWU's program would be contrary to the public interest in teacher education requirements because graduates from TWU's program might be affected by the discriminatory practices of their university. There was also a concern that there could be the perception that the graduates would not "uphold Canadian values" and a risk that the students might be less than supportive of gay and lesbian students, parents, or faculty.

[255] The chambers judge found that there was no evidence that

TWU students would discriminate, and therefore found that there was no evidence to support the Council's concerns.

[256] The fear that graduates from a five-year teacher training program at TWU would actually conduct themselves in a way that would discriminate against gay and lesbian members of the public school community was only one of Council's concerns, however.

[257] While there is no evidence that graduates would in fact discriminate if they taught in the public schools, there may be a valid concern that graduates may hold, or be perceived as holding, homophobic attitudes as a result of their acceptance of the community standards at TWU.

[258] Assuming that, as a result of attending TWU, TWU graduates believe or affirm their belief that gay and lesbian behaviour is biblically condemned, is that a sufficient basis for excluding them from teaching in public schools? The Catholic Civil Rights League argues that it cannot be a sufficient basis because that would exclude all Catholics who believe the teachings of the catechism from being able to teach in public schools. The intervenors argue that discriminatory beliefs alone cannot be sufficient to disqualify otherwise qualified people from teaching, short of evidence that those beliefs manifest themselves in some kind of conduct that would have a chilling effect on the school community, like that found in Ross v. New Brunswick School District No. 15, supra.

[259] Ross holds (at 855, para. 39), that human rights legislation cannot prohibit people from holding discriminatory beliefs or views, but it may prevent a person from being 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".

[260] In Ross, there was no evidence that Mr. Ross's treatment of his students was affected by his anti-Semitic views, but there was a concern about the effect of his views on the "school community". Mr. Justice La Forest found that this concern could be the basis for taking away a person's right to teach (in that case it was a right because Mr. Ross was already a teacher) if a negative effect on the school community could be proven, based on evidence from which a reasonable inference could be drawn that Mr. Ross was the cause of it.

[261] In some disciplinary cases, where "the nature of the occupation is important and sensitive, and when the substance, form and context of the employee's comments are extreme, an inference of impairment may be sufficient" (Ross, at 859, para. 46).

[262] In this case, there was no evidence of what the future impact might be of the graduates' beliefs on their ability to provide a supportive environment for gay and lesbian students or their family members in the public school setting.

[263] The Community Standards Contract itself would support an inference that graduates will likely hold the beliefs contained in the contract, although it must be noted that, unlike the faculty, students need only to agree to abide by the rules of conduct, not to believe that they are right.

[264] One of the concerns of the Program Approval Team was that TWU's teacher education program might not be able to train students adequately, by theory and example, as to the importance of not incorporating their beliefs into their attitudes, behaviour and teaching in the classroom. That led to PAT's making certain recommendations about the use of outside faculty and monitoring which I have already mentioned.

[265] In my opinion, the inadequacies in the program itself with respect to the requirement for all students and faculty to sign the Community Standards, and that faculty must actually endorse those standards as correct and agree to teach in accordance with the principles of the school, are sufficient to support the College's decision to deny certification.

VI. Charter arguments

[266] Having concluded that the Council's decision could properly be upheld within the administrative law framework, I must now turn to the question of whether the decision infringes any Charter rights and, if so, if the infringement can be justified under s. 1 of the Charter.

[267] TWU, Donna Lindquist and the intervenors argue that if the Council's decision was validly made, the decision contravened TWU's or Donna Lindquist's rights under s. 2(a), 2(b), 2(d) and s. 15 of the Charter.

Section 2(a): Freedom of Religion

[268] Section 2(a) does not require government to facilitate the practice of religion, beyond refraining from restricting existing rights based on religious belief. Because certification of TWU's proposed five-year teacher education program is not an existing right, a limitation upon it could not engage s. 2(a) of the Charter. Support for that opinion may be found in the separate concurring opinions of Sopinka J. (Major J. concurring), L'Heureux-Dub, J. and McLachlin J. in Adler v. Ontario [1996] 3 S.C.R. 609, 140 D.L.R. (4th) 385.

Section 2(b): Freedom of thought, belief and expression

[269] TWU's argument that its freedom of expression is infringed by the Council's decision proceeds on much the same analysis as its argument under s. 2(a), and relies on the assertion that a denial of a benefit would infringe the freedom.

[270] 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.

Section 2(d): Freedom of Association

[271] TWU submits that the Council, by its decision, placed a burden on Donna Lindquist on the basis of her association with TWU and other members of the TWU community. It has not been shown that TWU students would be prevented from doing something collectively that they had a right to do individually. Ms. Lindquist's freedom of association has not been infringed because no right to certification of the TWU program has been established.

Section 15: Equality rights

[272] As equality rights apply only to natural persons, I have taken the arguments advanced by TWU and the intervenors to be in support of the infringement of Donna Lindquist's equality rights.

[273] In order to determine whether there has been a breach of s. 15, the first step is to consider whether the decision draws a distinction, either on its face or in its effect. The second step is to consider whether the distinction is based on an enumerated or analogous ground: see Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577, at para. 58.

[274] In the present case, there is no facial distinction between standards applied to religious schools and those applied to other schools but the fact that the rule was neutral does not mean that there could not be an adverse impact on Christian students at TWU. In Adler v. Ontario, supra, the majority held that the absence of public funding for religious schools did not contravene s. 15 because the inequality was the product of s. 93 of the Constitution and therefore was immune from s. 15 scrutiny. As McLachlin J. rejected the s. 93 argument with respect to the public schools, she considered the merits of the s. 15 argument. In her judgment concurring in the result, McLachlin J. said, at 716-717:

> The respondents' second argument is that even if adverse effect discrimination is established, it is not caused by the Education Act, but by the appellants' religion. The cause of the inequality, they submit, is not government action, but the appellants' decision to belong to a religion which

puts them in the position of having to reject the public secular schools and establish and fund their own independent schools. With all deference to those who hold otherwise, I cannot accept this defence. By definition the effect of a discriminatory measure will always be attributable to the religion, gender, disability and so on of the person who is affected by the measure. If a charge of religious discrimination could be rebutted by the allegation that the person discriminated against chose the religion and hence must accept the adverse consequences of its dictates, there would be no such thing as discrimination. This Court has consistently affirmed a substantive approach to equality. The substantive approach to equality is founded on acceptance of the differences which lie at the heart of discrimination. Be they differences of birth, like race or age, or be they differences of choice, as religion often is, the law proceeds from the premise that the individual is entitled to equal treatment in spite of such differences. The state cannot "blame" the person discriminated against for having chosen the status which leads to the denial of benefit. The person is entitled to the benefit regardless of that choice. The essence of s. 15 is that the state cannot use choices like the choice of religion as the basis for denying equal protection and benefit of the law.

I conclude that while secular schooling is in theory available to all members of the public, the appellants' religious beliefs preclude them from sending their children to public schools. Therefore, they are adversely discriminated against by the lack of funding for schooling consistent with their religious beliefs. The fact that they may have chosen their religion and with it the need to send their children to religious schools does not negate the discrimination. This discrimination places a real and substantial financial burden on the appellants. The appellants are not treated as equal before and under the Education Act and do not receive equal benefit of the law. Therefore, the infringement of s. 15 is established.

[275] In this case, the concern is that the standards applied by the Council that require a teacher education program to abide by secular values of non-discrimination, may adversely impact those students who, for reasons of their religious convictions choose to attend TWU.

[276] In Adler, supra, the burden on parents for exercising their religious freedom and sending their children to religious schools was the cost of private religious school education. 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. The Council's decision which would require public school teacher education training programs to conform to non-discriminatory standards thus would have a prima facie discriminatory impact on TWU students on the basis of their religion.

Section 1 analysis

[277] A breach of s. 15 may be justified if it can be established that the infringement is "prescribed by law" and is "reasonable and demonstrably justifiable in a free and democratic society". In this case, the College must show that the objective of its policy that public teacher education programs must be non-discriminatory and produce graduates capable of understanding and upholding Canadian values of non-discrimination is a compelling one in a free and democratic society. The College must then show that the means it employed to further this objective, the denial of certification of TWU's teacher education program, was proportional to that goal. The proportionality test involves three requirements: the means must be rationally connected to the goal; the means must infringe the right as little as possible; and there is proportionality between the deleterious effects of the infringement and the meritorious effects of the objective.

Prescribed by law

[278] TWU argues that the Council's decision cannot be justified under s. 1 because it was not prescribed by law. TWU's position is based on the submission that the Council's decision was arbitrary and was not based on evidence as required by R. v. Therens, [1985] 1 S.C.R. 613. TWU also argues that because tribunals with delegated authority are presumed not to have the power to infringe the Charter, the Council did not have the delegated authority to make the decision it did.

[279] As I have endeavoured to explain earlier in these reasons, the Council's decision was within its jurisdiction to make and was reasonable. The decision was not arbitrary and the Council had the authority to infringe Charter rights, so long as the infringements can be justified under s. 1.

Objective

[280] The objective of the Council's policy is to uphold values of non-discrimination in the public school system. This goal must be regarded as a pressing and substantial one for it goes to the heart of the values of a free and democratic society. Those values include "respect for the inherent dignity of the human person, commitment to social justice and equality": see R. v. Oakes, [1986] 1 S.C.R. 103 at 136.

Proportionality

[281] I turn now to consider whether the Council's refusal to certify TWU's program was proportional to the objective it was intended to further. In doing so, I note that greater deference is accorded to a decision that must balance competing societal rights than to those governmental decisions that concern only an individual's relationship with the state: See R.J.R. Ä MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1, and Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577.

Rational connection

[282] The Council's denial of TWU's application for certification is rationally connected to the College's objective of upholding values of non-discrimination in the public school system. TWU's application was denied because its program required students and faculty to ascribe to a code of conduct, and teachers to endorse it as a matter of faith, fundamental to the mission of TWU, a condemnation of homosexual behaviour. The denial of the TWU application for certification of its program is connected to the need to uphold values of non-discrimination against gays and lesbians in the public school system.

[283] In Adler, supra, at 720, McLachlin J. considered the rational connection between the goal of promoting tolerance and understanding and the denial of funding of religious schools:

> Scientific demonstration of cause and effect is not necessary to satisfy the requirement of a rational connection between the objective sought and the infringing measure. Legislators can seldom demonstrate that the measures they propose for the betterment of society will inevitably have that effect. What is required is that the measure not be arbitrary, unfair or based on irrational considerations: Oakes, supra, at p. 139. As a matter of common sense, can it be said that the measure or legislative scheme in question may promote (as opposed to inevitably accomplish) the objective sought?

Minimal Impairment

(a) Submissions

[284] TWU argues that there was a readily available alternative to the Council's decision to deny its program certification altogether and that was to adopt the certification with the qualifications suggested by the Program

Approval Team. For example, the Program Approval Team had recommended public school teachers be hired as faculty associates to teach the fifth year professional development course, and that the program's admissions be subject to continual monitoring and review. In addition, PAT recommended that TWU's Social Issues in Canadian Education, which is based on a popular non-secular text, be made a mandatory class for all education students. In oral argument, counsel for TWU also indicated that TWU would be willing to ensure that gay and lesbian issues were specifically addressed as part of that course, and would be willing to bring in members of the gay and lesbian community to conduct workshops on tolerance and sensitivity. In contrast to these recommendations, TWU argues that the denial of certification amounts to a "total prohibition" in relation to TWU students' equality rights, where the same goal could have been achieved by less intrusive measures.

[285] The College argues that it is entitled to a certain "margin of appreciation" in its decision in this case, and that the decision of the Council falls within a range of acceptable resolutions to the problem. It states that within this margin, it was open to the Council to reject the Program Approval Team's recommendations for annual monitoring, admissions reviews, social issues courses, and public school faculty associates. The College submits that some of these requirements would, in fact, have been an even more intrusive solution, with a state agency directing what should be taught with respect to a subject fundamental to the faith of the Free Church.

[286] In addition, the College argues that the Council's decision was not a total prohibition but, in effect, continued the present situation in which TWU graduates complete their professional training year through Simon Fraser University.

(b) Analysis

[287] The impairment of the equality rights of TWU students in this case is a result of the Council's objective of ensuring that the public school system upholds the values of non-discrimination. In my view, this case does involve a difficult balancing of competing protected interests in society. Canadian values demand a degree of accommodation for cultural and religious differences, such as those of the TWU students. Those same values require the protection of vulnerable groups in our society historically subject to harmful discrimination, including gays and lesbians and their families.

[288] In this case, the Court is being asked to balance competing interests within society. While the College must still be able to justify the choice it made, the Courts will be cautious in imposing one justifiable solution over another. As Dickson C.J. stated in Irwin Toy, supra, at 993-994:

> Thus, in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude. In Edwards Books and Art Ltd., supra, Dickson C.J. expressed an important concern about the situation of vulnerable groups (at p. 779):
>
> > In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.
>
> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic

institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. For example, when "regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy" (Edwards Books and Art Ltd., supra, at p. 772).

In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the Charter, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions: see Sunday Times v. United Kingdom (1979), 2 E.H.R.R. 245, at p. 276. The same degree of certainty may not be achievable in cases involving the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources.

[289] In RJR Ä Macdonald, supra, at 342, McLachlin J., giving the reasons of the majority, said that, "If 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...."

[290] In Adler, supra, at 721, McLachlin J. applied the same reasoning with respect to the denial of funding to private religious schools on the basis of promoting diversity in public schools, minimally impaired the religious equality rights of those people whose religious convictions would not allow them to attend public schools:

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. Again, common sense is the guide.

[291] It 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, such as adoption of the Program Approval Team's recommendations or a continuation of the existing Simon Fraser University program.

[292] I should note here that the existence of TWU's arrangement with Simon Fraser University (SFU) for its fifth year students is not relevant to the present decision. The Council's decision was not contingent on the future cooperation of SFU, and, in any event, that cooperation is apparently by no means assured. The documents from which Council's decision has been drawn do not make reference to the continued cooperation

of SFU as desirable and there is no suggestion that it would meet the College's requirements if it were put forward for approval at this time.

[293] The Council is not obliged to follow the recommendations of the College's Program Approval Team. It had a duty to consider the matter itself, and to decide how best to meet the objective of upholding values of non-discrimination in the public school system. In doing so, it must also attempt to infringe the religious equality rights of the TWU students as little as possible and still meet its objective.

[294] The Council considered all these requirements and concluded that the recommendations of the Program Approval Team would be inadequate to meet the College's substantial concerns about TWU's Community Standards and its program as affected by those Standards. Some of these concerns were also raised by the Program Approval Team, although it apparently did not specifically consider the impact of the Standards on future gay and lesbian applicants, teachers, or future members of the public school community.

[295] In my opinion, the Council's decision falls within the acceptable range of alternatives and, if that be so, it meets the minimal impairment test.

Proportionality

[296] The effect of the infringements must be proportional to the goal of the decision. In Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835 at 887-888, 120 D.L.R. (4th) 12, Lamer C.J. added that not only the goal of the decision but also its "salutary effects" must be proportionate to the deleterious effects of the infringement.

[297] It has been established that the College's goal was a compelling one, very close to the heart of the values of our free and democratic society, but so is the value of accommodating and encouraging cultural diversity. In my opinion, the effects and goal of the College's decision are proportionate to the infringement in this case.

[298] The actual effect of the College's decision was to ensure that graduates of a certified teacher education program will not have been exposed to and trained within a program that endorses discriminatory attitudes towards gays and lesbians and expects its students to abide by those beliefs, and its teachers to accept them as true. This upholds the public perception that the public school system will not condone anti-homosexual policies. In addition, it should contribute to ensuring that our public schools, their teachers, and the institutions that train them, maintain high standards of non-discrimination.

[299] The deleterious effect, on the other hand, to Ms. Lindquist and other TWU students in the education program at TWU, is that they will not be automatically certified for teaching in the public school system. Ms. Lindquist may have to apply for a teaching position in an independent school, look into doing a professional training year through some other program, or attempt to show that she meets individual certification requirements as graduates of religious schools outside of B.C. currently must do. Other Christian students may choose not to go to TWU because they want to become public school teachers, and TWU's program cannot promise that. As a result, these Christian students may have to make a choice between taking their degree within a Christian perspective, or taking it in a certified, but secular, program.

[300] In my opinion this effect is proportionate to the Council's objective and the effects of its decision in upholding the values of non-discrimination in the public school system.

VII. Conclusion

[301] I would allow the appeal from the decision of the chambers judge and set aside the orders he made.

"THE HONOURABLE MADAM JUSTICE ROWLES"
APPENDIX

FINAL DRAFT - STUDENTS
RESPONSIBILITIES OF MEMBERSHIP IN THE COMMUNITY OF
TRINITY WESTERN UNIVERSITY
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.

In order to accomplish this mission, members of the community need to engage in an unhindered pursuit of knowledge, personal growth, and spiritual maturity (Hebrews 12:1-3). Consequently, the University strives to maintain a distinctly Christian living and learning environment conducive to a rigorous study of the liberal arts and sciences from the perspective of a biblical world view.

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. In return, they gain the privilege of enjoying the benefits of community membership and undertake to work for the best interests of the whole community (Phil. 2:4).

Compliance with these standards is simply one aspect of a larger commitment by students, staff, and faculty to live together as responsible citizens, to pursue biblical holiness, and to follow an ethic of mutual support, Christian love in relationships, and to serve the best interests of each other and the entire community.

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

The Community Standards reflect our University's core values and help preserve its distinctly Christian character. Members of the community rightly expect each other to behave in accordance with these:

* THE INSPIRATION AND AUTHORITY OF THE BIBLE Members of the community voluntarily submit to its teaching.

(ii)

* THE PURSUIT OF PERSONAL HOLINESS Members of the community strive to live distinctly Christian lives.

* THE UNIVERSITY'S MISSION Members of the community are determined to let nothing stand in the way of becoming "godly Christian leaders."

  THE COMMUNITY Members of the community place the welfare of the community above their personal preferences.

THE 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 THE LAW AND CONDUCT THEMSELVES AS RESPONSIBLE CITIZENS WHO CONTRIBUTE TO THE WELFARE OF THE GREATER COMMUNITY (Rom. 13:1-7). Among other things, this precludes the use of marijuana and drugs for non-medical purposes and conduct that disrupts classes or the general operation of the University. It also includes demonstrating respect for the property of others and of the University.

OBEY JESUS COMMANDMENT TO HIS DISCIPLES (Jn. 13:34-35) ECHOED BY THE APOSTLE PAUL (Rom. 14; 1 Cor. 8, 13) 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 viewing of pornography, premarital sex, adultery, and homosexual behaviour (I Cor. 6:12-20; Eph.

4:17-24; 1 Thess. 4:3-8; Rom. 2:26-27; 1 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.

EXERCISE CAREFUL JUDGMENT IN THE EXERCISE OF PERSONAL FREEDOM (Gal. 5:166: 10; Rom. 12:1-15:13; 1 Cor. 8:9-13; 13:1-13; Eph. 4:17-6:18; Col. 3:1-4:6; 1 Thess. 4:1-5:24). This entails the responsible use of time and material resources, and the honest pursuit of knowledge including regular attendance at classes, chapel services, and University events. It also requires that members of the community abstain from the use or possession of alcoholic beverages, tobacco in any form, other forms of substance abuse, all forms of gambling, and that members of the community maintain modest, inoffensive behaviour in personal relationships. Co-ed living arrangements are not suitable for unmarried Trinity students. Furthermore because many contemporary forms of amusement are of questionable value or diminish one's moral sensitivities, members of the community are to use discernment in their choice of entertainment including television, movies, live productions, and social dancing. Keep in mind that social dancing is not permitted on campus, neither may dances be sponsored by University or student groups. Furthermore, the University does not condone dancing at clubs where alcohol is liberally consumed, discretion in the choice of music is not exercised, and the overall atmosphere is questionable.

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 none the less, 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.

10/19/94