S.C.C. File No. 37209

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

APPELLANTS
(Appellants)

- and -

THE LAW SOCIETY OF UPPER CANADA

RESPONDENT
(Respondent)

- and -

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INTERVENERS

[Style of Cause continued on inside cover]

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[Style of Cause continued]

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(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(Respondent)

- and -

TRINITY WESTERN UNIVERSITY and **BRAYDEN VOLKENANT**

RESPONDENTS
(Appellants)

- and -

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OVERVIEW

1. As gatekeepers to the entry points of the legal profession, law societies have an obligation not only to ensure that their members possess certain academic qualifications; they must also promote equal access to the profession regardless of the personal characteristics of any applicants. This duty flows both from the equality-focused nature of the legal profession itself, and from the statutory obligation to make regulatory decisions in the public interest in the administration of justice.

2. Additionally, law societies must exercise their mandates and render regulatory decisions in a manner consistent with *Charter* values and applicable human rights legislation. Where necessary, they must balance competing rights in a way that ensures each right is restrained as minimally as is required to ensure corresponding respect for the other. This obligation is at the forefront of law societies' considerations in any decision about whether to accredit graduates of proposed law schools for practice of law within a province. Ultimately, these decisions will call into play the interlacing goals of diversity and equality that underpin membership in the legal profession.

3. As accreditation decisions lie at the heart of law societies' core regulatory mandate, these decisions are owed significant deference from reviewing courts. Where these regulatory decisions achieve a reasonable balance between competing fundamental rights, the courts should not intervene.

FACTS

4. The CBA takes no position on the facts of this case.

PART II: STATEMENT OF POSITION

5. Where a law society's regulatory decision has the potential to affect competing fundamental rights, the law society has an obligation to balance the different rights and values at stake in light of the public interest in promoting equality in the legal profession. In doing so, the law society should consider the actual impact its decision would have on each affected right.

When it engages in this exercise, the law society is fulfilling the role the legislature gave it, and enjoys a significant degree of deference from the courts. The experience of the United States in balancing fundamental freedoms against the need to prevent discrimination illustrates how courts will allow significant leeway to government institutions to promote equality, even when other rights are at play.

PART III: ARGUMENT

A. Requirement for deference to law society decisions

6. When this Court determined in *Trinity Western University v. British Columbia College of Teachers*[1] that the B.C. College of Teachers ("BCCT") failed to weigh the various rights involved in denying TWU's application for a teacher education program, it did so through a lens of correctness. The Court concluded that the BCCT was not well equipped to determine the scope of freedom of religion or to weigh that right against the right to equality. The Court did not extend deference because the consideration of discriminatory practices was determinative of BCCT's jurisdiction and beyond the scope of its expertise.

7. The same standard of review analysis does not apply today. *Dunsmuir* mandates a policy of judicial deference to decision-makers in the interpretation and application of their home statutes, in recognition of their expertise and field-sensitivity. Reviewing courts must be careful not to brand as "jurisdictional" that which may be doubtfully so; they must be sensitive to the "necessity of avoiding the undue interference with the discharge of" functions delegated to statutory delegates and recognize that "courts do not have a monopoly" on deciding all questions of law.[2]

8. *Doré*[3] has clarified that a reasonableness standard of review applies to discretionary decisions that engage *Charter* values. Where a *Charter* right is infringed, the statutory delegate must determine how the *Charter* value at issue will best be protected in view of its statutory objectives. There may or may not be more than one proportionate outcome having regard to

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[1] 2001 SCC 31 [*TWU 1*].
[2] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 27, 30 [*Dunsmuir*].
[3] *Doré v. Barreau du Québec*, 2012 SCC 12 [*Doré*].

those objectives.[4] Determining when a religious freedom must yield to a more pressing public interest is a "complex, nuanced fact-specific exercise that defies bright-line application."[5] The proportionality test is met so long as the decision falls within a range of possible, acceptable outcomes that are defensible on the facts and the law.[6]

9. This Court has recently confirmed the applicability of the foregoing framework to law societies in particular. It recognized that legislatures have given extensive regulatory powers and a "broad public interest mandate" to law societies and emphasized the need to interpret that mandate in a broad and purposive approach.[7] As the Court observed in *Green v. Law Society of Manitoba*, the independence given to law societies by the legislatures is "evidence of an intention" to give them "all necessary powers to regulate" the profession.[8] In view of their broad regulatory mandate and institutional expertise, law societies must be "afforded considerable latitude in making rules based on [their] interpretation of the 'public interest' in the context of [their] enabling statute."[9]

B. The effect of a law society's decision on equality rights should be evaluated through the lens of law as an inclusive profession

10. The question that the law societies faced in the present appeals was how to give effect to their broad public interest mandate when considering an application for accreditation from a proposed law school that intentionally sought to limit its student body through means that would normally be considered discriminatory. The law societies determined that accreditation of a law school with exclusionary admission policies was not in the public interest within the meaning of their home statutes.

11. They did so in light of their broad mandate to protect the public interest in the administration of justice. For the Law Society of Upper Canada, that statutory mandate includes a duty to maintain and advance the cause of justice and the rule of law and to facilitate access to justice for the people of Ontario. For the Law Society of British Columbia, that mandate includes

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[4] *Loyola High School v. Quebec (AG)*, 2015 SCC 12 at para. 41 [*Loyola*].
[5] *Bruker v. Marcovitz*, 2007 SCC 54 at para. 2 [*Bruker*].
[6] *Dunsmuir*, *supra* at para. 47.
[7] *Green v. Law Society of Manitoba*, 2017 SCC 20 at para. 38.
[8] *Ibid.* at para. 30.
[9] *Ibid.* at para. 24.

the duty to uphold and protect the public interest in the administration of justice by, *inter alia*, preserving and protecting the rights and freedoms of all persons.[10]

12. In furtherance of that mandate, law societies must promote the fundamental values of equality and respect for human dignity in both the legal profession and in the administration of justice. As Justice Abella observed in *Loyola*, the state "always has a legitimate interest in promoting and protecting the shared values of equality, human rights and democracy."[11] The responsibility to promote equality, tolerance and diversity flows from the inherent nature of the profession, namely its obligations to uphold and propagate the rule of law and respect for constitutionally protected rights and freedoms, and to provide representation to all.

13. The twin imperatives of inclusivity and equality require law societies to prevent barriers to access to the legal profession that are by their nature discriminatory. State actors must be extremely cautious not to legitimate the "affront to the dignity and worth" of the individuals that discrimination represents.[12] As former Justice Bertha Wilson wrote, "[o]ur profession … must not deny entry or discriminate at any stage of a lawyer's career on grounds of race, sex, disability, or sexual preference."[13]

14. Discrimination of the kind in this case is harmful on its face. It is unacceptable in a democratic society "because it epitomizes the worst effects of the denial of equality."[14] A law society cannot properly fulfill its duty while turning a blind eye to discrimination.

15. A law society does not properly fulfill its mandate by allowing what has been called direct discrimination to persist while waiting for evidence of its effects. Discrimination is an evil in itself. When faced with discrimination, it is no answer to tell those burdened by it that they can get equivalent services elsewhere, much less to oblige them to prove that they cannot get

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[10] *Law Society Act*, RSO 1990, c. L.8, s. 4.2; *Legal Profession Act*, SBC 1998, s. 3(a).
[11] *Loyola*, *supra* at para. 47.
[12] *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 at para. 107.
[13] Canadian Bar Association, *Touchstones for Change: Equality, Diversity and Accountability, Report on Gender Equality in the Legal Profession*, 1993, p. 4.
[14] *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at 172.

equivalent services elsewhere. The harm is in the discriminatory act itself, and does not require proof of the unavailability of alternative services.[15]

16. Where the discrimination at issue affects historically marginalized or disadvantaged groups, the effect of discrimination can immediately be understood at a systemic level. A broad and purposive interpretation of the law societies' mandates recognizes that they were required to consider these factors and the effects of the policies on the group being excluded.

17. As such, it is important to consider the evolution in the treatment and recognition of equality-seeking groups when assessing whether a proposed policy is justifiable under today's standards.[16] The impact of discriminatory practices on members of the LGBT community has long been acknowledged by Canadian courts. The exclusion of LGBT persons from equal benefits, whatever the context, sends an "implicit message" that "gays and lesbians, unlike other individuals, are not worthy of protection."[17] In *Vriend v. Alberta*, this Court noted that psychological injury accrues from discrimination in the form of exclusion of LGBT individuals, emphasizing the resulting harm to personal confidence, self-esteem and human dignity.[18]

18. It is equally important for the law societies to have regard to the systemic effects of these policies. Where discrimination is rooted in law school admissions rules, those rules will have broad consequences affecting access to the profession and the diversity of the future composition of the legal profession. Law societies must be sensitive to any restriction on access to the entry point of a legal career – particularly where the restriction risks systemically underrepresenting the very marginalized groups whose equality rights this profession is mandated to protect. Any contrary view would directly contradict the imperatives of inclusivity and equality that underpin the broad regulatory role of law societies.

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[15] See *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.,* [1985] 2 SCR 536 at 551, 558-59; *Sprague v. Riocan Real Estate Income Trust Fund*, 2016 HRTO 866 at para. 15.
[16] See e.g. *Carter v. Canada (Attorney General)*, 2015 SCC 5; *Canada (Attorney General) v. Bedford*, 2013 SCC 72.
[17] *Vriend v. Alberta*, [1998] 1 SCR 493 at para. 102.
[18] *Ibid.*; see also L'Heureux-Dube J. in *Egan v. Canada*, [1995] 2 SCR 513 at 567.

19. When equality rights come into conflict with another protected right or value, a complex, nuanced, fact-specific balancing exercise is required.[19] However, the mere existence of a conflict does not imply that rights are being violated. As this Court stated unequivocally in *Reference re. Same-Sex Marriage*:

> The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster. [20]

20. When the rights competing with equality are religious ones, a particular sensitivity to the principle of state neutrality is required. State actors must remain neutral toward practitioners of all faiths, neither favouring nor hindering the expression of any given religious belief. The state must show respect "for all postures towards religion … *while taking into account the competing constitutional rights of the individuals affected.*"[21] The contours of freedom of religion remain delineated by the context in which this freedom is exercised: that of "a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights."[22]

21. A facet of state neutrality entails recognition that the exercise of freedom of religion must account for the diverse and potentially competing rights of others.[23] Where the exercise of a religious right may harm another's fundamental freedoms, it is possible for that religious right to itself be restrained.[24] Law societies must remain conscious of this imperative when making decisions that have the potential to affect religious practice and expression.

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[19] *Bruker*, *supra*, at para. 2.
[20] *Reference re Same-Sex Marriage*, 2004 SCC 79 at paras. 46, 48.
[21] *S.L. v. Commission Scolaire des Chênes*, 2012 SCC 7 at para. 32 (emphasis added).
[22] *Loyola*, *supra* at para. 47.
[23] *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para. 61; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at para. 226; *TWU 1*, *supra* at para. 2; *Reference re Same-Sex Marriage*, *supra*.
[24] See e.g. *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 26; *Bruker*, *supra*; *R. v. Ross*, [1989] 1 SCR 3.

C. The U.S. experience of balancing competing rights provides useful parallels

22. While it has developed in a distinct legal context, U.S. jurisprudence on the approach to balancing competing rights offers some helpful illustrations of how a reasonable equilibrium may be struck between the exercise of fundamental freedoms on the one hand, and the protection of the rights of equality-seeking groups on the other.

23. The Supreme Court of the United States ("SCOTUS") has recognized that state support of discriminatory policies cannot be tolerated, even if the discriminatory policies are developed by private actors. This principle emerges clearly from the landmark 1973 case of *Norwood v. Harrison*,[25] in which the parents of four school children sued the state of Mississippi for enforcing a statutory program that lent textbooks to private and public schools without reference to whether a private school maintained racially discriminatory admissions policies. The parents argued that by continuing to lend textbooks to private schools with such policies, the state was providing direct assistance to racially segregated education.

24. The SCOTUS agreed. It characterized the textbook program as a benefit to which private schools lacked an automatic right,[26] but also went on to emphasize that the state was "clearly" not required to provide private schools with assistance where those schools discriminated on racial grounds. In the Court's view, "[t]hat the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination."[27] Further, "[a] State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination."[28]

25. Subsequent U.S. jurisprudence fleshed out the onus that lies on the state in justifying a denial of benefits where equality is compromised in the name of fundamental rights.

26. *Bob Jones University v. United States* dealt specifically with the conflict that can arise between a private party's interpretation of religious doctrine and the state's desire to respect

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[25] 413 U.S. 455 (1973) [*Norwood*].
[26] *Ibid.* at 463-64.
[27] *Ibid.* at 462-63 (emphasis added).
[28] *Ibid.* at 467 (emphasis added).

equality.[29] In that case, the U.S. Internal Revenue Service ("IRS") revoked tax-exempt status from Bob Jones University, a private Christian institution, because the university denied admission to applicants in interracial marriages. The University's refusal to admit students in interracial marriages was based specifically on religious belief, the sincerity of which was not at issue.

27. The SCOTUS maintained the IRS decision. It held that the state has a fundamental, overriding interest in eradicating racial discrimination in education. That interest substantially outweighed whatever burden the denial of tax benefits imposed on the University's exercise of religious beliefs, because no less restrictive means were available to achieve the government interest.[30] The language of the SCOTUS tracks this own Court's emphasis on reasonable and proportionate impairment of constitutionally protected rights, including in situations where such rights compete.[31]

28. In the 2010 case of *Christian Legal Society v. Martinez*,[32] the conflict involved the effect of a religious group's exclusionary policy based on sexual orientation, as opposed to race. Not surprisingly, the principles that guided the SCOTUS's decision remained the same.

29. The Christian Legal Society ("CLS"), a student religious group at the Hastings College of Law, sought recognition from the College as a Registered Student Organization ("RSO"). However, the College would only grant RSO status to groups that complied with its policy forbidding discrimination on the basis of sexual orientation and religion. CLS had adopted bylaws excluding from membership anyone engaging in "unrepentant homosexual conduct", which the College deemed violated that non-discrimination policy.

30. When assessing the legality of the application of this policy to CLS, which claimed a violation of its right to free speech and freedom of association, the SCOTUS emphasized again that there is a difference between a state *withholding a benefit* and *imposing a prohibition* on

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[29] 461 U.S. 574 (1983) [*Bob Jones*].
[30] *Ibid.* at 604. See also *Barrett v. Fonbonne Academy*, NOCV2014-751 (December 16, 2015, decision of the Massachusetts Superior Court).
[31] *Doré*, *supra* at para. 6.
[32] 561 U.S. 661 (2010) [*Martinez*].

expressive activity[33] – a distinction that is, of course, familiar in the Canadian jurisprudence.[34] Ginsburg J. thus held that "[t]he First Amendment shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be. But CLS enjoys *no constitutional right to state subvention of its selectivity*."[35] In that light, the College's non-discrimination policy was found to be reasonable based on, among other things, its encouragement of tolerance and equal access to the opportunities afforded by extracurricular programs.[36]

31. In *Martinez* CLS also made a claim for free exercise of religious rights, which the SCOTUS dismissed summarily in a footnote. The Court characterized the effect of Hastings' across-the-board all-comers policy as an "incidental burden" on religious conduct that arose out of CLS seeking "preferential, not equal, treatment."[37]

32. The principle underlying cases like *Harrison*, *Bob Jones*, and *Martinez* – that not only the direct behaviour of a state actor, but also its implicit or indirect affirmation of private actors' practices, may be subject to constitutional scrutiny – finds its counterpart in Canadian jurisprudence. In *Keith v. Canada (Correctional Service)*, the Federal Court of Appeal recognized that a federal hiring standard is not immune from constitutional review because it simply adopts a provincially regulated professional qualification.[38] This Court's decision in *Vriend* when faced with underinclusive legislation relies on similar logic: the state's legislative silence in the face of clear exclusion and discrimination may properly be remedied by the courts.[39] Likewise, regulatory decisions by law societies that result in an affirmation of law school policies that discriminate or otherwise impinge on protected rights will necessarily be subject to constitutional scrutiny.

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[33] *Ibid.* at 682.
[34] See e.g. *Baier v. Alberta*, 2007 SCC 31; *Native Women's Assn. of Canada v. Canada*, [1994] 3 SCR 627.
[35] *Martinez, supra* at 669 (emphasis added).
[36] *Ibid.* at 687-689.
[37] *Ibid.* at 697, footnote 27, citations omitted. See also *Employment Div., Department of Human Resources of Oregon v. Smith*, 496 U.S. 913 (1990).
[38] 2012 FCA 117 at para. 55.
[39] *Vriend, supra* at paras. 54-57.

33. Examples from the U.S. jurisprudence illustrate that state actors' refusal to grant benefits to institutions that maintain discriminatory admission policies can be legitimate even where those policies are characterized as manifestations of the freedoms of religion, expression and association. Particularly where benefits rather than prohibitions are at stake, freedom of religion in the U.S. can yield to a compelling state interest in protecting or vindicating competing fundamental rights such as equality. The history and context of the U.S. cases is distinct from the jurisprudence this Court is charged with developing. But the principles underlying these decisions find clear footing in Canadian law, and this Court should not shy away from drawing on these parallel developments to reach the appropriate balance between the competing rights in play in the cases before it.

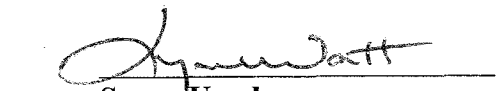
PART IV: SUBMISSIONS REGARDING COSTS

34. The CBA seeks no order as to costs, and asks that no award of costs be made against it.

PART V: ORDER SOUGHT

35. The CBA takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 5th day of September, 2017.



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PART VI: TABLE OF AUTHORITIES

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