IN THE HIGH COURT OF THE DOMINION OF CANADA
(ON APPEAL FROM THE MANITOBA COURT OF APPEAL)

B E T W E E N

TARA KEIGH AND TAMARA KEIGH

Appellants

-AND-

WINNIPEG SCHOOL DIVISION

Respondent

FACTUM OF THE RESPONDENT

Counsel for the Respondent

Team 9

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PART I – OVERVIEW

[1] This case throws into sharp relief the contemporary challenges faced by administrative decision-makers tasked with reconciling competing rights in a plural society. This burden falls on the shoulders of public school administrators who must often make difficult decisions in balancing the rights and interests of their diverse student bodies. We deal with one such decision here, where the Winnipeg School Division carefully accommodated both the equality and the religious freedom rights of its students. This appeal provides the Court with a unique opportunity to not only clarify the nature of the rights balancing exercise in the administrative context, but also to establish a reasonable threshold for *Charter* damage claims against good faith administrative attempts to properly balance competing rights and interests.

[2] It is respectfully submitted that the decision did not infringe the Appellants' rights under section 15 of the *Charter* because there was no discrimination. On the contrary, the Appellants' talent and athleticism was at all times recognized and celebrated. This was reflected in the decision to offer the Appellants a place on a team of comparable skill and exposure. Further, the decision fell under the ambit of an ameliorative program protected under section 15(2) of the *Charter*.

> *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15 [*Charter*].

[3] If an infringement of section 15 is found, the decision nonetheless reflects a careful balancing of the section 15 values, section 2(a) rights, and statutory objectives in play. The decision was entrusted to an experienced administrator and locally-elected trustees with intimate knowledge of the exigencies of the Hawerchuk community. Their decision reconciled divergent interests to the benefit of all parties and infringed the Appellants' rights no more than necessary.

The decision was not only reasonable: it was also an admirable and befitting reflection of Canada’s multicultural reality and the Court of Appeal’s decision in the matter should be upheld.

Charter, *supra* para 2 at s 15, 2(a).

PART II – STATEMENT OF FACTS

1. Factual background

[4] Hawerchuk Secondary School is a public school in Winnipeg, Manitoba popularly regarded as an accessible option for Jewish students unable to afford tuition at private religious institutions. Located in a predominantly Jewish neighbourhood, a majority of its students identify as Orthodox Jewish. To meet the needs of its students, Hawerchuk offers kosher foods in the school cafeteria and refrains from teaching substantive lessons on Jewish holidays.

Official Problem, the Wilson Moot 2017 at 2 [Official Problem].

[5] Jews are a small minority in Manitoba with only 1.1% of the population identifying as Jewish. Despite the positive psycho-social benefits of religious affiliation, expert testimony reveals that the number of teenagers who identify as religious has dropped significantly in the last 25 years.

Official Problem, *supra* para 4 at 2, 8.

[6] In 2013, an overwhelming majority of the Hawerchuk boys' soccer team either identified as religious or described themselves as coming from religious households. More than half identified as Orthodox who believe that physical contact between men and women is prohibited. Given the inevitability of coming into physical contact with women in the course of a game, these students confirmed that they would be forced to leave the team should female students be permitted to join.

Official Problem, *supra* para 4 at 5-6.

[7] The Appellants, twin sisters, asked permission to join the Hawerchuk boys' soccer team in September 2013. The Appellants hoped to play on a competitive team that would allow them to be scouted to play university soccer. Hawerchuk's principal, Arthur Vandalay, recognized the

weight of this request and considered statements from both the Appellants and members of the team before making his decision.

Official Problem, *supra* para 4 at 2-4.

[8] On October 15, 2013, Principal Vandalay resolved that providing the Appellants with the opportunity to join the soccer program at Oakwood Secondary School would best accommodate the rights and interests of all parties. His decision was affirmed by a vote of the Winnipeg School Division trustees on October 22, 2013.

Official Problem, *supra* para 4 at 4-5.

[9] Oakwood neighbours Hawerchuk and is located at a short 15-minute distance from the Appellants' home. The school's soccer program is highly competitive and is well regarded by university scouts. The Appellants availed themselves of this option and played on Oakwood's team throughout high school.

Official Problem, *supra* para 4 at 5.

[10] The Appellants won partial scholarships to play soccer at the University of California at Los Angeles (UCLA) following their graduation in June 2016. The Respondent is very proud of the Appellants' academic and athletic success.

Official Problem, *supra* para 4 at 10.

2. Procedural history

[11] In March 2015, Justice Elaine Abbott allowed the Appellants' application for judicial review and found that the decision infringed the Appellants' rights under section 15 of the *Charter*.

Official Problem, *supra* para 4 at 8-9.

[12] The Manitoba Court of Appeal overturned Justice Abbott's decision. In its own words,

the Court held that Justice Abbott "assum[ed] without deciding that the section 15 rights of the Keigh sisters were infringed." The Court also found that Justice Abbott failed to properly evaluate the religious freedom interests engaged by Respondent's decision and warned that the judgement "send[s] a chilling message that only those who can afford to enter private spheres to manifest their religious beliefs may enjoy the constitutionally protected religious freedoms that are supposed to be possessed by all."

Official Problem, *supra* para 4 at 9.

PART III – STATEMENT OF POINTS IN ISSUE

A. Did the Respondent's decision infringe the Appellants' rights under section 15 of the *Charter*?

The Respondent's decision was not discriminatory, as it did not perpetuate arbitrary disadvantage. Further, as a decision with ameliorative goals, it is protected under section 15(2).

B. If the answer to question 1 is yes, did the decision properly balance the Appellants' rights under section 15 of the *Charter* with the boys' rights under subsection 2(a) of the *Charter*?

Should discrimination be found, the decision reflects an appropriate balancing of the Appellants' equality rights with the religious freedom of Hawerchuk's Orthodox soccer players. The decision interfered with the Appellants' rights no more than necessary given the alternative measure offered.

C. If the answer to question 2 is no, should the Appellants' be awarded damages under subsection 24(1) of the *Charter* for the breach of their rights under section 15?

No damages are warranted. The Appellants' suffered no pecuniary loss. Any harm found is minimal and there are countervailing factors mitigating the effectiveness of damages.

PART IV – ARGUMENT

Issue 1: The decision did not infringe the Appellants' rights

[13] It is submitted that the Respondent's decision to preserve single-sex soccer teams at Hawerchuk Secondary School did not infringe the Appellants' equality rights under section 15 of the *Charter*. While the decision did draw a distinction on the basis of sex, (i) this distinction was not discriminatory. Moreover, (ii) the decision aimed to ameliorate the situation of a minority religious community. Any distinction drawn for this purpose is protected under section 15(2) of the *Charter*.

Charter, *supra* para 2 at s 15.

The distinction was not discriminatory

[14] The purpose of section 15 is to protect substantive equality (*Kapp*). Following *Andrews*, substantive equality does not entail identical treatment. Differential treatment must also be discriminatory in order to violate section 15 (*Andrews, Kapp*). The decision was not discriminatory because it did not (a) perpetuate arbitrary disadvantage nor (b) reinforce prejudice or stereotyping, (*Taypotat, Kapp*).

R v Kapp, 2008 SCC 41 [2008] SCR 483 at paras 14, 15, 17 [*Kapp*].
Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at 165, 182, 3 56 DLR (4th) 1 [*Andrews*].
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 at para 18, [2015] 2 SCR 548 [*Taypotat*].

The decision did not perpetuate arbitrary disadvantage

[15] A distinction is discriminatory when it "imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating… disadvantage" (*Taypotat*).

Taypotat, supra para 14 at para 20.

[16] While historically girls have been deterred from pursuing sports at an elite level, the

Respondent's decision did not perpetuate this disadvantage here for two reasons. First, the decision never deprived the Appellants of access to a highly competitive senior varsity soccer team. The Oakwood girls' soccer team was well matched to the Appellants in skill and exposure, and its coach, Teresa Ross, testified that the team's roster included a number of very talented players. The team's reputation among university scouts and its suitability to the Appellants' skill level is reflected in the fact that they both received partial athletic scholarships to play soccer at a top university. It is submitted that the Appellants' access to collegiate sport was not hindered.

Official Problem, *supra* para 4 at 5-7, 10.

[17] Second, the Oakwood team was physically accessible. As the Appellants testified, Oakwood was only a 15-minute bus ride away from the girls' home. According to section 43.1(a) of the *PSA*, a pupil's travel time is only considered "extended" if it is longer than one hour.

Official Problem, *supra* para 4 at 5.
The Public Schools Act, CCSM 2015, c P250, s 43.1(a) [*PSA*].

[18] The decision did not therefore negatively impact the Appellants by "withhold[ing] or limit[ing] access to opportunity, benefits, and advantages available to other members of society" (*Andrews*). The facts at issue here are readily distinguishable from those in *Pasternak*, where the Manitoba High Schools Athletic Association ("MHSAA") was held to have discriminated against two teenage girls in denying them the opportunity to participate in their high school boys' hockey team. Upon judicial review, the analysis turned on the fact that the alternative girls team "did not offer the same level of play and competition as did the men's team and league" (*Pasternak*). The alternative team offered in *Pasternak* "was developmental in nature" and half of the team's players "had not previously played organized hockey." The team was not suited to the complainants' talents and capacities, and would not have enabled them to meet their sporting

ambitions. The same certainly cannot be said here.

> *Andrews, supra* para 14 at 144.
> *The Manitoba High Schools Athletic Association Inc v Pasternak et al*, 2008 MBQB 24 at paras 67, 54 [*Pasternak*].

The decision did not perpetuate prejudice or stereotyping

[19] Discrimination may be found where a distinction creates a disadvantage by perpetuating prejudice or stereotyping (*Kapp*). As Justice Abella explained in *Quebec*, stereotyping "is a disadvantaging attitude… that attributes characteristics to members of a group regardless of their actual capacities," while "[p]rejudice is the holding of pejorative attitudes… about the appropriate capacities or limits of individuals or the groups of which they are a member."

> *Kapp, supra* para 14 at paras 23-24.
> *Quebec (AG) v A*, 2013 SCC 5 at paras 171, 173 [*Quebec*].

[20] The Respondent's decision did not arise from the stereotype that females are physically or athletically inferior to males, nor did the Respondent's decision reflect or reinforce a prejudicial view of "the appropriate capacities or limits" of women in sports (*Quebec*). There is no evidence to suggest that the Respondent perceived the Appellants as biologically unfit for boys' soccer or that this view was reinforced among Hawerchuk's students. As Gabriel Leibowitz testified, "Everyone knows that the Keigh sisters are great soccer players." The Appellants were at no point characterized as limited in their skill or capacity. On the contrary, Principal Vandalay clearly indicated that "there was 'not a doubt in his mind' that both Tamara and Tara would have qualified for the boys' soccer team at Hawerchuk, from an athletic perspective, and that they would be competitive with any of the team's current starters."

> *Quebec, supra* para 19 at 326.
> Official Problem, *supra* para 4 at 6.

[21] The Appellants' gender did not influence the Respondent's assessment of the Appellants'

athletics capacities at all. Rather, the decision to maintain single-sex soccer teams was made in consideration of the religious freedom rights of Hawerchuk's Orthodox players—a reason altogether different from one founded in prejudice or stereotyping.

The decision created a distinction that affirmed the Appellants' potential

[22] In *Gosselin*, the Supreme Court held that a program is not discriminatory if it affirms the potential of those subject to a distinction on enumerated or analogous grounds. At issue in *Gosselin* was a government program that required people under the age of 30 to participate in employability programs to receive full social assistance benefits. The government had argued that, for young people, remaining on welfare for a prolonged period of time can have "potentially devastating social and psychological consequences" (*Gosselin*). Chief Justice McLachlin held that the program did not infringe section 15 because it "was not a denial of young people's dignity; it was an affirmation of their potential." The government program was applauded for tackling issues related to youth employment "at their roots" (*Gosselin*).

Gosselin v Quebec (AG), [2002] 4 SCR 429 at paras 42, 43, 44 [*Gosselin*].

[23] A similar analysis can be applied to the Respondent's decision. Removing strong female athletes from female teams to the benefit of male teams undermines the overall strength of female sports teams and renders female sports more vulnerable to prejudice. As Dr. Dana Foley testified, there remains a significant gap in recognition for female professional athletes versus male athletes. As a result, "[c]ollege and university programs are more likely to cut a female program rather than a male program if athletics are underfunded."

Official Problem, *supra* para 4 at 7.

[24] The Respondent's decision tackled these problems "at their roots," strengthening the Oakwood soccer team from the inside. As Coach Teresa Ross testified, the presence of the

Appellants encouraged all female players to perform at their finest: “there is a real spirit of friendly competition among our players this year that is driving everyone to play her very best game.” The decision at issue was not discriminatory, but instead affirmed the capacity and potentiality of all-female sports teams.

Official Problem, *supra* para 4 at 6-7.

The decision falls under section 15(2)

[25] For an activity to fall under the ambit of section 15(2), the activity must be genuinely ameliorative, there must be a correlation between the activity and the disadvantage of a targeted group, and the means chosen to pursue the ameliorative goal must be rational (*Kapp, Cunningham*).

Kapp, *supra* para 14 at paras 41, 49.
Alberta v Cunningham, 2011 SCC 37 at para 32, [2011] 2 SCR 670 [*Cunningham*].

[26] In acknowledging and accommodating the specific needs of its Orthodox students, the Respondent protected an activity that enhanced the substantive equality of Orthodox students of limited means (*Cunningham*). Hawerchuk is a public school, though one that provides religious accommodation to students who cannot afford to attend private religious school. The decision at issue is genuinely ameliorative as it strives to support religious young people otherwise effectively excluded from activities, like team sports, that are central to an adolescent’s education and development (*Cunningham*).

Official Problem, *supra* para 4 at 2, 8.
Cunningham, *supra* note 25 at paras 40, 44.

[27] There is a strong correlation between maintaining same-sex soccer teams and making a large group of otherwise marginalized students feel welcome and included in activities important to adolescent education (*Cunningham*). Preventing female students from joining the soccer team

is a rational way of achieving this ameliorative goal (*Kapp*, *Cunningham*).

> *Cunningham*, *supra* note 25 at paras 44, 74.
> *Kapp*, supra note 14 at para 49.

[28] Although the decision creates a distinction on the basis of sex to effect this ameliorative goal, it does so to target a group disadvantaged on the grounds of religion. As explained in *Cunningham,* "governments should be permitted to target subsets of disadvantaged people on the basis of personal characteristics, while excluding others. ...Section 15(2) affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities." The Respondent's goal here was to protect the availability of the soccer program to a large subset of Hawerchuk's students. Its decision is thus protected under section 15(2).

> *Cunningham, supra* para 25 at para 41.

Issue 2: The decision properly balanced *Charter* rights and statutory objectives

[29] Even if the Court were to find an infringement of section 15, the Respondent's decision was reasonable because it reflects a proportionate balancing of the Appellants' equality concerns with the Respondent's statutory objectives under the *PSA* and the religious freedom rights of its Orthodox students (*Doré*, *Trinity Western Ont.*).

> *Doré v Barreau du Québec,* 2012 SCC 12 at para 57, [2012] 1 SCR 395 [*Doré*].
> *Trinity Western University v Law Society of Upper Canada*, 2016 ONCA 518 at paras 112-13, [2016] OJ No. 3472 [*Trinity Western Ont*].

[30] Where an administrative decision engages the *Charter*, the decision must be reviewed on a standard of reasonableness. A decision will be reasonable if it proportionally balances the *Charter* values and statutory objectives at stake (*Doré*, *Trinity Western Ont*). Reasonableness is a fact-specific, contextual inquiry that recognizes the expertise that decision-makers bring to the adjudication of difficult disputes (*Loyola*, *Dunsmuir*). This is particularly the case when it comes

to decisions made by elected officials who are accountable to their constituents, as these decision-makers "often balance complex and divergent interests" and are "more conversant with the exigencies of their community than are the courts" (*Nanaimo*). As in other reasonableness analyses, complainants must show that the decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*).

> *Doré, supra* para 29 at para 58.
> *Trinity Western Ont*, *supra* para 29 at para 77.
> *Loyola High School v Quebec (Attorney General),* 2015 SCC 12 at para 37, [2015] 1 SCR 613 [*Loyola*].
> *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 49, [2008] 1 SCR 190 [*Dunsmuir*].
> *Nanaimo (City) v Rascal Trucking Ltd*, 2000 SCC 13 at para 35, [2000] 1 SCR 342 [*Nanaimo*].

[31] The decision at issue required the Respondent, a body of elected trustees, to balance the religious freedom rights of the majority of the Hawerchuk boys' soccer team with the equality concerns of two female students. The decision is supported by Principal Vandalay's reasons. It reflects his 20-year career in public school administration and extensive discussions with all parties. It is respectfully submitted that the decision was carefully calibrated to the needs of the Respondent's students and neighbouring community, as well as to those of the Appellants.

> Official Problem, *supra* para 4 at 4.

[32] Properly reflecting (i) the objectives of the *PSA*, (ii) the religious freedom rights of Hawerchuk's Orthodox students, and (iii) the Appellants' equality concerns, the decision at issue (iv) interfered with the Appellants' section 15 rights no more than necessary given the substantial harm that would have resulted from a decision to permit the Appellants to join the team. While the Appellants' equality concerns are certainly important, they do not, on the facts of this case, outweigh the religious freedom rights and statutory objectives in play.

(i) The decision properly reflects the objectives of the Public Schools Act

[33] The reasonableness of the Respondent's decision must be considered in light of the statutory premium Manitoba has placed on local governance in public education in the *PSA* (*Doré*). The *PSA*'s preamble requires that locally elected trustees "provid[e] public education that is responsive to local needs and conditions" and that the school system "take into account the diverse needs and interests of the people of Manitoba."

> *Doré, supra* para 33 at para 55.
> *PSA, supra* para 8 at preamble.

[34] Principal Vandalay's decision, affirmed by a vote of the Respondent's trustees, appropriately weighed the needs and concerns of Hawerchuk's predominantly Jewish student body and neighbouring community.

> Official Problem, *supra* para 4 at 5, 2.

[35] The Supreme Court has affirmed the importance of local input and participation to reflecting and maintaining diversity in public education. In *Chamberlain,* the Court held that "[l]ocal community input is essential to an effective public education system that serves many diverse communities." As an elected body accountable to parents and students, school board decisions "may reflect the concerns of particular parents and the distinct needs of the local community."

> *Chamberlain v Surrey School District No 36*, 2002 SCC 86 at paras 26, 3, [2002] 4 SCR 710 [*Chamberlain*].

[36] Where religion is of concern to a school board's constituency, it may legitimately enter into the school board's decision-making process:

> Board members are entitled, and *indeed required*, to bring the views of the parents and communities they represent to the deliberation process. Because religion plays an important role in the life of many communities, these views will often be motivated by religious concerns. *Religion is an integral aspect of people's lives, and cannot be left at the boardroom door*.
>
> *Chamberlain, supra* para 35 at para 19 [emphasis added].

[37] Although Manitoba's *PSA* does not require "strict secularism," this is true even where a school board's enabling statute does require it, as was the case in *Chamberlain* with British Columbia's *School Act* (s. 76). This is because "a secular state also supports pluralism" as pluralism "allows communities with different values and practices to peacefully co-exist" (*Loyola*). As explained in *Niagara*, a case that implicated the Ontario *Human Rights Code*'s protection against discrimination on the basis of creed:

> To find that there can be no promotion of religious ideas or practices in public schools for those who want to participate in them would be to prohibit activities like optional religious clubs in high schools or the provision of prayer rooms. In my view, the Code ensures equality because of creed, but does not ban creed from all public spaces. Indeed, *such a policy could be contrary to Code values of diversity and inclusion.*

School Act, RSBC 1996, c 412, s 76 [*School Act*].
Chamberlain, supra para 35 at para 19.
Loyola, supra para 30 at para 45.
RC v District School Board of Niagara, 2013 HRTO 1382 at para 60, [2013] OHRTD No 1388 [*Niagara*] [emphasis added].

[38] By reflecting the religious beliefs of Hawerchuk's parents and students, the decision at issue appropriately promoted the *PSA*'s mandate that school board decisions respond to local needs and promote local diversity.

Religious freedom is a key consideration

[39] The reasonableness of the Respondent's decision must also be assessed in light of the religious freedom rights of Hawerchuk's Orthodox soccer players. It is well established that administrative decision-makers must exercise their discretionary authority in accordance with the principles of the *Charter* (*Baker*, *Doré*). The Respondent's decision correctly identified religious freedom as a key consideration in the decision-making process, noting that the religious beliefs of affected players are "sincerely" held.

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at

para 53, 174 DLR (4th) 193 [*Baker*].
Doré, *supra* para 29 at para 42.

[40] Had the Respondent permitted the Appellants to join the team, the Respondent would have infringed the religious freedom rights of the team's Orthodox players. An administrative decision will infringe a person's religious freedom right under the *Charter* when it impedes "the individual's ability to act in accordance with his or her beliefs'" (*Saguenay*). As established in *Amselem*, infringement will be made out when (a) a complainant's belief, having a nexus with religion, is sincere and (b) his ability to act in accordance with his beliefs is interfered with in a manner that is more than trivial or insubstantial.

Mouvement laïque québécois v Saguenay (City), 2015 SCC 16 at para 85, [2015] 2 SCR 3 [*Saguenay*].
Syndicat Northcrest v Amselem, 2004 SCC 47 at paras 46, 59, [2004] 2 SCR 551 [*Amselem*].

(a) The belief is sincere

[41] Principal Vandalay found that a majority of the team's players sincerely believe that physical contact between men and women who are not married or related is not permissible.

Official Problem, *supra* para 4 at 5-6.

[42] The fact that affected players interact with girls in the classroom and on social occasions does not impair the sincerity of this belief. The validity of the belief in issue, or its consistency with other practices, *from the perspective of others* is irrelevant to the section 2(a) analysis. As in *Amselem*, "the focus of the inquiry is not what others view the claimant's religious obligations as being, but rather what the claimant views their personal religious 'obligations' to be…." Although the Respondent denies that this fact represents an inconsistency, note that Chief Justice McLachlin has held that a person "should not be denied the right to raise s. 2(*a*) merely because she has made what seemed to be a compromise in the past in order to participate in some facet of

society" (*NS*).

Amselem, *supra* para 40 at paras 43, 54.
R v NS, 2012 SCC 72 at para 13, [2012] 3 SCR 726 [*NS*].

[43] The Respondent contests any related claim that this alleged inconsistency impairs the strength of their students' beliefs. This is a fact that, though irrelevant to the section 2(a) analysis, may otherwise be relevant when balancing conflicting rights (*NS*). No evidence was tendered to establish that Orthodox Jews of different genders do not interact in classroom settings. The boys' beliefs against physical contact cannot be said to be inconsistent with their participation in mixed-gendered classrooms.

NS, *supra* para 42 at para 13.

The infringement would have been serious

[44] A decision in the Appellants' favour would have substantially interfered with the rights of a majority of the team's players by limiting their access to the soccer team. Section 2(a) of the *Charter* is concerned not only with direct interferences with freedom of religion but also with "indirect forms of control which determine or limit alternative courses of conduct available to others" (*Big M*).

R v Big M Drug Mart Ltd, [1985] 1 SCR 295 at para 95, 18 DLR (4th) 321 [*Big M*].

[45] As soccer is a contact sport, its players can expect to come into habitual physical contact with each other. The presence of the Appellants on the team would have indirectly barred Orthodox players from it. They would have had to choose between staying on the team, despite the likelihood that they would come into physical contact with women, and leaving the team altogether, as affiants Tim Stern and Gabriel Leibowitz both testified.

Official Problem, *supra* para 4 at 6.

[46] A decision in the Appellants favour would thus have infringed the rights of the Orthodox

players under section 2(a). The Ontario Superior Court of Justice came to a similar conclusion when it found a provision in the rules of the Canadian Amateur Boxing Association in contravention of section 2(a), as it prohibited those who wear beards for sincere religious reasons from competing in boxing championships.

Nagra v Canadian Amateur Boxing Assn, [2000] OJ No 850 at para 2 [*Nagra*].

[47] The infringement would have been serious. Participation in a competitive team sport is an experience central to an adolescent's education and personal development. For those with professional ambitions, a decision in the Appellants' favour would have prevented affected players from being scouted and from accessing the economic and academic opportunities that college sport makes available.

[48] It is important to remember that Hawerchuk's Orthodox student population is part of a historically embattled minority community in a province where education has until recently been monopolized by Roman Catholic and Protestant institutions (*Manitoba*). The Respondent's decision cannot thus be characterized as one in which a "smug majority" has imposed its religious beliefs on a captive minority (*Manitoba*); on the contrary, the decision reflects the reality that, in the words of Justice Lau of the Manitoba Court of Appeal, "[a] pluralistic society requires that a variety of beliefs must be accommodated."

Manitoba Assn for Rights and Liberties Inc v Manitoba, 94 DLR (4th) 678 at paras 6, 9, [1992] 5 WWR 749 [*Manitoba*].
Official Problem, *supra* para 4 at 2.

The decision appropriately considered the Appellants' equality concerns

[49] In addition to weighing the religious freedom rights of its Orthodox students, the decision appropriately considered the prohibition's impact on the Appellants' equality rights.

[50] A decision need not reference section 15 of the *Charter* by name in order to satisfy

Doré's requirement that administrative decision-makers exercise their discretion in keeping with *Charter* values. It is sufficient for the decision to recognize and grapple with the substance of the complainant's asserted rights (*Ktunaxa*).

> *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568 at para 306, [2014] BCJ No 584, aff'd 2015 BCCA 352, [2015] BCJ No 1682 [*Ktunaxa*].

[51] The Respondent's decision did so here. Principal Vandalay acknowledged the impact that a negative decision could have in terms of the Appellants' sense of self worth, particularly as it related to their vocational hopes and expectations. The decision thus discussed the Appellants' "future soccer ambitions," "personal sense of competition," and desires "to be scouted," and offered an alternative in keeping with those ambitions and expectations. In so doing, the decision gives expression to the purpose of the section 15 guarantee, which is in part to prevent unfair limits to opportunities and personal development (*Andrews*).

> Official Problem, *supra* para 4 at 4.
> *Andrews*, *supra* para 14 at 197.

The decision interfered with the Appellants' rights no more than necessary

[52] A decision will be proportional when it interferes with *Charter* rights no more than is necessary to achieve statutory objectives (*Loyola*). Where both religious freedom and equality are implicated, a reasonable balance is one that reconciles these rights proportionally (*Trinity Western Ont*). The Respondent's decision to enable the Appellants to play for Oakwood represents a commendable alternative measure that preserved both rights proportionally. In the alternative, harm to Hawerchuk's Orthodox students would have outweighed harm to the Appellants had the Respondent decided in the Appellants' favour.

> *Loyola, supra* para 30 at para 4.
> *Trinity Western Ont*, *supra* para 29 at para 112-13.
> *Dunsmuir*, *supra* para 30 at para 47.

(a) In offering the Oakwood alternative, the decision preserved both rights proportionally

[53] Where rights conflict, the Court should look for reasonably available alternative measures that would resolve claims while preserving both rights (*NS, Multani*). As stated in *Ktunaxa*, "the adoption of certain accommodation measures might provide the appropriate balance between" rights and objectives. Equality rights do not "trump" the right to religious freedom (*Trinity Western BC*): "[a] hierarchical approach to rights, which places some over others, must be avoided."

> *NS*, *supra* para 42 at para 32.
> *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 92, [2006] 1 SCR 256, Abella J, dissenting [*Multani*].
> *Ktunaxa*, *supra* para 50 at para 305.
> *Trinity Western University v Law Society of British Columbia,* 2016 BCCA 423 at para 164, [2016] BCJ No 2252 [*Trinity Western BC*].

[54] In the present case, the Appellants were offered the opportunity to play soccer on Oakwood's highly competitive senior varsity girls' soccer team. As discussed above (please see para 16), this alternative was appropriate for two reasons. First, the Oakwood players matched the Appellants in rank and skill. Second, the Oakwood team was physically accessible at a 15-minute bus ride away. As noted above, according to section 43.1(a) of the *PSA*, a pupil's travel time is only considered "extended" if it is longer than one hour.

> Official Problem, *supra* para 4 at 5.
> *PSA, supra* para 17 at 43.1(a).

[55] The Appellants' equal rights to play competitive soccer were thus reasonably preserved. The facts at issue here are distinct from those in *Pasternak*, where the alternative offered was inadequate given the team's developmental nature and the complainants' high level of skill and competition.

> *Pasternak*, *supra* para 18 at paras 67, 54.

Harm to the players would have outweighed harm to the Appellants

[56] The harm that would have been sustained by the Orthodox members of the Hawerchuk boys' soccer team outweighs the minimal harms sustained by the Appellants. A decision in the Appellants' favour would have had the effect of forcing the boys to choose between their religious beliefs and their ability to participate in competitive varsity sports. As Justice Abella explained in *NS*,

> religious requirements are experienced as "obligatory and non-optional", that is, as not providing a genuine choice to the religious believer: "…laws …often put religious minorities in something like Antigone's dilemma: either they have to violate a sacred requirement or they have to break the law and/or forfeit some state-granted privilege."

> *NS*, *supra* para 42 at para 93, Abella J, dissenting, quoting Martha C Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008), at 117, 167.

[57] Again, a decision in the Appellants' favor would have forced at least half of the students off the team. As Justice Lau concluded: "[t]here is sufficient evidence to conclude that if the Keigh sisters were permitted to try out for the boys' team, a number of players on Hawerchuk's boys' team would have been unable to play."

> Official Problem, *supra* para 4 at 9-10.

[58] The Respondent's decision was thus necessary to prevent substantial harm to the section 2(a) rights at issue (*Dagenais*). The Appellants could not be allowed on the team without wholly violating the religious freedom rights of at least half of the team's players.

> *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at para 78, [1994] SCJ No 104 [*Dagenais*].

[59] As noted above, Jews form a religious minority in a province historically dominated by Roman Catholic and Protestant institutions (*Manitoba*). A decision in the Appellants' favor would have caused real psychic harm, reinforcing feelings of social marginalization and

difference among Hawerchuk's Orthodox students. As Tim Stern testified, "It's really difficult to identify as a religious person these days – people automatically accuse you of being out of touch with modern times or being intolerant. Religion is something that really is valuable to me and gives me great peace of mind."

Manitoba, *supra* para 48 at para 6.
Official Problem, *supra* para 4 at 6.

[60] The Supreme Court has repeatedly emphasized that the values of the majority should not be forced on religious minorities where such values can be otherwise satisfied. As the Supreme Court held in *Big M*, "What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of 'the tyranny of the majority.'"

Big M, *supra* para 48 at para 96.

[61] While the MHSAA generally allows girls to play on boys' teams, this rule, although appearing value-neutral, in fact reproduces norms inimical to the values of the Orthodox students in question. As the Bouchard-Taylor Commission observed: "a number of apparently neutral or universal norms in actual fact reproduce worldviews, values, and implicit norms that are those of the majority culture or population." A decision in the Appellants' favor would have signaled to these students that their values are less deserving of respect, consideration, and inclusion. As Justice Lau put it, "To sanction the School Division's decision is to send a chilling message that only those who can afford to enter private spheres to manifest their religious beliefs may enjoy the constitutionally protected religious freedoms that are supposed to be possessed by all."

Quebec, Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future, A Time for Reconciliation,* (Quebec: Gouvernment du Quebec, 2008) at 161 [Bouchard-Taylor

Commission]
Official Problem, *supra* para 4 at 9.

[62] Such a decision would have also risked the ability of parents to transmit Orthodox Jewish values to their children, as it would have pressured observant players to compromise their beliefs in order to participate in varsity sports. This pressure to assimilate more generally is detrimental not only to individual students but to the religious community as a whole, whose vitality depends on “the ability of its members to pass on their beliefs to their children” (*Loyola*). This consequence is particularly troublesome when one considers that the number of Canadians who identify as religious is dwindling.

Loyola, supra para 30 at para 64.
Official Problem, supra para 4 at 8.

[63] Although one may claim that any harm caused by the decision was not only to the two Appellants but also to the broader interests of female athletes, this claim assumes that co-ed opportunities are objectively better, glossing over the value and importance of all-female sports teams. As noted by an expert witness called for the complainants in *Pasternak*, “there is tremendous value in girls-only teams… sometimes a girls-only team is the only forum in which girls can develop their skill and ability, their self-confidence and their leadership ability.”

Pasternak, *supra* para 18 at para 97.

[64] A decision in the Appellants’ favor would have substantially interfered with both the individual and collective aspects of the right to religious freedom. The harm that would have been sustained by the majority of the Hawerchuk boys’ team would have outweighed the relative inconvenience sustained to the Appellants’ section 15 interests. The Respondent’s decision to enable the Appellants’ to join the Oakwood girls’ team maximized overall student participation in varsity sports, preserving both the equality concerns and the religious freedom rights

proportionally. Reflecting a pluralist view of Canadian society, the Respondent's decision reconciles complex interests and claims to the benefit of all parties. The decision was thus not only reasonable, but an admirable balancing of competing values befitting of Canada's multicultural reality.

Issue 3: No damages are due under subsection 24(1) of the *Charter*

[65] Should the Court find the decision unconstitutional, the Appellants should not be awarded damages under subsection 24(1).

[66] Where there has been a breach of the *Charter*, damages can only be granted where they are "appropriate and just" (*Ward*). Damages are not warranted in this case because (i) there is no functional justification for damages. In the alternative, (ii) there are countervailing factors that render damages ineffective and (iii) no determinable quantum of compensatory, vindicatory, or deterrent damages can be established (*Ward*).

Vancouver (City) v Ward, 2010 SCC 27 at paras 15-16, [2010] 2 SCR 28 [*Ward*].

(i) There is no functional justification for damages

[67] As the Supreme Court observed in *Ward*, damages are only justified "to the extent that they serve a *useful function or purpose*" (*Ward*). Damages should only be awarded where they would compensate for personal loss, vindicate the right breached, or deter future breaches. Damages would fulfill no such objectives here.

Ward, supra para 66 at para 24 [emphasis added].

(a) Damages would not compensate the Appellants

[68] The purpose of compensatory damages is to put claimants back in the same position as they would have been had their rights not been infringed (*Ward*). This is unnecessary here. The Appellants played as starters on Oakwood's team throughout their high school career, where, as

Ms. Ross testified, they "blended into [the] team very well" and got "along with the Oakwood players." Further, upon graduation, both girls attended UCLA with partial athletic scholarships. As both aimed to secure scholarships to play soccer at the same university, the Appellants' objectives were therefore met.

Official Problem, *supra* para 4 at 6.

[69] Given these academic and professional gains, it is not possible to show compensable harm. The Appellants suffered no ascertainable physical, psychological, or pecuniary loss. While the Appellants expressed a desire to play for their own team and felt embarrassment when barred from it, it is submitted that these harms to intangible interests, being minimal, are insufficient to ground a claim for compensatory damages.

Damages would not provide vindication or deterrence

[70] It is submitted that vindication and deterrence damages should not be awarded in the absence of a clear disregard for *Charter* rights. While vindication is concerned with "affirming constitutional values," deterrence "seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution" (*Ward*). The Respondent's conduct here did not result from a decision that was blatantly wrong or taken in bad faith, but instead involved the weighing of complex and competing rights and interests. This task is not an easy one. Any errors committed in the process can be adequately vindicated by a declaration from this Court to that effect.

Ward, supra para 66 at paras 28-29.

[71] Similarly, deterrence damages are inappropriate in the absence of egregious conduct. The Respondent did consider the Appellants' equality rights, and attempted to respect those rights in offering the Oakwood alternative. Deterrence damages may cause administrators to

inappropriately hierarchize equality rights over religious freedom rights when otherwise unwarranted. This reality is troublesome, given the plurality of views that exist with regards to the desirability of mixed-gender sports teams. Both Nova Scotia and British Columbia prevent female students from playing on male teams where a school has fielded women's teams. Even the MHSAA encourages athletes to play on teams of their respective gender. Same-sex teams may encourage female students otherwise uncomfortable on mixed-gendered teams to participate in sport. As Dr. Foley indicated, there is value in promoting elite female sport, as the latter "can play an important role in providing high profile role models and advocates for women in sport."

Official Problem, *supra* para 4 at 7-8, 4.

Countervailing factors defeat the use of damages

[72] In the alternative, there are countervailing factors that render damages inappropriate and unjust in this context (*Ward*). Damages are not warranted where (a) alternative remedies exist to correct the breach, or (b) they would be contrary to the demands of good governance, as in the present case (*Ward*).

Ward, supra para 66 at para 33.

(a) There are adequate alternate remedies available

[73] As the Supreme Court observed in *Ward*, "*Charter* damages are only one remedy amongst others available under s. 24(1), and often other s. 24(1) remedies will be more responsive to the breach" (*Ward*). Declarations are particularly well suited in cases where "the claimant has suffered no personal damage" (*Ward*). As noted above, the Appellants have not suffered any significant personal damage. A declaration of *Charter* breach would therefore be a more effective and productive remedy.

Ward, supra para 66 at paras 34, 21, 37.

There are concerns relating to good governance

[74] *Ernst* lays out several countervailing factors that might impact the liability of a state actor in relation to good governance, two of which are relevant here. Note that the precedential value of this recent decision, though splitting the Court three ways, should not be dismissed: in the matters relevant here, Justice Abella's reasons do not challenge Justice Cromwell's.

Ernst v Alberta Energy Regulator, 2017 SCC 1 at paras 45-47 [*Ernst*].

[75] Firstly, awarding damages would create an excessive demand on the Respondent's resources. In *Ernst*, the Court found damages incompatible with a regulatory board's numerous responsibilities and its public duty to balance "several potentially competing rights, interests and objectives."

Ernst, *supra* para 74 at para 47.

[76] Under the *PSA*, the Respondent has over 35 responsibilities. These include, but are certainly not limited to, providing a nurturing learning environment for every student; drafting written policies affecting the health and safety of students; arranging for the purchase of textbooks; and identifying at-risk students and engaging these students in school programing (*PSA*). The Respondent is responsible for balancing several competing rights, interests, and objectives and this justifies immunity from liability for damages from *Charter* breaches.

PSA, *supra* para 17 at s 41.1.

[77] Secondly, awarding damages would "chill the exercise of policy-making discretion" among public school divisions (*Ward*, *Ernst*). Public schools must often do much with very few resources. Some schools operate in inner cities or in vastly distinct multi-cultural neighbourhoods. They work in good faith to respond creatively to the varied needs of their students, parents, teachers, and support staff, balancing rights and interests in the process.

Damages would likely deter school divisions from developing creative and cost-effective policies for fear of opening themselves up to “new and undesirable modes of collateral attack on [their] decisions” (*Ernst*).

> *Ward, supra* para 66 at para 38.
> *Ernst*, *supra* para 74 at para 47, 55.

Quantum of damages should be minimal

[78] In the alternative, the quantum of compensatory damages should be minimal. The quantum must be assessed in light of the seriousness of state misconduct (*Ward*). The Respondent’s conduct was not egregious: the breach to the Appellants’ rights was the result of a balancing exercise conducted in good faith. The Appellants do not need to be made whole: by measure of their stated athletic and academic objectives, they remain in a comparable position to the one they would have been in had the breach not occurred.

> *Ward, supra* para 66 at para 52.

[79] Finally, it must be noted that damages for vindication or deterrence are classed as purely punitive. Punitive damages are only reluctantly granted (*Ward*). Given that there has been minimal impact to the Appellants, punitive damages are not warranted.

> *Ward, supra* para 66 at para 56.

PART V: ORDER SOUGHT

[80] The Respondent requests that this appeal be dismissed.

All of which is respectfully submitted this 26th day of January, 2016.

Team 9
Counsel for the Respondent

PART VI – LIST OF AUTHORITIES AND STATUTES

LEGISLATION

Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
School Act, RSBC 1996, c 412, s 76.
The Public Schools Act, CCSM 2015, c P250.

JURISPRUDENCE

Alberta v. Cunningham, 2011 SCC 37, [2011] 2 SCR 670.
Andrews v. Law Society of British Columbia, [1989] 1 SCR 143, 182, 3 56 DLR (4th) 1.
Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 174 DLR (4th) 193.
Chamberlain v Surrey School District No 36, 2002 SCC 86, [2002] 4 SCR 710.
Dagenais v. Canadian Broadcasting Corp., [1994] 3 SCR 835, [1994] SCJ No 104.
Doré v Barreau Du Québec, 2012 SCC 12, [2012] 1 SCR 395.
Dunsmuir v New Brunswick, 2008 SCC 9, [2008] 1 SCR 190.
Ernst v Alberta Energy Regulator, 2017 SCC 1.
Gosselin v Quebec (AG), 2002 SCC 84, [2002] 4 SCR 429.
Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations), 2014 BCSC 568, [2014] BCJ No 584.
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Mouvement laïque québécois v Saguenay (City), 2015 SCC 16, [2015] 2 SCR 3.
Multani v Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6, [2006] 1 SCR 256.
Nagra v Canadian Amateur Boxing Assn, [2000] OJ No 850.
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RC v District School Board of Niagara, 2013 HRTO 1382, [2013] OHRTD No 1388.
Syndicat Northcrest v Amselem, 2004 SCC 47, [2004] 2 SCR 551.
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30, [2015] 2 SCR 548.
The Manitoba High Schools Athletic Association Inc v Pasternak et al, 2008 MBQB 24, [2008] 10 WWR 729.
Trinity Western University v Law Society of British Columbia, 2016 BCCA 423, [2016] BCJ No 2252.
Trinity Western University v Law Society of Upper Canada, 2016 ONCA 518, [2016] OJ No. 3472.
Vancouver (City) v Ward, 2010 SCC 27, [2010] 2 SCR 28.

SECONDARY MATERIAL

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Official Problem, the Wilson Moot 2017.

Quebec, Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future, A Time for Reconciliation,* (Quebec: Gouvernment du Quebec, 2008)