Court of Appeal File No.: C61116
(Divisional Court File No. 250/14)

COURT OF APPEAL FOR ONTARIO
(ON APPEAL FROM THE DIVISIONAL COURT)

B E T W E E N :

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Applicants
(Appellants)

- and -

THE LAW SOCIETY OF UPPER CANADA

Respondent
(Respondent)

- and –

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PART I – OVERVIEW

1. The Criminal Lawyers' Association ("CLA") submits that under the test established in *Doré v. Barreau du Québec*,[1] the Respondent's decision to refuse to accredit Trinity Western University's proposed law school because of the discriminatory character and effects of the Community Covenant strikes a proportionate balance between the Law Society's statutory objectives and limitations on the Appellants' freedom of religion rights. Accordingly, the application for judicial review was properly disposed of by the Divisional Court.

PART II – THE FACTS

2. The CLA adopts the facts as summarized by the Divisional Court below.

PART III – ISSUES AND THE LAW

A. *Doré v. Barreau du Québec* Provides the Analytic Framework

3. Acting pursuant to statutory authority, Convocation of the Law Society of Upper Canada voted to refuse to accredit the law school which Trinity Western University (TWU) wishes to establish. The Appellants did not challenge the legal authority under which Convocation made this decision. Rather, they challenged the decision itself on various grounds, including the principal objection that it was an unjustified limitation on their right to freedom of religion guaranteed by s. 2(a) of the *Charter.*

4. It has been settled law since *Baker v. Canada (Minister of Citizenship and Immigration)* that administrative decision-makers must consider fundamental values, including those enshrined in the *Charter*, when exercising their discretion.[2] Recently, the Court noted that it "goes without saying that administrative decision-makers must act

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[1] 2012 SCC 12; [2012] 1 S.C.R. 395 ["*Doré*"] [Joint Book of Authorities, Tab 10]

[2] [1999] 2 S.C.R. 817, at paras. 53 – 56, per L'Heureux-Dubé [Joint Book of Authorities, Tab 153]

consistently with the values underlying the grant of discretion, including *Charter* values."[3] Less clear, at least until *Doré*, was precisely how an administrative decision-maker ought to proceed when its decision engages *Charter* values and, further, what framework a court should use to scrutinize how those values were applied, especially when reviewing an administrative decision that is said to limit *Charter* rights.[4]

5. *Doré* provided the following guidance to administrative decision-makers:

> How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision maker should first consider the statutory objectives....
>
> Then the decision-maker should ask how the *Charter* value at issue will be best protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.[5]

6. On judicial review, "the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play."[6] "If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable."[7] As the Court further explained in *Loyola High School v. Québec (Attorney General)*, a "proportionate balancing is one that gives effect, as fully as

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[3] *Doré, supra* note 1 at para. 24 [Joint Book of Authorities, Tab 10]

[4] The jurisprudential and academic debates on this point are summarized in *Doré* at paras. 23-42 [Joint Book of Authorities, Tab 10]

[5] *Doré, supra,* note 1 at paras. 55 – 56 [Joint Book of Authorities, Tab 10]

[6] *Ibid.,* at para. 57 [Joint Book of Authorities, Tab 10]

[7] *Ibid.,* at para. 58 [Joint Book of Authorities, Tab 10]

possible to the *Charter* protections at stake given the particular statutory mandate."[8] The *Doré* analysis is "a highly contextual exercise" and under it there "may be more than one proportionate outcome that protects values as fully as possible in light of the applicable statutory objective and mandate."[9] If, however, a decision lacks this proportionate balancing, it will be found to be unreasonable on review.[10]

B. Applying the *Doré* Framework

1) What is the Statutory Mandate?

7. The decision to refuse to accredit TWU's proposed law school was an exercise of the Respondent's gatekeeper role with respect to the legal profession in Ontario. The Respondent has exclusive authority to grant licences to practice law in Ontario. It also has exclusive authority to prescribe the qualifications and other requirements for obtaining such a licence, including qualifications with respect to legal education.[11] In the exercise of this jurisdiction, the Respondent may decide whether or not to accredit a Canadian law school. Someone who holds a degree from an accredited law school is entitled to enter the licensing process directly. Someone who does not hold a degree from an accredited law school may still enter the licensing process provided they submit

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[8] *Loyola High School v. Québec (Attorney General)* 2015 SCC 12, [2015] S.C.J. No. 12, para. 39, per Abella J. ["*Loyola*"] [Joint Book of Authorities, Tab 49]

[9] *Ibid.,* at para. 41 [Joint Book of Authorities, Tab 49]

[10] That was the result, for example, in *Loyola.* In their concurring reasons, McLachlin C.J. and Moldaver J. took a different approach, stating: "However one describes the precise analytic approach taken, the essential question is this: did the Minister's decision limit Loyola's right to freedom of religion proportionately – that is, no more than was reasonably necessary?" (at para. 114). On their approach, the decision in issue was found to infringe Loyola's *Charter* right in a way that could not be justified under s. 1 of the *Charter* because the decision was not minimally impairing (at para. 151).

[11] *Law Society Act*, s. 4.1(a) (R.S.O. 1990, c. L.8) [Joint Book of Authorities, Tab 133]

a certificate of qualification issued by the National Committee on Accreditation ("NCA") appointed by the Federation of Law Societies of Canada and the Council of Law Deans.[12]

8. This pre-licensing requirement (whether administered directly by the Respondent or delegated to the NCA) ensures that all prospective licensees have met minimum legal education standards before they enter the licensing process. This helps to ensure that only those who are competent to practice law in Ontario receive a licence to do so.

9. Section 4.2 of the *Law Society Act* states in part that in carrying out its functions, duties and powers under that Act the Law Society shall have regard to several principles, including: "The Society has a duty to protect the public interest."[13] The Respondent is statutorily obliged to act in the public interest when rendering a decision on a matter brought before it for consideration. In *Edwards v. Law Society of Upper Canada*, the Supreme Court of Canada held that decisions made by the Law Society "require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties."[14] As with any complex decision, individual interests and the broader public interest may come into conflict.

10. A key question raised in this appeal is whether, in the accreditation context, this statutory obligation to protect the public interest is broader than simply ensuring that prospective licensees have graduated from a law school whose curriculum has been judged to be adequate. In the case at bar, competence is not the issue. No one suggests

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[12] By-Law 4, s. 9(1) [Joint Book of Authorities, Tab 168]. The NCA is a standing committee of the Federation of Law Societies of Canada. It assesses the legal education and professional experience of individuals who obtained their credentials outside of Canada or in a Canadian civil law program and determines what further legal education, if any, is required to ensure that the applicant's legal education meets the requisite standards to seek admission to a Canadian common law Bar.

[13] *Law Society Act*, s. 4.2 [Joint Book of Authorities, Tab 133]

[14] 2001 SCC 80, [2001] 3 S.C.R. 562, at para. 14 [Joint Book of Authorities, Tab 92]

that graduates of TWU's law school would necessarily be unable to fulfill the Barrister's Oath to "safeguard the rights and freedoms of all persons,"[15] would fail to meet their professional obligation not to engage in discriminatory conduct, or would otherwise fail to be competent lawyers. The issue is whether the Respondent could withhold the public benefit of accreditation to an institution, which guarantees direct admission of its graduates into the licensing process in Ontario, because that institution has discriminatory practices in respect of admissions and student discipline, even if its curriculum is entirely adequate.

11. It is submitted that the Divisional Court correctly concluded that the mandate conferred by s. 4.2 of the *Law Society Act* is not restricted simply to standards of competence and that this mandate engages the Respondent "in a much broader spectrum of considerations."[16] That said, it is submitted that the application of this mandate in this case is narrower than the Divisional Court took it to be.

12. The broad language of s. 4.2 and its overarching place in guiding the conduct of the Respondent's activities suggest that it can encompass, among other things, the values of respect for the dignity and worth of all persons, the importance of treating all persons equally without discrimination, and the inherent value of diversity within the legal profession and the wider community of which it is a part. This mandate is also capable of supporting a commitment to removing all barriers to access to the legal profession save those based on merit.[17] These are all values that the Respondent may and indeed must

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[15] By-Law 4, s. 21 [Joint Book of Authorities, Tab 168]

[16] *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250 at para. 58 [Appeal Book, Tab 4]

[17] As described by the Divisional Court, *ibid.,* at para. 96 [Appeal Book, Tab 4]

promote. This is not to say, however (as the Divisional Court found), that the Respondent's decision "necessarily involved two *Charter* rights" – on the one hand, the freedom of religion rights of the Appellants, and on the other hand "the rights of the members of the respondent, both current and future" to equal access to the legal profession in Ontario.[18]

13. It is submitted that this is not a case where rights are pitted against one another.[19] It is certainly true that the freedom of religion rights of the Appellants are engaged (a point to which we return below). However, there are no definable individuals whose right to equal access to the legal profession is engaged and is protected in a meaningful way by the Respondent's refusal to accredit TWU's law school or, conversely, which would be adversely affected in a meaningful way by a decision to accredit TWU's law school. The Respondent cannot *prevent* TWU from opening a law school or requiring its students to adhere to the Community Covenant. Whatever the Respondent might do, TWU is free to continue to engage in discriminatory conduct. Moreover, whether the pool of eligible licensees would be more diverse if the law school was not accredited or less diverse if it was simply cannot be known. Refusing to accredit TWU's law school does not improve equality of access to positions in accredited law schools; at best, it preserves the *status quo*. This is too indeterminate a foundation upon which to introduce competing rights-holders whose claims must be balanced against those made by the Appellants'.

14. Instead, under *Doré* the correct approach is to consider the *values* that the Respondent is statutorily mandated to be guided by. It is sufficient to understand the

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[18] *Ibid.*, at para 102 [Appeal Book, Tab 4]

[19] This is in contrast, for example, to *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, and the *Dagenais/Mentuck* line of cases discussed therein (at paras. 7-9) [Joint Book of Authorities, Tab 100]

decision as an affirmation of these fundamental values. It is neither necessary nor helpful to also see it as balancing rights that are in conflict with those asserted by the Appellants.

2) What is the Impact of the Refusal to Accredit on Freedom of Religion?

15. The next question under *Doré* is whether, in the pursuit of its statutory mandate, the Respondent's decision had an adverse impact on a *Charter* right or value.

16. While expressing uncertainty about the correct test, the Divisional Court concluded that the Respondent's decision infringed the Appellants' rights under s. 2(a) of the *Charter*.[20] It is submitted that the question of whether a right has been "infringed" or not is less apt under the *Doré* framework than it is when a party is seeking a remedy under s. 24(1) of the *Charter*.[21] Rather, the question is whether the decision *engages* the *Charter* by limiting its protections in some way.[22] Only if it does is it necessary to reach the third stage of the *Doré* test, namely that of assessing proportionality. Of course, jurisprudence dealing with rights infringements is an indispensable guide when determining in the judicial review context whether a *Charter* protection has been limited in some way.[23]

17. It is submitted that, while not necessarily directed to the correct question, the Divisional Court's discussion of the impact of the Respondent's decision on the Appellants supports the conclusion that the Appellants' religious freedoms were limited in two respects. First, the decision to deny accreditation because of a measure – the Community Covenant – which TWU has adopted to express its religious convictions and

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[20] *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250 at paras. 86-91 [Appeal Book, Tab 4].

[21] As noted, the latter was the approach taken by McLachlin C.J. and Moldaver J. in *Loyola*, *supra*.

[22] See *Loyola, supra*, note 8, at para. 39 (per Abella J.) [Joint Book of Authorities, Tab 49]

[23] See, for example, the discussion of the right to freedom of religion in *Loyola, supra*, note 8, at para. 58-67 [Joint Book of Authorities, Tab 49]

to constitute its religious community will make it more difficult for the proposed law school to be viable because it may be a less attractive option for prospective law students than it would be if it were accredited. In other words, the refusal to accredit the law school places an additional burden on TWU solely because of a choice the latter has made in the exercise of its religious freedoms. Second, a student who chooses to attend TWU's law school for religious reasons will face a barrier to access to the legal profession in Ontario that he or she would not face if the law school were accredited (i.e. having to obtain a certificate of qualification from the NCA).[24]

3) Does the Decision Strike a Proportionate Balance?

18. Since the decision limits *Charter* protections, the final question under *Doré* is whether this limit is proportionate to the contribution the decision makes to promoting the statutory objective. In other words, does the decision limit a *Charter* right or value more than is necessary to achieve the Respondent's statutory mandate?

19. In assessing whether the Respondent struck a proportionate balance, it is important to recall that in a secular state, religious differences cannot trump core national values. As the Supreme Court held in *Loyola*:

> These shared values – equality, human rights and democracy – are values the state always has a legitimate interest in promoting and protecting....This is what makes pluralism work...Religious freedom must therefore be understood in the context 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.[25]

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[24] There may be other consequences of the Respondent's decision as well but it is submitted that they are too remote to be meaningfully factored into the analysis. For example, one potential consequence of the decision is that TWU ultimately decides not to open a law school, which would deprive a student who wished to go there for religious reasons of the opportunity to do so. It is submitted that there are simply too many contingencies involved in this scenario for it to contribute to the analysis of limitations on religious freedoms.

[25] *Loyola, supra,* note 8, at para. 47 [Joint Book of Authorities, Tab 49]

20. It is submitted that the Respondent's decision is an important affirmation of its commitment to the values of equality, diversity and non-discrimination. The Respondent went as far as it could to express its commitment to these fundamental values. Unlike a body that decides whether TWU should be permitted to open a law school at all, the Respondent could not directly prevent discrimination or otherwise directly protect equality rights. Even without accreditation in Ontario, TWU remains free to open its law school and to continue to insist on adherence to the Community Covenant, with all of its discriminatory effects. But even if the decision was an indirect means to achieve certain goals, it is a clear affirmation of the Respondent's commitment to the fundamental values of equality, diversity and non-discrimination.[26] The decision promotes the Respondent's statutory mandate as much as possible.

21. It is submitted, further, that the limitations the decision places on freedom of religion are proportionate to the contribution it makes to important statutory objectives. While those limitations are not trivial, they are very modest. The Respondent has not prevented TWU from opening a law school. The Respondent has not insisted that the law school must be a secular one. TWU may open a law school and integrate it into its religious community as it sees fit, including by requiring that all law students adhere to the Community Covenant. While the school may be less marketable to prospective students because it is not accredited in Ontario, this difficulty is largely hypothetical now and the viability of the school is contingent on a number of factors outside the

[26] This is not to say that a decision in favour of accreditation would necessarily signal approval of the Community Covenant. A decision to accredit the law school could easily be accompanied by a statement disapproving of the Community Covenant in no uncertain terms and explaining why accreditation was granted despite the Community Covenant. That this option also existed, however, does not necessarily render the refusal to accredit unreasonable.

Respondent's control. Moreover, the Respondent has not prevented any prospective student from attending the law school should it open nor has it prevented such a student from becoming a member of the Ontario Bar. On the contrary, as the Divisional Court emphasized, should a future TWU graduate seek to be admitted to the Ontario Bar, the Respondent will be obliged to consider the request for admission in such a way as "to ensure that the religious rights of any graduate of TWU's law school are minimally impaired."[27]

22. Applying *Doré,* it is submitted that the modest and, indeed, largely hypothetical limitations on freedom of religion that result from the Respondent's decision are proportionate to the importance of that decision as a clear affirmation of fundamental values and the Respondent's commitment to them. The refusal to accredit did not limit rights any more than was reasonably necessary to achieve important statutory objectives. Accordingly, the decision was reasonable and was properly upheld on review.

PART IV – ORDER REQUESTED

23. The CLA respectfully supports the Respondent's position that the appeal should be dismissed. Pursuant to the order of Hoy A.C.J.O. dated December 16, 2015, the CLA does not seek costs and no costs are to be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of February, 2016

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[27] *Trinity Western University v. The Law Society of Upper Canada,* paras. 127-28 [Appeal Book, Tab 4]. Unless s. 9(1) of By-Law 4 is amended, such consideration would presumably have to be done in coordination with the National Committee on Accreditation.

SCHEDULE A – TABLE OF AUTHORITIES

Doré v. Barreau du Quebec, [2012] 1 S.C.R. 395

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817

Loyola High School v. Quebec (Attorney General), [2015] S.C.J. No. 12

Edward v. Law Society of Upper Canada, [2001] 3 S.C.R. 562

R. v. N.S., [2012] 3 S.C.R. 726

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