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 AND TAMARA KEIGH (BY THEIR LITIGATION GUARDIAN VALERIE KEIGH)

Appellant

-AND-

WINNIPEG SCHOOL DIVISION

Respondent

FACTUM OF THE RESPONDENT

Counsel for the Respondent

Team 11

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PART I – OVERVIEW

[1] Canada's commitment to pluralism and religious freedom requires administrative decision-makers to reasonably accommodate multiple values wherever possible. The School Division's accommodation in this case falls squarely within the range of reasonableness articulated by the Supreme Court of Canada in *Doré*. The Winnipeg School Division properly balanced competing *Charter* values when it ensured that Orthodox Jewish boys could play for Hawerchuk while providing a reasonable alternative to the Appellants.

[2] The School Division did not discriminate against the Appellants and accommodated all students to the fullest extent possible. The Appellants were able to compete at the highest level of girls' soccer in the province and went on to secure athletic scholarships at an elite American college. Had the School Division allowed the Appellants to try out, over half of the boys' team would have been forced to quit on the basis of their sincerely held religious beliefs. The outcome the Appellants sought would have infringed the religious freedom of the Orthodox Jewish team members. Instead, as a result of the School Division's decision, all the students were able to play soccer.

[3] Even if this Court finds that the equality interests of the Appellants have been infringed, *Charter* damages would not be an appropriate and just remedy. The Appellants have suffered no compensable loss. A declaration would vindicate the *Charter* rights at issue without chilling the exercise of the School Division's policy-making discretion.

PART II – STATEMENT OF FACTS

1. Factual background

a) Hawerchuk Secondary School

[4] Hawerchuk Secondary School ("Hawerchuk") is a public high school in Winnipeg, Manitoba. Hawerchuk is popularly regarded as a 'Jewish school' for students who are unable to afford the cost of tuition at private denominational schools. The school is located in a predominantly Jewish neighborhood. While only 1.1% of Manitoba's population identifies as Jewish, 80% of Hawerchuk students are Jewish. Of those Jewish students, 75% identify as Orthodox.

Official Problem, Wilson Moot 2017 at paras 4-6 [Official Problem].

[5] Hawerchuk has taken steps to ensure that Orthodox Jewish students are able to fully participate in every aspect of public education. For example, Hawerchuk's school cafeteria caters to the specifications of a kosher diet and Hawerchuk teachers respect observance of Jewish holidays by avoiding teaching substantive lessons on those days.

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

[6] Hawerchuk has soccer programs for both boys and girls. The girls' soccer team, however, was only in its second year in 2013. Before 2012, girls at Hawerchuk who wished to play soccer joined the team at Oakwood High School ("Oakwood"), a neighbouring high school. In the last ten years, sixteen Hawerchuk girls have played soccer for Oakwood. The Oakwood girls' soccer team is highly competitive.

Official Problem, *supra* para 4 at paras 10, 11.

[7] Many Orthodox Jews believe that any physical contact between men and women who are not married or related to each other is impermissible. While some interaction between the

sexes is allowed, the physical contact associated with competitive sports rises above permissible levels for most Orthodox Jews. At least twelve students on the Hawerchuk boys' team identify as Orthodox Jewish and cannot play soccer with girls on this basis. This prohibition is based on their personal beliefs as well as the wishes of their parents and religious leaders.

Official Problem, *supra* para 4 at paras 8, 17, 21.

[8] Hawerchuk participates in interschool sports competitions organized by the Manitoba High Schools Athletic Association (the "MHSAA"). Membership in the MHSAA is voluntary and schools agree to abide by its rules and regulations in order to be eligible for competitions. The MHSAA generally permits girls to try out for boys' teams, but encourages student athletes to play for their respective gender when the school has teams for both sexes.

Official Problem, *supra* para 4 at paras 14, 15.

b) The accommodation of the Appellants

[9] Tara and Tamara Keigh moved to Winnipeg and enrolled at Hawerchuk in the summer of 2013. The twins had played soccer at a high-level in Toronto and intended to continue to participate competitively when they moved to Winnipeg. Both girls hoped to be scouted during their high school years and wanted to obtain athletic scholarships to university.

Official Problem, *supra* para 4 at paras 3, 12.

[10] The girls attended the Hawerchuk boys' soccer team tryouts in September 2013. The head coach of the Hawerchuk team was concerned that several team members (the "Orthodox Team Members") would be forced to quit the team should the Appellants be allowed to play. The head coach sought permission from Hawerchuk's principal, Arthur Vandalay, to allow the Appellants to try out. As per school policy, the coach and the Appellants provided Principal Vandalay with written arguments outlining their positions.

Official Problem, *supra* para 4 at paras 13, 16.

[11] The principal carefully reviewed the submissions. He then had further discussions with all interested parties, including the Appellants and 18 of the 23 Hawerchuk boys' team members.

Official Problem, *supra* para 4 at para 16.

[12] Principal Vandalay released his decision by way of a letter dated October 15, 2013. Portions of the letter are as follows:

> Thank you all for your thoughtful submissions and helpful follow-up discussions over the past few weeks. In my 20-year-career in public school administration, rarely has an issue caused me so much consternation. Please be assured, I have given this issue considerable thought.
>
> I am aware of Tara and Tamara's desire to play on the boys' team – both to fulfill their personal sense of competition as well as to be scouted. Manitoba is a province that generally permits girls to play for boys' teams. I have taken into account their desire to play on the boys' team very seriously.
>
> Having discussed with Coach Bala, and speaking to the boys on the team, I understand that at least half of his roster would be unable to participate on a team with female players based on their religious beliefs. I have questioned these boys extensively and am confident they sincerely hold these views. I am also obligated to take these views very seriously.

Ultimately, Principal Vandalay decided not to allow the Appellants to try out for the boys' team. This decision was affirmed by a vote of the Winnipeg School Division trustees (the "Decision").

Official Problem, *supra* para 4 at paras 17, 18.

[13] After careful consideration, the School Division offered the Appellants two possible accommodations. First, they were invited to try out for the Hawerchuk girls' team. Second, they were given the opportunity to play for the Oakwood girls' team. The Appellants decided to play for Oakwood, where they blended in well with the team. After three successful years at Oakwood, they went on to play soccer for the University of California, Los Angeles, on partial athletic scholarships.

Official Problem, *supra* para 4 at paras 16, 17, 18, 25.
Official Problem, *supra* para 4 at Fresh Evidence, paras 1, 2 [Fresh Evidence].

2. Procedural history

[14] Following School Division's decision, the Appellants sought judicial review. In May 2015, Justice Abbott allowed the Appellants' application. Justice Abbott held that the School Division's decision did not reflect a proportionate balancing of the Appellants' equality rights and the religious rights of many of the players on the boys' team.

Official Problem, *supra* para 4 at para 28.

[15] The School Division appealed Justice Abbott's order and was granted a stay pending appeal which prevented the Appellants from trying out for the Hawerchuk boys' team. A majority of the Manitoba Court of Appeal overturned Justice Abbott's decision, finding that she had not properly evaluated the religious rights at play. Justice Lau held that "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 enjoyed by all." Justice Lau further held that Justice Abbot had failed to determine that the Appellants' s. 15 rights were actually infringed.

Official Problem, *supra* para 4 at para 28.

PART III – STATEMENT OF POINTS IN ISSUE

[16] The present appeal raises the following constitutional questions:

1. **Did the School Division's decision infringe the Appellants' rights under s. 15 of the *Charter*?**

   The Decision created a distinction on an enumerated ground. But, it does not infringe s. 15 because it had as its object the amelioration of conditions of a disadvantaged group, namely, the Orthodox Jewish students. In the alternative, the distinction is not arbitrary and therefore not discriminatory under s. 15(1).

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

   The School Division properly balanced the Appellants' s. 15 rights with the Orthodox Jewish team members' s. 2(a) rights. The School Division achieved its statutory objectives while minimally impairing any *Charter* values at play.

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

   Damages are not an appropriate and just remedy. Damages cannot be functionally justified, and countervailing factors defeat any considerations which support a public law damage award.

PART IV – ARGUMENT

[17] The parties agree that the standard of review is reasonableness. In *Doré*, a unanimous Supreme Court of Canada held that "[e]ven where charter values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant charter values *on the specific facts of the case*."

> *Doré v Barreau du Québec*, 2012 SCC 12 at para 54, [2012] 1 SCR 395 [*Doré*] [emphasis in original].

Issue 1: The Decision did not infringe the Appellants' rights under s. 15 of the *Charter*

[18] The Decision did not infringe the Appellants' rights under s. 15 of the *Charter* as it had an ameliorative purpose under s. 15(2). The creation of a single-sex soccer team served the genuinely ameliorative purpose of providing sports programming to Orthodox Jewish students who have historically faced significant barriers to inclusion and access to services in public schools. Because the Decision is ameliorative under s. 15(2) it is not subject to s. 15(1) scrutiny. In the alternative, any disadvantage the Appellants allegedly experienced was not arbitrary and therefore not discriminatory under s. 15(1).

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

1. The Decision was ameliorative under s. 15(2)

[19] It is unnecessary to undertake a s. 15(1) analysis because the Decision created "a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality" (*Cunningham*). Section 15(2) "preserves the right of governments" to proactively "combat discrimination" without fear of challenge under s. 15(1) (*Kapp*). The resulting distinction was not discriminatory because the Decision advanced an ameliorative purpose and promoted substantive equality.

Alberta (Aboriginal Affairs and Northern Development) v. Cunningham, 2011 SCC 37 at para 44, [2011] 2 SCR 670 [*Cunningham*].
R v Kapp, 2008 SCC 41 at paras 16, 52, [2008] 2 SCR 483 [*Kapp*].

a) The Decision had an ameliorative purpose

[20] The Decision had the genuinely ameliorative purpose of ensuring that a historically disadvantaged group could obtain the equal benefit of public school programs. Principal Vandalay and the School Division were well acquainted with the specific forms of disadvantage that Jewish students face within public schools. Indeed, Hawerchuk had already adopted procedures to address the specific needs of this community by providing a kosher cafeteria and generally refraining from teaching substantive lessons on Jewish holidays. The Decision was made with the intention of ensuring that Orthodox Jewish students have equal access to the soccer program and that their religious rights are respected within the school community.

Official Problem, *supra* para 4 at paras 7, 17.

[21] Orthodox Jewish students are part of an historically disadvantaged group in need of ameliorative assistance. Jewish communities have traditionally had difficulty deriving equal benefit from public school systems, which have been slow to accommodate their needs (*Chambly*). Jewish individuals have been the targets of hate crimes and harassment, often within public schools (*Keegstra* and *Ross*). The Supreme Court of Canada has endorsed Isaiah Berlin's contention that "[a] person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs" (*Keegstra*). This consideration is present in Principal Vandalay's letter which states that "the religious rights of the boys' players [*sic*] will be respected" (Official Problem).

Commission scolaire régionale de Chambly v Bergevin [1994] 2 SCR 525, 115 DLR (4th) 609 [*Chambly*].
R v Keegstra [1990] 3 SCR 697, at para 65 [1990] SCJ No 131 (QL) [*Keegstra*] citing Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (New York: Oxford University Press, 1969) [emphasis added].
Ross v New Brunswick School District No. 15 [1996] 1 SCR 825, 133 DLR (4^{th}) 1 [*Ross*].
Official Problem, *supra* para 4 at para 17.

[22] The Decision had the ameliorative purpose of guaranteeing Orthodox Jewish students equal access to the soccer program at Hawerchuk. This object could only be accomplished by ensuring that girls did not play for the boys' team. Further, the ameliorative purpose is not simply to provide access to athletic opportunities but to do so within a school that accommodates this groups' faith in other ways. Hawerchuk is distinctive in the way it provides Jewish students with access to important school amenities: sports programming, academic accommodations, and kosher meals. Ultimately, the Decision ensures that the boys could continue playing soccer in a school that accommodates their religious needs.

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

[23] The Decision does not need to employ the language of s. 15(2) in order to uphold its ameliorative purpose. School administrators are "not writing for the courts" and should not have their intentions subverted simply because they do not render them in formal, legalistic ways. Indeed, the Court has adopted a deferential stance of "respectful appreciation" of the specialized and divergent ways that administrators deliver their decisions.

Newfoundland and Labrador Nurses Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62, at paras 23, 13 [2011] 3 SCR 708 [*Newfoundland Nurses*].

b) The Decision constitutes an ameliorative program

[24] The School Division had the authority to create an ameliorative program. The *Public Schools Act* (the "PSA") requires public school administrators to "take into account the diverse

needs and interests of the people of Manitoba." The PSA further affirms school divisions' "important role in providing public education that is responsive to local needs and conditions." The legislature intended the School Division to proactively respond to those diverse, local needs.

The Public Schools Act, CCSM c P250 [the PSA].

[25] Section 15(2) does not only protect programs created specifically by legislation. The *Charter* must be given a broad and liberal reading which supports the interpretation of "law, program, or activity" as including programs created through the discretion of administrative actors (*Big M*). The Ontario Superior Court of Justice has recently adopted this broad interpretation of s. 15(2) in holding that the discretionary decision of a minister can constitute an ameliorative "program or activity" (*Anglers*). School division trustees are similar to ministers in that they are elected officials with the power to create policy over specific jurisdictions.

R v Big M Drug Mart Ltd., [1985] 1 SCR 295 at para 17, 1985 CanLII 69 (SCC) [*Big M*].

Ontario Federation of Anglers and Hunters v. Ontario (Minister of Natural Resources and Forestry), 2016 ONSC 2806 at para 64, 131 O.R. (3d) 223 [*Anglers*].

c) The implementation of the Decision was rationally connected to the ameliorative purpose

[26] The Decision's ameliorative purpose was genuine because there was a "real nexus between the object of the program…and its implementation" (*Apsit*). The soccer team's single-sex requirement was "rationally connected" to the object of allowing equal access for Orthodox Jewish students (*Kapp*). The presence of girls on the team would deprive the Orthodox Team Members of the opportunity to play soccer at school. Unlike the Appellants, the Orthodox Team Members had no other school teams that they could join. They would not have played at all. Furthermore, had they switched schools in pursuit of another team, they would have lost access to the other religious accommodations that Hawerchuk provided.

Apsit v Manitoba (Human Rights Commission) (1987), 50 Man R (2d) 92 at para 54, 7 ACWS (3d) 179 (MBQB) [*Apsit*].
Kapp, *supra* para 19 at para 49.

d) The Decision's distinction serves and advances the ameliorative purpose

[27] A distinction on the basis of sex was necessary to the ameliorative purpose. Although it is unfortunate that this distinction served to exclude the Appellants, "it is unavoidable that ameliorative programs, in seeking to help one group, necessarily exclude others." The government is not required to benefit all groups equally. It may create "targeted programs" to address particular groups. Although the Appellants were denied the benefit of joining the boys' team, they acquired the substantially similar benefit of playing for the Oakwood team.

Cunningham, supra para 19 at para 45, 40, 41.

2. The Decision did not infringe s. 15(1) because it did not arbitrarily disadvantage the Appellants

[28] The Decision created a distinction based on the enumerated ground of sex; however, the distinction was not discriminatory. It did not "have the effect of perpetuating arbitrary disadvantage" for the Appellants (*Quebec*). In the Supreme Court of Canada's unanimous decision in *Taypotat*, arbitrary disadvantage was used synonymously with discrimination. The Court identified two essential conditions for a finding of discrimination in the context of s. 15(1): first, that the law "fails to respond to the actual capacities and needs of the members of the group"; second, that the law has the effect of "reinforcing, perpetuating or exacerbating their disadvantage" (*Taypotat*). When those conditions are met, the law is arbitrary. Neither of these necessary elements is present in this case, and the Decision is therefore not discriminatory.

Quebec (Attorney General) v A, 2013 SCC 5 at para 331, [2013] 1 SCR 61, Abella J, [*Quebec*].
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 at paras 18, 20, [2015] 2 SCR 548 [*Taypotat*].

[29] Although the Appellants experienced differential treatment that caused them personal disappointment, this is not sufficient to ground an equality claim. As Supreme Court of Canada held in *Withler*: "Equality is not about sameness and s. 15(1) does not protect a right to identical treatment." Section 15 is concerned with substantive equality and proceeds through an objective rather than a subjective analysis.

> *Withler v Canada (Attorney General),* 2011 SCC 12, at para 31, [2011] 1 SCR 396 [*Withler*].
> *Kapp, supra* para 19 at para 20.

a) The Decision responded to the actual capacities and needs of the Appellants

[30] By allowing the Appellants to try out for the Oakwood girls' team, the Decision responded to their actual capacities and needs. The Appellants were given an opportunity to play for an established and competitive soccer team. The coach of the Oakwood girls' soccer team attested to the program's challenging environment which drove "everyone to play her very best game." Further, university scouts routinely attended Oakwood games and held their soccer program in high regard. Joining the Oakwood team facilitated the Appellants' goal of jointly obtaining athletic scholarships to a top university.

> Official Problem, *supra* para 4 at paras, 12, 25, 20.

[31] The Appellants' needs would not have been met had the School Division come to the opposite decision. In *Withler*, the Court held that perceived disadvantages must be considered in light of other benefits to the claimants in order to avoid an "artificial understanding" of the law's impact. A majority of the Manitoba Court of Appeal found that "the entire team may have been in jeopardy" had the Appellants joined the Hawerchuk boys' team. At least half of the players would have quit due to religious concerns. In a school where Orthodox Jews comprise 60% of the population, it is unlikely that there would be sufficient interest or talent to make up for the

loss of those first-string players. The team would have been disbanded, or would have been significantly less competitive. The Decision saved them from these disadvantageous outcomes.

Withler, *supra* para 29 at para 74.
Official Problem, *supra* para 4 at paras 28, 21, 5.

[32] The Decision did not create arbitrary disadvantage simply because it did not result in the outcome that the Appellants perceived to be in their interest. In *Eaton,* the Court held that a school board's decision to remove a disabled girl from an integrated classroom and place her in a different school against her parents' wishes did not constitute discrimination. In *Law*, the Court clarified that the s. 15(1) test must proceed as an objective analysis informed by the "particular traits and circumstances" of the individual. A claimant's contention that they were differentially impacted, without more, is insufficient to support the finding of a s. 15(1) infringement.

Eaton v Brant County Board of Education, [1997] 1 SCR 241, at paras 5, 7, 8, 142 DLR (4^{th}) 385 [*Eaton*].
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497, at para 59, 170 DLR (4^{th}) 1 [*Law*].

[33] The present case is distinguishable from previous successful sex discrimination claims in athletics. In all those instances, there were no girls' teams of comparable skill or resources. Either there was unequal funding to girls' and boys' teams (*Hawkins*), the girls' team played a different version of the sport (*Pasternak*), or there was no team of comparable skill in the area (*Casselman*). The Oakwood girls' team suffered no such deficiencies.

Hawkins v Little League Canada, 2009 BCHRT 12, 65 CHRR D/429 [*Hawkins*].
Pasternak v Manitoba High Schools Athletics Association, 2008 MBQB 24, 222 Man R (2d) 288 [*Pasternak*].
Casselman v Ontario Soccer Association (1993), 23 CHRR D/397 (Ont Bd Inq) [*Casselman*].

[34] Additionally, in these cases there was no valid purpose or competing interest which justified the exclusion. In *Blainey*, the court accepted that distinctions on the basis of sex may be

reasonable where "there is a valid purpose for such a distinction." Allowing a religious minority to equally participate in athletics constitutes such a purpose.

> *Blainey v Ontario Hockey Association*, [1986] OJ No 236, 54 OR (2d) 513 at para 46, 26 DLR (4th) 728 [*Blainey*].

[35] Further, in *Withler*, the Court determined that "the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis." Where the impugned distinction exists within a wider benefit scheme, the discrimination inquiry must "focus on the object of the measure alleged to be discriminatory in the context of the broader legislative scheme, taking into account the universe of potential beneficiaries." Thus, the discrimination analysis must be contextual. Not only did the Decision respond to the needs and capacities of the Appellants, but it did so while accommodating those of the Orthodox Team Members. Had the School Division decided differently, these boys would have been unable to play soccer at all. This context is essential to the discrimination analysis.

> *Withler*, *supra* para 19 at paras 38, 3 [emphasis added].

b) The Decision did not reinforce, perpetuate, or exacerbate the disadvantage of the Appellants

[36] Joining the Oakwood girls' team did not reinforce, perpetuate, or exacerbate any disadvantage of the Appellants. They spent three years playing for a competitive senior varsity team that is well regarded by university scouts. After graduating, they achieved their goal of obtaining athletics scholarships to play soccer for an excellent university team.

> Official Problem, *supra* para 4 at para 20 and page 10.

[37] The indicia of discrimination, namely stereotyping and prejudice, are not present in this case. Although these two components are not discrete elements of the test, the Supreme Court of Canada has emphasized their usefulness in defining and interpreting discrimination (*Quebec*).

They remain instructive in determining whether substantive equality has been harmed or served in a given context. The decision to deny the Appellants the option to try out for the Hawerchuk boys' team was not made on the basis of "inaccurate understandings of the merits, capabilities and worth" of either the Appellants or of women in general (*Law*). There was never a suggestion that the Appellants were athletically inferior or unworthy of team membership. Principal Vandalay openly stated that he believed they could have qualified for the team.

> *Quebec*, *supra* para 28 at para 325.
> *Law*, *supra* para 32 at para 64.
> Official Problem, *supra* para 4 at para 22.

[38] Further, the decision does not disadvantage the Appellants or women in general by perpetuating prejudice. In *Quebec*, Justice Abella defined prejudice as "the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member." Allowing boys and girls to excel in athletics separately does not encourage negative judgment about the merits or capabilities of either group. In fact, the excellence of the Oakwood girls' team was known at Hawerchuk. Travelling to Oakwood rather than playing for the Hawerchuk girls' team may have confirmed the Appellants' athletic ability in the eyes of their schoolmates.

> *Quebec*, *supra* para 28 at para 326.
> Official Problem, *supra* para 4 at para 17.

Issue 2: The School Division's decision properly balanced the Appellant's rights under s. 15 of the Charter with the boys' rights under s. 2(a) of the Charter

[39] The Decision is reasonable because it minimally impaired all *Charter* values at issue while achieving its statutory objective. The Supreme Court of Canada in *Doré* established that reasonableness is the proper standard of review for an administrative decision that engages

Charter values. Where a decision engages multiple *Charter* values, decision-makers must balance them proportionately and seek to reasonably accommodate all values at play.

> *Doré*, *supra* para 17 at para 45.
> *R v NS*, 2012 SCC 72 at para 9, [2012] 3 SCR 726 [*NS*].

[40] *Charter* values, not *Charter* rights, are the proper focus of the *Doré* balancing exercise. Nonetheless, the content and definition of *Charter* values are similar to rights. In *Loyola*, a majority of the Court noted that "[*Charter* values] underpin each right and give it meaning." *Charter* values retain the textual or jurisprudential meaning and scope of their associated *Charter* rights. Moreover, "it remains for each tribunal to determine…how to balance those values against its policy mandate" (*Loyola*). The relevant values include those enshrined in the *Charter* as well as broader societal values such as secularism and multiculturalism (*Chamberlain*).

> *Doré*, *supra* para 17 at para 35.
> *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 36, 42, [2015] 1 SCR 613 [*Loyola*].
> *Chamberlain v Surrey School District No 36*, 2002 SCC 86 at para 21, [2002] 4 SCR 710 [*Chamberlain*].

[41] In *Doré*, the Barreau du Québec only had one *Charter* value to consider: freedom of expression. In the instant case, however, the School Division had to balance multiple *Charter* values. In these situations, the Supreme Court of Canada's decision in *NS* provides a useful framework which can inform the balancing stage of the *Doré* test. In *NS* the majority adapted the *Oakes* test to apply to competing *Charter* rights. Similarly, in *Doré* the *Oakes* test was adapted for potential *Charter* infringements which arise in the administrative context. *NS* is therefore a useful means of evaluating competing *Charter* claims in the context of an administrative decision. After establishing that two *Charter* values are engaged, a decision-maker must first seek to accommodate both values before choosing between them.

> *NS*, *supra* para 39 at paras 9, 35.

Doré, *supra* para 17 at para 5.

[42] The School Division reasonably balanced the *Charter* and societal values at play in light of the following factors:

(1) administrative decisions attract a high level of deference on review;

(2) the broad statutory objectives of the School Division confer wide discretion;

(3) the Decision significantly engaged freedom of religion of the Orthodox Team Members;

(4) religion must be accommodated in the public school context;

(5) the Decision reasonably accommodated competing *Charter* values;

(6) the School Division properly contemplated the concrete, objective harms that both sides would suffer as a result of its decision; and

(7) the Decision accomplished the School Division's statutory objectives.

1. Administrative decisions attract a high level of deference on review

[43] The Decision is entitled to a high degree of deference on review. Professor John Evans, quoted with approval by a unanimous Supreme Court of Canada in *Doré*, writes that the "reasons for judicial restraint in reviewing agencies' decisions on matters in which their expertise is relevant do not lose their cogency simply because the question in issue also has a constitutional dimension."

Doré, *supra* para 17 at para 46, citing John Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991), 29 *Osgoode Hall LJ* 51 at page 81.

[44] Principal Vandalay and the School Division are uniquely placed to assess and respond to the special needs of the local population. Balancing is a highly fact-dependent exercise. The School Division has extensive experience accommodating the conflicting interests of the

community it serves and is accustomed to making difficult decisions while implementing its home statute.

> *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 48, 1 SCR 190 [*Dunsmuir*].
> *Doré*, *supra* para 1 at paras 67, 36.

[45] The limited scope of the Decision increases the need for deference. The Decision does not create a standard of general application and the School Division is free to decide a similar case differently. Courts should be hesitant to interfere with administrative decisions that apply only to an individual set of facts at a precise moment in time. The Decision therefore deserves further deference on review.

> *Dunsmuir*, *supra* para 40 at para 53.

2. The broad statutory objectives of the School Division indicate wide discretion

[46] The School Division's purpose is gleaned from its enabling statute. All public schools in Manitoba are governed by the PSA, which grants broad discretionary powers with respect to decision-making. The preamble to the PSA provides:

> And whereas public schools should contribute to the development of a fair, compassionate, healthy and prosperous society; […]
>
> And whereas the public system must take into account the diverse needs and interests and interests of the people of Manitoba; […]
>
> And whereas democratic local school divisions and districts play an important role in providing public education that is responsive to local needs and conditions; […]
>
> *Loyola*, *supra* para 40 at para 50.
> Official Problem, *supra* para 4 at page 1.

[47] The School Division's mandate is broad. School administrators must be attentive to a wide range of local and provincial interests in promoting the overall well-being of Manitobans. Unlike impugned laws or government programs, school boards have wide-ranging obligations

and purposes. They have both adjudicative and policy-making functions. The School Division should therefore be granted discretion in choosing the means of accomplishing its objectives.

Official Problem, *supra* para 4 at page 1.

3. The Decision significantly engaged the freedom of religion of the Orthodox Team Members

[48] It is not necessary to undertake a full s. 2(a) inquiry in order to determine that the value of freedom of religion was engaged. However, the framework for establishing a s. 2(a) violation is a useful means of determining the extent to which the value is engaged. Freedom of religion is triggered where claimants demonstrate a sincere belief which calls for certain behaviours that have a nexus with religion.

Loyola, *supra* para 40 at para 41.
Syndicat Northcrest v Amselem, 2004 SCC 47 at para 56, [2004] 2 SCR 551 [*Amselem*].

[49] Canadian courts have opted for a broad definition of freedom of religion. Chief Justice Dickson first explored the full meaning of the right in *Big M*. There, the Court found that coercive state action which infringes religious freedom is not limited to direct interference with religious practice:

> Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.

Big M, *supra* para 25 at para 95 [emphasis added].

[50] Generally, freedom of religion protects against state interference with explicitly religious practices, such as building succahs (*Amselem*), carrying a kirpan (*Multani*), or teaching Catholicism (*Loyola*).

Amselem, *supra* para 48.
Multani v Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6, [2006] 1 SCR 256 [*Multani*].
Loyola, *supra* para 40.

[51] However, s. 2(a) also protects the right of religious individuals to do non-religious things while upholding the tenets of their religion. For example, in *BCCT* the Supreme Court of Canada held that "[Trinity Western University's] freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society." In that case, the ability to attend a teacher education program taught in accordance with Evangelical Christianity was found to be a legitimate expression of freedom of religion.

Trinity Western University v British Columbia College of Teachers, 2001 SCC 31 at para 35, [2001] 1 SCR 772 [*BCCT*].

[52] The Orthodox Team Members' religious freedom has been similarly engaged. To play on a team with the Appellants would require each individual Orthodox Team Member to violate a tenet of his faith. The Orthodox Team Members would be forced to choose between obeying a fundamental tenet of their religion and participating in an activity with significant personal, social, and physical benefits. This coercion is a violation of the religious freedom of the Orthodox Team Members (*TWU v LSUC*).

Official Problem, *supra* para 4 at paras 23-24.
Trinity Western University v The Law Society of Upper Canada, 2016 ONCA 518 at para 99, 131 OR (3d) 113 [*TWU v LSUC*].

[53] The Orthodox Team Members are entitled to access public school programs while maintaining commitment to their faith. Playing on a school sports team is an important community- and character-building activity which has positive mental and physical benefits. If the School Division had prevented even one Orthodox Jewish player from joining the team on the basis of a religious belief, this would engage the value of religious freedom.

Official Problem, *supra* para 4 at para 21.

4. Religion must be accommodated in the public school context

[54] Secularism does not require the School Division to ignore religion in its decision-making process. The state should neither hinder nor support any particular religion from operating in civic institutions (*des Chênes*). In *Chamberlain*, Chief Justice McLachlin explored the meaning of secularism and neutrality in the public school context:

> The [School] Act's insistence on strict secularism does not mean that religious concerns have no place in the deliberations and decisions of the Board. 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.

SL v Commission scolaire des Chênes, 2012 SCC 7 at para 32, 131 OR (3d) 113 [*des Chênes*].
Chamberlain, *supra* para 40 at para 19.

[55] This modern conception of secularism also recognizes that there is value in interactions between students with divergent worldviews. Secularism helps prevent the creation of insular, religious silos in which students learn and interact exclusively with other members of their faith. Instead, secularism fosters positive relationships among students with different beliefs. As the Court held in *Chamberlain*, "[t]he cognitive dissonance that results from such encounters is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children come to realize that not all of their values are shared by others."

Chamberlain, *supra* para 40 at para 65.

[56] If Hawerchuk did not accommodate the religious freedom of the Orthodox Jewish students at the school—for example, by failing to maintain a kosher cafeteria or teaching substantive lessons during Jewish holidays—many of these students would not be able to attend

public school. For those students who could not afford to attend a private denominational school, there would be significant practical issues regarding access to education and the resulting social and economic disruption. However, even for students whose families can afford the cost of a religious education, forcing these students to attend private school would undermine the values of pluralism and secularism.

Official Problem, *supra* para 4 at para 23.

[57] It is therefore appropriate for the School Division to consider the religious beliefs of the Orthodox Team Members in making its decisions. The School Division must be attentive to the needs of the Hawerchuk student body, of which 80% are Jewish and 60% are Orthodox. The School Division is required to accommodate their religious beliefs whenever practicable. The Decision did so, and the Court of Appeal was therefore correct in upholding it.

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

5. The Decision reasonably accommodated competing Charter values

[58] Although the *Doré* framework concerns *Charter* "values," Supreme Court jurisprudence concerning *Charter* "rights" can inform the balancing stage of the test. Courts must avoid a hierarchical approach to the balancing of *Charter* rights. No *Charter* right is absolute. A decision-maker's analysis must fully respect the importance of both sets of rights, lest one *Charter* right becomes a trump card in the balancing of rights and freedoms. Similarly, no *Charter* value should automatically outweigh another.

NS, *supra* para 39 at para 9.

[59] The majority opinion in *NS* provides a useful framework for addressing competing *Charter* values. When a decision-maker is faced with two competing *Charter* rights, it should make every effort to find a "reasonably available alternative" that would avoid a "serious risk" to

the *Charter* rights at play. Reasonable accommodation can include offsetting the detrimental effect which would result from a religious practice (*Chambly*). The test was intentionally crafted to have a broad application beyond the criminal context in which it arose, and it is applicable in the administrative law context.

NS, *supra* para 39 at paras 9, 33.
Chambly, *supra* para 21.

[60] The School Division's solution—allowing the Appellants to play at a nearby school with a highly competitive soccer program—accommodates both the Appellants' equality rights and the Orthodox Team Members' rights under s. 2(a). Given the wide range of values and commitments at play, the School Division had to consider various competing interests in making its decision. As shown above, the outcome of the School Division's exercise of discretion is in line with a proper balancing of these interests.

Official Problem, *supra* para 4 at para 21.

[61] The Decision was also reasonable in light of the School Division's obligations under the MHSAA Regulations. One MHSAA provision states that "[g]irls should generally be permitted to try out for a boys' team and to play for a boys' team following a successful try-out." The word "generally" indicates that there may be exceptions to the default rule that girls will be permitted to try out for a boys' team. The situation at Hawerchuk is an example of one such exception.

Manitoba High Schools Athletic Association, "2016/2017 MHSAA Handbook," Rules & Regulations at s. II(q).
Official Problem, *supra* para 4 at paras 14-15.

[62] The MHSAA Regulations also require that schools "ensure that female and male students are given equal opportunities and access to sports teams." The Decision accomplished this goal by allowing the Appellants to access an elite soccer program at a neighbouring school.

Official Problem, *supra* para 4 at para 15.

6. The School Division properly contemplated the concrete, objective harms that both sides would suffer as a result of its decision

[63] The extent to which a *Charter* value is engaged must be determined according to objective, concrete standards. Although the subjective element is important, "proving the infringement requires an objective analysis of the rules, events or acts that interfere with the exercise of the freedom. To decide otherwise would allow persons to conclude themselves that their rights had been infringed and thus to supplant the courts in this role."

des Chênes, *supra* para 54 at para 24.

[64] The School Division properly balanced competing values on an objective basis. The School Division evaluated the harms that would be suffered by the Appellants and the Orthodox Team Members depending on the outcome of its decision. The School Division determined that in order protect all *Charter* values as much as possible, the Appellants would not be allowed to try out.

Official Problem, *supra* para 4 at para 17.

[65] As a result of the Decision, the Appellants substantially satisfied their goals. They played highly competitive soccer at a neighbouring school. They secured scholarships to a top American university. They continue to play the sport they love at an elite level. The Appellants also fit in well with the Oakwood girls' team. The coach at Oakwood found that even compared to past Hawerchuk girls who played for Oakwood, the arrangement with the Appellants had worked out particularly well. The Appellants' equality interest was only minimally engaged.

Official Problem, *supra* para 4 at para 25, page 10.

[66] Had the School Division decided in the Appellants' favour, the harm to the Orthodox Team Members would have been more significant. The Orthodox Team Members did not have an alternative. Unlike the Appellants, the Orthodox Team Members could not play for the

Hawerchuk girls' team, and there is no evidence they could play for the Oakwood boys' team. Each Orthodox Team Member would have been prevented from accessing the type of program the Appellants were able to enjoy. The harm to the Orthodox Team Members was therefore more significant than the harm to the Appellants.

Official Problem, *supra* para 4.

[67] Although balancing competing *Charter* values is not simply a numerical exercise, the School Division was obligated to consider the number of individuals who would be affected by its decision. At least twelve students would have been completely barred from playing soccer had the School Division decided differently. Instead, those twelve players were able to participate while the two Appellants ended up playing for a team that satisfied nearly all the criteria they had identified as central for their personal development.

Official Problem, *supra* para 4 at para 12.

7. The Decision accomplished the School Division's statutory objectives

[68] The School Division successfully achieved its statutory objectives. It promoted the health and wellbeing of its school division by allowing the largest number of players to join elite teams, including the Appellants. It responded to the unique needs of its constituents by ensuring that Hawerchuk would remain accessible for Orthodox Jews who cannot afford to attend religious schools. These students can continue to exercise their religious freedom because of the Decision.

Issue 3: Damages are not a just and appropriate remedy under s. 24(1) of the Charter

[69] Damages are statutorily barred from being awarded on judicial review. The Manitoba Court of Queen's Bench Rules do not list damages among available remedies. However, in the event that the Court does consider a damage award, it would not be an appropriate remedy.

Manitoba Regulation 553/88 rule 68.01.

[70] *Ward* provides the appropriate framework for determining the availability of damages for *Charter* breaches, including in the administrative context. The Appellants have failed to show that damages are an appropriate and just remedy. The Appellants have failed to (1) functionally justify damages, (2) overcome countervailing factors, and (3) justify a more-than-nominal quantum of damages. The Appellants should therefore not be entitled to any damages.

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

1. Damages are not functionally justified

[71] The Appellants have not engaged the three purposes of a damage award: compensation for the claimant's loss, vindication for society at large by ensuring *Charter* rights are protected, and deterrence of future breaches by the decision-maker.

Ward, *supra* para 70 at paras 27-29.

[72] The Appellants have not experienced a compensable loss. Loss in the context of a *Charter* breach is focused on physical, psychological, and pecuniary loss. The Appellants did not experience a physical loss. Nor did the Decision result in a pecuniary loss. There is no evidence that the Appellants would have received larger scholarships had the Decision gone differently.

Ward, *supra* para 70 at para 27.

[73] The only potential loss in this case is psychological. The Appellants argue that the psychological distress associated with playing soccer for the neighbouring Oakwood team rises to a level worthy of compensation. However, given that the Appellants fit in well with the Oakwood team and achieved a high level of success at their chosen sport, any psychological harm caused by playing soccer at a neighbouring school was trivial. Accordingly, damages are not functionally required in order to compensate the Appellants.

Official Problem, *supra* para 4 at para 19.
Ward, *supra* para 70 at para 27.

[74] Damages would not serve the purpose of vindication because the Decision did not "impair public confidence and diminish public faith in the efficacy of the [constitutional] protection." The Decision followed a lengthy and deliberate process of balancing competing *Charter* values, and the School Division successfully achieved its statutory objective in doing so. Public confidence in the efficacy of constitutional protections is improved when administrative decision-makers engage in such careful consideration of competing *Charter* values.

Ward, supra para 70 at para 28.

[75] Finally, the "general deterrence" function of damages is not engaged. Deterrence is aimed at dissuading future decision-makers from engaging in unconstitutional conduct. The School Division made a good-faith effort to protect all *Charter* values at issue. Because the Decision was highly fact-specific, punishing the School Division for striking the "wrong" balance would not make the "right" balance any more obvious for future decision-makers. The School Division considered all the evidence before it and engaged in a difficult, multi-stage balancing exercise. The Court should not seek to deter such careful administrative decision-making.

Ward, supra para 70 at para 29.

2. Countervailing factors negate any functional justifications for damages

[76] Although "a complete catalogue of countervailing considerations remains to be developed as the law in this area matures," at least two countervailing factors have been established by the Supreme Court of Canada: the existence of alternative remedies and good governance concerns. In the present case, both factors militate in favor of a denial of damages.

Ward, supra para 70 at para 33.

[77] The availability of alternative remedies in the present case distinguishes it from past decisions where *Charter* damages were awarded (*Ernst*). Unlike a prosecutor or police officer,

the School Division is subject to judicial review. The normal remedies available under judicial review would more effectively address the Appellants' needs. For example, a declaration that the decision barring the Appellants from trying out is null would be more suitable than damages (*Multani*). If the declaration were narrowly construed, it would avoid fettering the discretion of other school divisions in the future. Further, a declaration would not deprive the School Division of scarce financial resources which could be put towards improving girls' sports programs.

Ernst v Alberta Energy Regulator, 2017 SCC 1 at para 38 [*Ernst*].
Multani, *supra* para 50 at para 82.

[78] Damages are also inappropriate given the countervailing factor of good governance. Administrative bodies, acting in accordance with valid statutes, should not be discouraged from pursuing their statutory objectives. Justice Cromwell recently held in *Ernst* that "*Charter* damages would never be an appropriate remedy" against the decision-maker in that case because "the state does not wish to chill the exercise of policy-making discretion." As in *Ernst*, the School Division has both adjudicative and policy-making functions and must act in the public interest. Damages claims against policy-making and adjudicative bodies are time-consuming and may result in defensive actions which inhibit an administrator's ability to carry out its statutory duties effectively. The School Division's responsibility to balance public and private interests in the execution of its duties is inconsistent with being liable to an individual claimant.

Ernst, *supra* para 77 at paras 24, 42, 47.

[79] The School Division did not display any evidence of malice, bad faith, negligence, or abuse of power in coming to its decision. The conduct of the School Division should not be penalized, nor should similarly placed administrative bodies refrain from carrying out their statutory duty for fear of attracting a public law damages award.

Ward, *supra* para 70 at para 38.

[80] Since *Ward*, damages for a *Charter* breach have been been awarded in only two circumstances: when a police officer has ignored *Charter* protections in the course of an illegal strip search or detainment (*Joel Elliot*, *Mason*), and when a Crown prosecutor has demonstrated a blatant disregard for the rights of an accused by withholding important disclosure (*Henry*). These situations are far different from an administrative decision-maker's careful balancing of competing *Charter* rights.

> *Joel Elliot v Waterloo Region Police Services,* 2011 ONSC 6889, 209 ACWS (3d) 724 [*Joel Elliot*].
> *Mason v Turner*, 2014 BCSC 211, [2014] BCWLD 2355 [*Mason*].
> *Henry v British Columbia (Attorney General),* 2015 SCC 24, [2015] 2 SCR 214 [*Henry*].

3. An appropriate and just remedy demands a nominal quantum of damages

[81] If the Court sees fit to award the Appellants damages under s. 24(1) of the *Charter*, the award should be nominal. The Appellants have suffered no personal loss worthy of compensation. A substantial damages award would discourage effective governance among other administrative bodies. If the School Division did breach the s. 15 rights of the Appellants, the breach was an extremely minor one. In nearly all cases, damages awards have followed intrusive and humiliating police conduct. In the present case, a school division was forced to make a difficult decision. It was attentive to and considerate of all *Charter* rights at play. All these factors, considered in the larger framework of the *Ward* analysis, indicate that if there is to be a damages award at all, it should be extremely limited.

PART V – ORDER SOUGHT

[84] The Respondent requests that this appeal be dismissed. In the alternative, the Respondent requests an order declaring the Decision unjustifiably limited the Appellants' s. 15 equality rights.

All of which is respectfully submitted this 26th day of January, 2017

Team 11
Counsel for the Respondents

PART VI – LIST OF AUTHORITIES AND STATUTES

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John Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991), 29 *Osgoode Hall LJ* 51.	43