Court of Appeal File No. C61116

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Applicants
(Appellants)

- and -

LAW SOCIETY OF UPPER CANADA

Respondent
(Respondent)

- and -

CHRISTIAN LEGAL FELLOWSHIP, EVANGELICAL FELLOWSHIP CANADA AND CHRISTIAN HIGHER EDUCATION CANADA, JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS, OUT ON BAY STREET AND OUTLAWS, THE ADVOCATES' SOCIETY, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), CANADIAN CIVIL LIBERTIES ASSOCIATION, LAWYERS' RIGHTS WATCH CANADA, CANADIAN SECULAR ALLIANCE, ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA, THE SEVENTH DAY ADVENTIST CHURCH IN CANADA, CANADIAN CONSTITUTION FOUNDATION and CANADIAN BAR ASSOCIATION

Interveners

FACTUM OF THE INTERVENER, CANADIAN SECULAR ALLIANCE

February 26, 2016

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PART I – OVERVIEW

1. The Canadian Secular Alliance (the "Alliance") intervenes in this appeal to address the proper scope and approach to freedom of religion under s. 2(a) of the *Charter of Rights and Freedoms*.[1] The Alliance submits that the court must not treat the first stage of the analysis in a freedom of religion claim – the determination of whether a decision engages the *Charter* by limiting its protections – in a perfunctory manner, leaving any concerns about the strength of the claim or the impact of the impugned decision for consideration in the proportionality analysis under the *Doré* framework.[2] Before proceeding to the second stage, the court must (a) carefully characterize the claimant's asserted religious belief or practice; (b) consider whether the practice over which the claimant seeks protection falls within the scope of the freedom delineated by s. 2(a); (c) assess whether the claimed religious belief is sincerely held; and, finally, (d) determine whether the state has objectively interfered with religious freedom.

PART II – THE FACTS

2. Students at Trinity Western University ("TWU") are expressly not required to hold evangelical Christian beliefs in order to attend the university; TWU accepts students of all faiths and denominations, including non-believers. There are students at TWU – and there would be law students – for whom adherence to the Community Covenant (the "Covenant") is plainly not a matter of religious belief or practice. Rather, it is an obligation they would be forced to undertake in order to attend law school. These facts necessarily lead to the conclusion that the appellants' claim falls outside the scope of the protection provided by s. 2(a). As a result, the Law Society of Upper Canada's (the "Law Society") decision (the "Decision") to refuse to

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

[2] *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, 2012 SCC 12; Joint Book of Authorities ("JBOA"), tab 10.

accredit the law school proposed by TWU did not infringe the appellants' freedom of religion.

PART III – ISSUES AND THE LAW

A. The proper characterization of the practice at issue

3. The appellants claim that the Decision infringes their freedom of religion. Thus, they implicitly assert that they have a sincerely held belief that the study of law must be conducted in a program that requires all of its students to adhere to a prescribed set of evangelical Christian practices and rejects those students who cannot or choose not to do so (the "Practice").

4. It is critical that religiously-based practices over which constitutional protection is sought be carefully and accurately characterized, as above, because it is those practices that are the subject of the entire freedom of religion analysis. It is not enough for a claimant to simply assert, as the appellants do, that they sincerely believe in their religion writ large, and that the practice in question is a "manifestation" of their religion.[3] Such an approach denies the Court the ability to rigorously assess the sincerity of the claimant's belief in the practice at issue, for a claimant's belief in their entire religion will rarely be assailable.

5. The appellants do not merely seek to study law in an evangelical Christian environment or atmosphere, or to study law amongst other evangelical Christians, or to study law while holding to certain evangelical Christian beliefs and practices. Such rights are not at issue because they are not impacted by the Decision. Rather, it is only the Practice with which the Decision interferes and, accordingly, it is only the Practice for which the appellants seek constitutional protection in this case.

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[3] Factum of the Appellants, Trinity Western University and Brayden Volkenant, ("Appellants' Factum"), at paras. 7(a) and 78.

B. The Practice does not fall within the scope of freedom of religion

6. Section 2(a) of the *Charter* is designed to protect individuals from state coercion or constraint of religious belief or practice. As Dickson J. stated in *R. v. Big M Drug Mart Ltd.*:[4]

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. ... Freedom can primarily be characterized by the absence of coercion or constraint. ... Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. [Emphasis added.]

7. The Practice is not the sort of practice that s. 2(a) of the *Charter* protects. The appellants argue that by refusing to accredit TWU's proposed law school the Law Society is constraining their religiously-motivated desire to teach and study law in a program in which all students are required to adhere to a prescribed set of evangelical Christian practices. Section 2(a) does not protect practices that seek to coerce or constrain the behaviour of other individuals for religious reasons. The only direct and palpable religious constraint that arises out of the Practice is TWU's imposition and enforcement of the observance of evangelical Christian religious practices on its law students, regardless of their religious or conscientious beliefs. Recent freedom of religion jurisprudence does not support the protection of such a practice. Section 2(a) is only engaged by state conduct that actually limits the ability to hold, profess, or practice religious beliefs.

8. In *Loyola High School v. Quebec (Attorney General)*,[5] the majority held that freedom of religion was engaged where the government mandated a curriculum that would force teachers at a Roman Catholic school to teach Catholicism from a "neutral" perspective, because this amounted to "requiring a Catholic institution to speak about Catholicism in terms defined by the

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[4] [1985] 1 S.C.R. 295 at pp. 336-37 ("*Big M*"); JBOA, tab 72. See also *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at p. 759 ("*Edwards Books*"); JBOA, tab 107.

[5] [2015] 1 S.C.R. 613, 2015 SCC 12 ("*Loyola*"); JBOA, tab 49.

state rather than by its own understanding of Catholicism."[6] However, the majority went on to conclude that a curriculum requiring Loyola to teach students about other religions and ethics from a neutral perspective did not interfere with freedom of religion because it did not require anyone to "shed their own beliefs."[7] The fact that the teachers' personal religious views were not at the forefront in the teaching of ethics and other religions did "not mean that the Loyola teacher is silenced, or forced to forego his own beliefs, or even appears to be doing so."[8]

9. A similar conclusion was reached in *Hall (Litigation guardian of) v. Powers*,[9] where a student at a Roman Catholic high school sought an injunction to allow him to attend the school's prom with his boyfriend. The principal and the School Board had denied his request on the basis that approval would have been contrary to Catholic beliefs about homosexual sexual activity. The court, in granting the injunction, rejected this position and concluded that permitting Mr. Hall to attend prom with his boyfriend would not impair the freedom of religion of the principal or School Board, as it "will not compel or restrain teachings within the school and will not restrain or compel any change or alteration to Roman Catholic beliefs."[10]

10. The Decision does not force evangelical Christians to forego, silence or constrain their personal beliefs. Evangelical Christians who attend, teach or work at TWU are free to adhere to the standards of conduct described in the Covenant, and can undertake in writing to do so.

11. Further, recent authority directs that freedom of religion does not protect practices that coerce or require the participation of others. Where a s. 2(a) claim is based on an activity that

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[6] *Ibid* at para. 63.
[7] *Ibid* at para. 78.
[8] *Ibid.*
[9] (2002), 213 D.L.R. (4th) 308, 59 O.R. (3d) 423 (Sup. Ct.); JBOA, tab 169.
[10] *Ibid* at para. 55.

restrains or prescribes the conduct of non-believers, or otherwise involves a belief that others must behave in a certain way, it falls outside the scope of the right. Any other conclusion would contradict the very principles underlying s. 2(a): a right designed to shield individuals from religious coercion cannot be used as a sword to coerce religious practice.

12. As Dickson J. stated *Big M*:

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.[11] [Emphasis added.]

13. In the present case, to the extent that the values cited by Dickson J. are threatened, it is only by the appellants' assertion of a constitutional right to require religious practice by others.

14. Professor Richard Moon has rightly concluded that freedom of religion "does not support the accommodation of religious views about the rights and freedoms of others."[12] He observes that there is a line between the "sphere of personal or communal religious life and the sphere of political or civic life" that must be maintained in adjudicating freedom of religion claims.[13] Where an ostensibly religious claim in fact concerns a position on the rights, interests or status of others in the community, that belief or practice enters the public sphere and becomes "a political position, and not a personal religious practice or belief, and as such it should not be excluded or insulated from political decision-making" in the way that a matter personal to the individual

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[11] *Big M, supra* at p. 346. See also *Syndicat Northwest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47 at paras. 61-62 ("*Amselem*"); JBOA, tab 64. See also, *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141 at p. 182; JBOA, tab 172.

[12] Richard Moon, "Conscientious Objections by Civil Servants: The Case of Marriage Commissioners and Same Sex Civil Marriages" in B. Berger and R. Moon, *Religion and the Exercise of Public Authority* (Hart, 2016) (forthcoming); *Available at SSRN 2631570* (2015) (Moon, "Conscientious Objections") at p. 25 (page citations to *SSRN*); JBOA, tab 173.

[13] *Ibid* at p. 3.

could be.[14]

15. The British Columbia Court of Appeal came to a similar conclusion in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*.[15] The Ktunaxa Nation claimed that their religion required that all persons refrain from developing a particular area of land. As the Court pointed out, the religious custom the Ktunaxa invoked – "do not develop" – was one that would have to be performed by all people, of every faith or creed. The Court concluded that s. 2(a) does not include the freedom to control or modify the behaviour of others as a method of preserving the vitality of a religious community.[16]

16. The Court distinguished between cases like *Loyola*, where the state's regime interfered with how a voluntarily-created community passed on its religious values, and cases where an organization seeks to impose religiously-based conduct on individuals who do not share the underlying religious beliefs.[17] As for the latter sort of cases, the Court commented:

> It is not, in my view, consonant with the underpinning principles of the *Charter* to say that a group, in asserting a protected right under s. 2(a) that implicates the vitality of their religious community, is then capable of restraining and restricting the behaviour of others who do not share that belief in the name of preserving subjective religious meaning.[18]

17. The *Ktunaxa* decision is consistent with the Supreme Court's direction in *Amselem* that freedom of religion is a personal and subjective freedom "that is integrally linked with an individual's self-determination and fulfilment and is a function of personal autonomy and choice, elements which undergird the right." The emphasis, as Iacobucci J. put it, is on "personal choice

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[14] *Ibid* at p. 22.

[15] 2015 BCCA 352 at paras. 68-70 ("*Ktunaxa*"); JBOA, tab 170.

[16] *Ibid* at paras. 73-74.

[17] *Ibid* at paras. 72-73.

[18] *Ibid* at para. 73.

of religious beliefs."[19] The freedom is "is founded on the idea that no one can be forced to adhere to or refrain from a particular set of religious beliefs."[20] It guarantees that no one can be "compelled ... to act in a manner contrary to his or her beliefs."[21] It does not extend to allow one person to impose on the personal choice and religious beliefs of another person, let alone claim a constitutionally-protected right to do so.

18. In the present case, the Practice has the effect of coercing non-believers into adhering to conduct motivated or required by evangelical Christian beliefs. Students who do not identify as evangelical Christians are required to act or refrain from acting in a manner that is directed by a religion they do not observe. By restraining and coercing the behaviour of others, the Covenant undermines the very principles that animate s. 2(a).

19. It would be antithetical to the philosophy underlying s. 2(a) to recognize a claim that requires non-believers to "adhere or refrain from a particular set of religious beliefs" or to act contrary to their own beliefs. As Iacobucci and Major JJ. stated in their concurring opinion in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*,[22] "'[f]reedom of religion' should not encompass activity that so categorically negates the 'freedom of conscience' of another."

C. <u>The appellants have not established a sincere belief in a religious obligation</u>

20. In order to succeed in a claim under s. 2(a), the claimant must establish:

> a practice or belief, having a nexus with religion, which calls for a particular line of

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[19] *Amselem, supra* at paras. 42-43.

[20] *Loyola, supra* at para. 59, *per* Abella J.

[21] *Mouvement laique quebecois v. Saguenay (City)* 2015 SCC 16 at para. 69; JBOA, tab 3. See also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650, 2004 SCC 48 at para. 65; JBOA, tab 78.

[22] [1995] 1 S.C.R. 315 at p. 437 ("*B.(R.)*"); JBOA, tab 66. The majority in *B.(R.)* dealt with the freedom of religion claim under s. 1, whereas Iacobucci and Major J. preferred to deal with it at as a question of scope.

> conduct, either by being objectively or subjectively obligatory or customary, or by, in general, engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith.[23]

21. The claimant's belief or practice must be religious in content: only "beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion."[24] While the beliefs that underlie the Covenant may be religious in nature, the evidence does not establish that the Practice itself is in fact religious in its content; that is, that studying law among those who have signed a covenant to refrain from Biblically-condemned practices is a precept of evangelical Christianity. Attending law school is not a religious rite or practice, but a secular activity. There can be religious elements to education. That is the basis for the majority opinion in *Loyola*, in which the religious quality of the education was directly linked to the interest in transmitting religious beliefs to children – a factor clearly absent in a law school context.[25] In *Loyola*, only the study of Catholicism itself – and not the study of other religions – was found to fall within the religious sphere for Loyola's students; plainly the teaching of law falls even farther outside.

22. Further, the evidence does not establish that the respondents believe that this particular line of conduct – attendance at law school only with those who have signed a covenant to refrain from Biblically-condemned practices – is required by their religion. The evidence only goes so far as to suggest that they might prefer an evangelical Christian atmosphere.

23. The case law since *Amselem* makes clear that a "preference" for a certain line of conduct

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[23] *Amselem, supra* at para. 56.

[24] *Ibid* at para. 39.

[25] *Loyola, supra* at paras. 61, 64 emphasizes that the interference with religious freedom arose because the Minister's decision interfered with the manner in which the members of an institution "formed for the purpose of transmitting Catholicism could teach and learn about the Catholic faith." The context here is markedly different.

is not sufficient to meet the test for a freedom of religion claim.[26] Where a claim relates to a practice, the claimant must show that they sincerely believe that the practice is *required* by their religion. An optional activity, or an activity that the claimant might prefer over the available alternatives, does not meet the test. There is no claimant in this case who states that they subjectively believe that evangelical Christianity requires that they attend law school only where the other students have signed a covenant to refrain from Biblically-condemned practices.

24. Further, it is undisputed that evangelical Christians – including Mr. Volkenant – have attended other law schools in Canada, and there is nothing in evidence to suggest that the sexual practices of other law students in any way interfered with their religious practice or beliefs. A student's desire to learn law from a Christian perspective is, on its face, simply a matter of pedagogical bent and curriculum, and there is nothing in evidence to establish that such a desire requires the Practice.

D. The appellants have not demonstrated an interference with their religious freedom

25. As stated in *Edwards Books* interference is only established where religious beliefs or conduct "might reasonably or actually be threatened."[27] The freedom only prohibits "burdens or impositions" on a religious practice that are non-trivial.[28]

26. In *Re Marriage Commissioners Appointed Under the Marriage Act*, Smith J.A. in her concurring opinion found that the requirement that marriage commissioners perform same-sex

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[26] *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256, 2006 SCC 6, at para. 35; JBOA, tab 171. *S.L. v. Commission scolaire des Chênes* [2012] 1 SCR 235, 2012 SCC 7 at paras. 2, 22, 24, 26; JBOA, tab 69. See also *R. v. N.S.*, [2012] 3 S.C.R. 726, 2012 SCC 72, at para. 11, referring to the fact that the claimant had to show that she sincerely believed "that her religion requires her to wear a niqab in the presence of men who are not her relatives, including while testifying in court" (emphasis added); JBOA, tab 100.

[27] *Supra*, at p. 759.

[28] *Amselem, supra* at para. 58.

marriages even where they had a religious objection to same-sex conduct affected their religious beliefs "only in a secondary way".[29] Because they were not compelled to engage in the conduct that they found objectionable, any interference was trivial or insubstantial.

27. This conclusion applies with far greater force to the appellants. They are not being asked – let alone required – to forego their beliefs about what sexual behaviours are condemned by the Bible. They are not being silenced; they may share these views with others as they see fit. Simply put, sitting in the same law school classroom as a classmate in a same-sex marriage does not implicate a student in that marriage or otherwise interfere with that students' personal religious beliefs or conduct in any way. The appellants' implied argument to the contrary was rightly rejected long ago. As the Court stated in *Reference re Same-Sex Marriage*:

> The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of Charter rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the Charter was meant to foster.[30]

PART IV – ORDER REQUESTED

28. Pursuant to the Order of Hoy A.C.J.O., the Alliance does not seek costs and asks that no costs be ordered against it. The Alliance respectfully requests ten minutes for oral arguments at the hearing of the appeal to present its distinct submissions regarding s. 2(a) of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

February 26, 2016

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[29] 2011 SKCA 3 at para. 148; JBOA, tab 139.
[30] 2004 SCC 79, at para. 46; JBOA, tab 63.

SCHEDULE A – LIST OF AUTHORITIES

B.(R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315.

Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), [2004] 2 S.C.R. 650, 2004 SCC 48.

Hall (Litigation guardian of) v. Powers (2002), 213 D.L.R. (4th) 308, 59 O.R. (3d) 423 (Sup. Ct.).

Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations), 2015 BCCA 352.

Loyola High School v. Quebec (Attorney General), [2015] 1 S.C.R. 613, 2015 SCC 12.

Mouvement laique quebecois v. Saguenay (City), 2015 SCC 16.

Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256, 2006 SCC 6.

P.(D.) v. S.(C.), [1993] 4 S.C.R. 141.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295.

R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713.

Re Marriage Commissioners Appointed Under the Marriage Act, 2011 SKCA 3.

S.L. v. Commission scolaire des Chênes, [2012] 1 SCR 235, 2012 SCC 7.

Syndicat Northwest v. Amselem, [2004] 2 S.C.R. 551, 2004 SCC 47.

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