SCC SUPPORTS LGBTQ STUDENTS IN BALANCING RELIGIOUS FREEDOMS AND STATUTORY MANDATES

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On June 15, 2018, the Supreme Court of Canada released landmark decisions on Canadian limits on institutional religious freedoms. The decisions concerned regulator rejections of a law school which required that students sign a covenant prohibiting any form of sexual activity outside of a marriage between a man and a woman. In *Law Society of British Columbia v Trinity Western University*[1] and Trinity Western University v Law Society of Upper Canada[2], the Supreme Court found that both the Ontario and British Columbia law societies' (the "Law Societies") decisions not to accredit Trinity Western University's ("TWU") proposed law school proportionately balanced religious freedom and the Law Societies' statutory mandates.

Facts

TWU is a private post-secondary institution that provides education in an evangelical Christian environment. While LGBTQ students are not prohibited from attending TWU, all students are required to sign a covenant that prohibits any form of sexual activity outside of a marriage between a man and a woman. In light of this covenant, the Law Societies voted to deny accreditation to TWU's proposed law school after long deliberations on the basis that they were discriminatory to LGBTQ people.

The Courts Below

On judicial review, Ontario's Divisional Court held that the Law Society of Ontario had properly exercised its statutory mandate to act in the public interest in refusing to grant accreditation to TWU's proposed law school because its mandatory covenant was discriminatory.[3] While the denial of accreditation had violated TWU's section 2(a) religious rights under the *Charter of Rights and Freedoms*, the court found that the violation was proportionate and reasonably balanced against equality rights and the Law Society of Ontario's public interest mandate. The Ontario Court of Appeal later upheld this decision unanimously.

In contrast, the British Columbia Court of Appeal reversed the Law Society of British Columbia's decision not to approve TWU's proposed law school. The court instead found that the decision's effect on TWU's religious rights was severe compared to the minimal impact on Law Society of British Columbia's statutory public interest objectives.[4]

Leave to appeal to the Supreme Court was given for both cases in light of these contrasting Court of Appeal decisions.

The Decision

The Supreme Court upheld the Law Societies' decisions to deny accreditation to TWU's proposed law school in a 7-2 decision.

The majority of the Supreme Court recognized that the Law Societies had violated TWU's communal religious freedom. As a *Charter* right was engaged in the Law Societies' administrative decision, the Supreme Court applied a framework from previous decisions, the *Dore/Loyola* framework, for the balancing Charter rights with statutory objectives.

The Supreme Court held that the Law Societies had balanced competing interests reasonably and proportionately. As with many administrative decisions, the decision under review did not need to be correct; it was only required to fall within a range of possible reasonable outcomes.[5]

On one hand, the Supreme Court reasoned that TWU's religious rights were not limited to a significant extent because the mandatory covenant at issue was not required for the study of law in a Christian environment.[6] Students could still follow the covenant without it being mandatory.[7]

On the other hand, the Supreme Court emphasized that the Law Societies' statutory public interest mandate included preventing harm to LGBTQ law students, an interest in a diverse bar and equal access to the legal profession.[8] The Law Societies therefore made a reasonable decision to consider the importance of their statutory objectives to outweigh the harm suffered by TWU's violation of religious rights in denying approval to its proposed law school.

In a minority concurring decision, Justice Rowe found that TWU's religious rights had not been engaged by the Law Societies' decisions. He argued that while religious rights protected individuals and faith communities' beliefs and practices, it did not protect their attempts to impose adherence to others who do not share their beliefs.[9] With no *Charter* right balanced against the Law Societies' public interest mandate, the decision to deny TWU accreditation was entirely reasonable.

In another minority concurring decision, Chief Justice McLachlin provided her views on how the Dore/Loyola framework should be applied, commented that freedom of expression and freedom of association should also be considered and disagreed regarding the impact on the freedom of religion of members of the TWU community. She ultimately agreed, however, that the decision of the Law Societies was reasonable as they had a heightened duty to maintain equality and avoid condoning discrimination.

In dissent, Justice Côté and Justice Brown argued that the Law Societies' statutory mandates did not include the governance of law schools.[10] They further noted that the mandatory covenant was not discriminatory because it did not explicitly target the LGBTQ community and did not condone discrimination.[11] They concluded that Law Societies had failed to take into account these considerations and therefore came to an unreasonable decision.

Implications

The decision serves as a high-profile example of judicial review of administrative decisions engaging Charter rights. The Supreme Court declined to depart from the Dore/Loyola framework, despite criticism in some circles. In these decisions, the Supreme Court stated that the framework seeks to ensure that "Charter protections are upheld to the fullest extent possible given the statutory objectives within a particular administrative context".[12]

The Supreme Court's analysis is also illustrative of the deference courts may show – even when Charter rights are engaged – when it comes to considering the enforcement of statutory mandates by administrative bodies.

The impact of these decisions extends beyond adjudging the quality of various legal tests. The number of interveners (23) across religious and human rights spectra illustrate how personally important these decisions were to groups across Canada. As noted above, the Supreme Court focused on interests of diversity and equal access to the legal profession in reaching its conclusions. Many will view these decisions favourably as a continuation of the use of the Charter to advance the rights of LGBTQ Canadian citizens.[13]

by Adam Chisholm and Joseph Osborne

[1] Law Society of British Columbia v Trinity Western University, 2018 SCC 32 [TWU BC].
[2] Trinity Western University, et al v Law Society of Upper Canada, 2018 SCC 33 [TWU Ontario].
[3] Trinity Western University v Law Society of Upper Canada, 2015 ONSC 4250.
[4] Trinity Western University v Law Society of British Columbia, 2016 BCCA 423.
[5] TWU Ontario, supra at para 29.
[6] TWU BC, supra at para 88.
[7] TWU Ontario, supra at para 38.
[8] TWU BC, supra at para 92.
[9] Ibid at para 209.
[10] Ibid at para 282.
[11] TWU Ontario at para 81; TWU BC at para 138.
[12] TWU BC, supra at para 57.
[13] See eg Halpern v Canada (Attorney General), [2003] OJ No 2268 (Ont. C.A.).

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.