Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
SML Steinecke Maciura LeBlanc Barristers & Solicitors

Even More Deference to Regulators

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On June 15, 2018, the Supreme Court of Canada released two companion decisions in the Trinity Western University (TWU) matter. These high profile and long-awaited decisions articulate Canada's highest court's balancing of the competing rights - of respect for sexual orientation and religious belief - when they collide in the regulation of professions. However, for regulators, the real story about these decisions is the degree of deference the Court awarded to policy decisions made by regulators.

TWU offers a law degree. There was no dispute that the program meets all of the requirements for ensuring that its graduates are competent and ethical. However, TWU has a student code of conduct, based on religious belief, which its students are required to sign, that prohibits sexual activity other than in a heterosexual marriage. The issue was whether legal regulators could refuse to accredit a program that discriminates on the basis of sexual orientation.

The highest Court in British Columbia struck down a decision by the regulator to refuse registration to the graduates of TWU, primarily because the regulator made its decision based on a vote of its members rather than a principled decision on the merits. However, that Court also suggested that the decision was contrary to the protections for religious belief in the *Canadian Charter of Rights and Freedoms*. The Ontario Court of Appeal, on the other hand had reached the opposite conclusion. It held that the Ontario regulator was justified in refusing to accredit TWU on the basis that the TWU code of conduct was discriminatory. The Ontario regulator did not use a referendum process; the Benchers debated and voted on the issue.

The majority of the Supreme Court of Canada held that the regulators had engaged in a reasonable balancing of *Charter* rights against its statutory mandate. The majority acknowledged that the decision not to accredit the school did violate, in a material way, the freedom of religion of the school community. However, the decision not to accredit the school was a proportional response. Its decision was based on important considerations relating to:

> equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students were valid means by which the LSBC could pursue its overarching statutory duty: upholding and maintaining the public interest in the administration of justice, which necessarily includes upholding a positive public *perception* of the legal profession.

The majority also noted that the regulator only had two options: to accredit or not to accredit the school, thereby making the balancing decision more stark.

There are three significant points in this decision for regulators:

1. **Accreditation decisions are not limited to ensuring graduates are competent and ethical**. The majority held that it was within the mandate of the regulator to also ensure that the school did not foster values that were inconsistent with those of the profession. The two dissenting Justices viewed this aspect of

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the decision as giving regulators undue authority to regulate educational programs. This broader scope of review of educational programs has implications for other contexts including recognizing international schools that may foster certain religious or cultural beliefs and for professions where different philosophical views exist.

2. **Courts will rarely require detailed reasons for policy decisions by regulators**. In fact, given the process followed by the BC regulator, there was very little in the way of rationale for the decision. However, the Court was willing to review the record to infer the rationale for the decision and impute the proportionality analysis. This approach is consistent with other recent decisions including: *Alberta College of Pharmacists v Sobeys West Inc.*, 2017 ABCA 306; *Green v Law Society of Manitoba*, 2017 SCC 20; and *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41.

3. **Member referenda were given approval**. Perhaps this is the most puzzling aspect of the majority decision as it gives support to an enhanced role for members in making decisions about their own regulation. The current consensus amongst regulators and public policy thinkers is that the regulator should have less accountability to practitioners and greater oversight from external, non-member authorities. Indeed, many are now questioning the process of electing professional members to serve on regulatory Boards. The two dissenters commented on the referendum process, calling it a violation of the statutory duty of the regulator. Likely this aspect of the majority's ruling reflects that regulators can, in appropriate cases, consult with its members in this manner rather than an endorsement of the general use of a referendum. The issue needs to be considered in the context of the nature of the decision (professional and societal values) and the specific statutory scheme and should not be viewed as a general endorsement of regulating professions through referenda.

Lawyers will be intrigued about the different approaches taken in the four separate judgments on how regulators are to analyze when they can infringe *Charter* rights. The majority took the view, questioned by four other justices, that the usual section 1 *Charter* analysis (often called the *Oakes* test) did not apply to administrative decisions. The majority endorsed a simplified proportionality analysis approach.

While regulators have faced some pushback from the courts in some recent complaints and discipline decisions, the deference to the exercise of discretion by regulators demonstrated in the TWU decision has never been higher.

The companion decisions can be found at: http://canlii.ca/t/hsjpr and http://canlii.ca/t/hsjpt.