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

Raising the Bar

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Regulators have struggled for years balancing the concepts of parity and changing societal expectations. The principle of parity says that the sanction for a particular type of misconduct should be consistent with that imposed in prior decisions. However, changing societal expectations suggests that some sanctioning ranges are no longer suitable. Attempts to go above the previous range for sanctions, especially in the area of sexual abuse, have resulted in bumpy roads for regulators: *College of Physicians and Surgeons of Ontario v Peirovy*, 2018 ONCA 420, http://canlii.ca/t/hrt0r, *Horri v The College of Physicians and Surgeons*, 2018 ONSC 3193, http://canlii.ca/t/hs8sz, *Abrametz v The Law Society of Saskatchewan*, 2018 SKCA 37, http://canlii.ca/t/hs7tk.

However, the recent decision of the Supreme Court of Canada in *R. v Friesen*, 2020 SCC 9, http://canlii.ca/t/j64rn may advance this debate. Mr. Friesen was initially sentenced to six years in jail for sexual interference with a four year old girl. The Manitoba Court of Appeal reduced the sentence to 4 ½ years because the trial Judge had used a four to five year "starting point" from cases where there had been a breach of trust (before considering aggravating factors). The Court of Appeal found this to be an error because there was no breach of trust found in the case.

The Supreme Court of Canada restored the trial Judge's sentence in a lengthy discussion of the relevant principles.

To begin with, the Court viewed the principle of parity of sentences for similar conduct as part of the broader principle of proportionality:

> "All sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principle of proportionality has long been central to Canadian sentencing…. Parity and proportionality do not exist in tension; rather, parity is an expression of proportionality. A consistent application of proportionality will lead to parity.

The Court went on to state "sentencing ranges and starting points are guidelines, not hard and fast rules". In some cases it may be possible to determine a suitable, individualized sentence without reference to the range at all. Appellate courts should not use their reviewing authority to enforce or impose a sentencing range. Having said that, the Court also declined to "suggest that starting points are no longer a permissible form of appellate guidance".

The Court went on to engage in a lengthy discussion of the "wrongfulness of sexual offences against children and the profound harm that they cause." Much of this discussion resonates with the concepts underlying the sexual abuse of clients, including adults, by professionals.

In this discussion the Court said that such offence provisions protect the "the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children." The Court said:

> As Professor Elaine Craig notes, "This shift from focusing on sexual propriety to sexual integrity enables greater emphasis on

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> violations of trust, humiliation, objectification, exploitation, shame, and loss of self-esteem rather than simply, or only, on deprivations of honour, chastity, or bodily integrity (as was more the case when the law's concern had a greater focus on sexual propriety)"…. This emphasis on personal autonomy, bodily integrity, sexual integrity, dignity, and equality requires courts to focus their attention on emotional and psychological harm, not simply physical harm.

This led the Court to apply the principles of proportionality to the sexual abuse of children. The conduct is both clearly wrong and extremely harmful. These considerations, particularly where they are accompanied by legislative changes addressing the concern, mean that sentencing must prioritize denunciation and deterrence. As such "it is no longer open to the judge to elevate other sentencing objectives to an equal or higher priority" although other objectives, such as rehabilitation, may be given some weight.

The Court then went on to discuss factors that assist in determining a fit sentence in child sexual abuse cases including:

- Likelihood to re-offend;
- Abuse of a position of trust and authority;
- Duration and frequency; and
- Age of the victim, partially as an indicator of their degree of vulnerability.

The Court acknowledged that a degree of physical interference could be an aggravating factor in that it was an indicator of the degree of violation of the child. However, the Court was concerned that this consideration could be misapplied because:

- It could resurrect traditional notions of sexual impropriety (e.g., prioritizing penile penetration as the key aggravating factor);
- It assumes that the harm to the child correlates to the physical act;
- It can de-emphasize the inherent wrongfulness of sexual abuse of children in general; and
- It can lead to a false hierarchy of physical acts.

The Court also indicated that a victim's participation in the conduct was irrelevant and should not be considered when coming up with a fit sentence. In fact, grooming behaviour by the offender, which can lead to victim participation, is an aggravating factor.

In the circumstances of this case, the Court afforded less weight to the guilty plea and expression of remorse than it might otherwise have received because they did not result in achieving a "change in attitude that reduced his likelihood of further offending".

The Court also pointed out that the six year sentence should not be viewed as the upper end of the range for these types of offences. Unfortunately, in the Court's experience this was not a "worst case".

The Court went on to discuss three aggravating factors in the case that could have been considered, but were not:

- The potential harm to the mother from the extortion that accompanied the sexual offence;
- The fact that the defendant committed the offences in the home of the child's mother; and

- The evidence of misogynistic attitudes on the part of the defendant.

Many of the principles of this case could be applied to the sanctioning of practitioners who engage in the sexual abuse of their clients. The wrongfulness of the acts and the potential harm to clients are enormous.

The case also gives guidance to considerations that may allow for the raising of the range of sanctions from its previous, perhaps too low, position. For example, social science evidence about the nature and potential harm, including long-term harm, to clients can be used. Legislative measures to address the issue, including amendments to the sanctions that can be imposed, is an indicator of changing societal views. Distinguishing older precedents that were based on a different understanding of the nature of the misconduct is also helpful. Finally, focussing the on the aggravating factors mentioned above is important.

This case illustrates that raising the bar, for some forms of professional misconduct, is possible.