Ontario Court of Appeal Upholds Law Society's Decision to Deny Accreditation to Trinity Western University

June 30, 2016

Trinity Western University v. Law Society of Upper Canada, 2016 ONCA 518

In a unanimous decision, Justices MacPherson, Cronk and Pardu of the Ontario Court of Appeal upheld the Law Society of Upper Canada's (the "Law Society" and "LSUC") decision to deny accreditation to Trinity Western University's ("TWU") proposed law school. TWU requires as a condition of admission that applicants sign a Community Covenant pledging, among other things, to abstain from sexual intimacy outside of heterosexual marriage. The Law Society engaged in an unprecedented process and lengthy debate which was followed by a majority vote against accreditation. The key issue before the Court was whether the Law Society's decision to deny accreditation reasonably balanced TWU's freedom of religion with the Law Society's public interest mandate; in particular, the public interest in ensuring LGBTQ students have access to every accredited law school. Writing for the Court, Justice MacPherson held (at para. 129):

In my view, the answer to this question is 'Yes', indeed 'Clearly yes'.

The Court upheld all aspects of the decision of the Ontario Divisional Court (2015 ONCA 4250), which had upheld the Law Society's decision on TWU's application for judicial review. The Court agreed with the lower court that the Law Society's decision infringed TWU's freedom of religion. However, it found that the Law Society's benchers reasonably balanced that infringement with the public interest in maintaining merit as the only criterion for entry into the legal profession, thereby ensuring equality of opportunity in access to the legal profession in Ontario.

The Court also agreed with the Divisional Court that the Supreme Court of Canada's decision in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 was not binding precedent in this case because it was distinguishable on its facts.

The Court of Appeal also concurred with the Divisional Court that the standard of review of the Law Society's decision was reasonableness. The question of accreditation was

squarely within the Law Society's statutory mandate, and as such a presumption of reasonableness applied. The balancing the Law Society engaged in was fact specific and was not a true question of jurisdiction or a question of central importance to the legal system, and therefore the presumption of reasonableness was not displaced. In addition, the Court found that the Law Society's decision had to be assessed from the entire record before the Law Society to determine whether the decision was reasonable, and not by focusing on benchers' speeches in minute detail.

The Court held that the Law Society's decision infringed TWU's freedom of religion, finding that a broad reading of freedom of religion was appropriate in the circumstances. On that basis, the Court held the denial of accreditation would make it harder for TWU to attract students to its law school, which infringed its ability to express its religion.

Notwithstanding this finding, the Court went on to find that the Law Society had an obligation to govern the legal profession in the public interest. It further found that in setting and maintaining standards of learning, professional competence and professional conduct, the Law Society was entitled to do so against the backdrop of the composition of the legal profession, including the desirable goal of promoting a diverse profession (at para.109):

It follows that one of the LSUC's statutory objectives is to ensure the quality of those who practise law in Ontario. Quality is based on merit, and merit excludes discriminatory classifications… the LSUC over its long history has strived to remove discriminatory barriers to access to the legal profession.

In examining the balancing exercise undertaken by the Law Society, the Court held that TWU's admission policy was clearly discriminatory (at para. 119):

My conclusion is a simple one: the part of TWU's Community Covenant in issue in this appeal is deeply discriminatory to the LGBTQ community, and it hurts.

Consequently, the Court held that if the Law Society accredited TWU, members of the LGBTQ community would have a diminished opportunity for admission to the Ontario bar, and that the Law Society was entitled to consider this discriminatory effect when evaluating whether it was in the public interest to accredit TWU's proposed law school. The Court considered this in the context of the Law Society's history of ensuring the only criterion for admission to the Ontario bar was merit.

Ultimately, the Court held that the benchers' speeches showed that the Law Society had engaged in a thoughtful and thorough balancing of the rights at issue: "a full reading of the 29 speeches leaves a reader impressed." (para. 124). Indeed, the Court noted that the process adopted by the Law Society to consider TWU's application was "excellent" (para. 122). The Court ultimately found that the Law Society's decision not to accredit TWU was a reasonable outcome.

This is the first decision of an appellate court on this issue in Canada, but it will not be the last. The law societies in Nova Scotia and British Columbia also denied TWU accreditation, and judicial review proceedings of those decisions were brought by TWU. The lower courts in both those provinces struck down their respective law societies' decisions, and appeals were heard in Nova Scotia in April 2016 and in British Columbia in June 2016. Stay tuned.

Borden Ladner Gervais LLP ("BLG") acted on behalf of the Law Society (Guy J. Pratte, Nadia Effendi and Duncan A.W. Ault)

By

Heather Pessione, Graham Splawski, Nadia Effendi

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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