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**RECENT FREEDOM OF RELIGION
DECISIONS FROM THE SUPREME
COURT OF CANADA**

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**25th Annual
Church & Charity Law
Seminar™**
Toronto – November 8, 2018

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A. INTRODUCTION

- The Supreme Court of Canada (“SCC”) delivered two decisions involving freedom of religion this year:
 - *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 (31 May 2018) (“*Wall*”), and
 - *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (with the companion decision in *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33) (15 June 2018) (“*Trinity Western*”)
- This presentation provides an overview of these two SCC decisions and their impact on freedom of religion
- See Bulletins on both decisions at www.carters.ca

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B. RELIGIOUS AUTONOMY IN THE WALL DECISION

1. Facts

- Mr. Wall was a member of the Congregation who had been “disfellowshipped” after the Congregation’s Judicial Committee determined that he was not sufficiently repentant for having failed to observe the accepted scriptural standards of the Congregation
- Mr. Wall later made an application for judicial review, claiming that his property and civil rights were prejudiced because the decision to disfellowship him had caused him to be shunned by his family as well as by other Jehovah’s Witnesses, which had resulted in significant loss in his business income as a real estate agent

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- Both the Alberta Court of Queen’s Bench and the Alberta Court of Appeal held that courts have the jurisdiction to review decisions made by religious groups regarding the discipline or expulsion of members where such decision is made in a manner that does not reflect principles of natural justice
- At the Court of Appeal, Mr. Wall had alleged that before his expulsion he was not provided with the details of the allegations against him or an explanation of the discipline process that he would face. Mr. Wall also alleged he was not advised whether he could retain counsel for purposes of the meeting with the Judicial Committee or whether there would be a record of the proceedings, nor did he receive written reasons

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2. The SCC’s Ruling

- The SCC stated that the central question in the appeal was “when, if ever, courts have jurisdiction to review the decisions of religious organizations where there are concerns about procedural fairness”
- The SCC unanimously held that the Congregation’s decision to expel Mr. Wall could not be reviewed by a court under judicial review for three reasons:
 - First, judicial review is a public law concept restricted to public decision makers (not private parties) where there is “an exercise of state authority and where that exercise is of a sufficiently public character”
 - The Congregation was not exercising statutory authority, plus its decision was not of sufficiently public character

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- Second, where no underlying legal right is present, there is no free-standing right to procedural fairness concerning certain decisions made by religious groups and other voluntary associations
 - Courts have jurisdiction to consider a religious group or voluntary association’s adherence to its own procedures and, in certain circumstances, the fairness of those procedures where there is “a legal right which a party seeks to have vindicated,” such as wrongful dismissal, property or contractual right
 - Mr. Wall had no property right in maintaining his client base or “a right to the business of the members of the Congregation”, or contractual right because there was no written constitution

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- Third, even where judicial review would otherwise be available, courts should only consider issues that are justiciable
 - The SCC stated that decisions of justiciability are contextual, and courts should ask whether they have the “institutional capacity and legitimacy to adjudicate the matter”
 - Considering the relevance of religion to the question of justiciability, the SCC referred to its decision in *Syndicat Northcrest v Amselem*, which held that: “[s]ecular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion”

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- The SCC added that the court may also lack the legitimacy and institutional capacity to even review a religious group’s procedural rules where those rules may require the interpretation of religious doctrine
 - It therefore upheld its previous findings that courts do not have the legitimacy or institutional capacity to deal with the merits of a religious tenet
- Regarding the right to freedom of religion under the *Canadian Charter of Rights and Freedoms* (“*Charter*”), the SCC held that the *Charter* does not apply directly to private litigation, but rather only to legislative, executive and administrative branches of government

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3. Commentary

- While the *Wall* decision narrows the scope of the court’s jurisdiction by identifying the types of fact situations over which it will not exercise jurisdiction, it does not provide much clarity over instances in which the court will intervene. Rather, it simply identifies three situations when the court will not intervene
- First, it is clear that judicial review is restricted to public decision makers where there is an exercise of state authority of a sufficiently public character
 - an impact on a broad segment of the public, in and of itself, is not sufficient to make a decision public, but rather it must involve questions about the rule of law and the limits of an administrative decision maker’s exercise of power

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- As such, the SCC affirmed the principle that religious groups and other voluntary associations are private, non-governmental bodies rather than state actors or public bodies, and therefore these entities have autonomy to make decisions as private bodies free from the statutory constraints that are imposed on public bodies
- Second, the *Wall* decision provides clarity on the court’s stance concerning the justiciability of decisions made by religious groups
 - Matters concerning religious doctrine are beyond the scope of the court’s jurisdiction and will not be subject to review

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- However, a dispute is not necessarily non-justiciable simply because it has a religious aspect to it. Rather, the non-justiciability of such disputes is constrained to matters involving religious doctrine, including where procedural rules involve the interpretation of religious doctrine
 - Courts may still review procedural rules that are “based on a contract between two parties, even where the contract is meant to give effect to doctrinal religious principles”
- Third, the *Wall* decision provides clarity on the limitation of courts to review decisions made by religious groups and other voluntary associations for procedural fairness.

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- Courts should not interfere in decisions of religious and voluntary associations, even where procedural fairness and the principles of natural justice are alleged to have been breached unless a legal right has been violated
 - In this regard, the SCC held that “[w]hat is required is that a *legal right of sufficient importance* – such as a property or contractual right – be at stake” [Emphasis added]
 - In order to provide clarity on this point, the SCC identifies various examples of legal rights, including civil and property rights, contractual rights, and underlying legal rights, such as wrongful dismissal.

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- Considerations for Not-for-Profit Corporations:
 - The *Wall* decision did not explicitly reference corporate legislation since the Congregation was not incorporated and did not have a written constitution, by-laws or rules
 - However, some new corporate legislation, such as the *Canada Not-for-profit Corporations Act* (as well as the pending Ontario *Not-for-Profit Corporations Act, 2010*), permit not-for-profit corporations to discipline a member through their constating documents, provided that “the circumstances and the manner in which that power may be exercised” is set out in the articles and bylaws of the corporation

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- As such, the courts would generally have the ability to review whether the discipline procedures set out in the constating documents of the corporation and the applicable underlying corporate legislation have been complied with where a member of a corporation has been disciplined, no matter what the reason was for the discipline in the first place
- Therefore, the *Wall* decision should be seen as relatively narrow in scope as it is limited to decisions made by religious organisations or other voluntary associations that do not have an enforceable “contract” or written agreement, such as a written constitution, letters patent, articles of incorporation, by-laws, or rules that would otherwise create a legal relationship of a contractual nature with their members

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- Organizations that have established legal relationships with their members, akin to that of a contract, should recognise that rights associated with such relationships, when contravened, may be subject to legal review for failure to follow the procedures of the organization
- This would be in addition to the jurisdiction of the courts to review decisions that may impact other legal rights of the individual in question, such as matters of wrongful dismissal, or a property or contractual right
- The SCC’s attempt to clarify matters in the limited facts of the *Wall* decision has left open questions that will themselves likely require further clarification and be expanded upon by the SCC and lower courts

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C. TRINITY WESTERN’S CONVENANT

1. Facts

- Trinity Western University (“TWU”) is a private evangelical Christian university in British Columbia (“BC”) that had proposed opening a law school
- Like all students and faculty of the university, those of the law school would have been required to sign a faith-based community covenant that included, among other requirements, abstinence from sexual intimacy outside marriage between a man and a woman (the “Community Covenant”)
- The law societies of BC and Ontario (“Law Societies”) both denied accreditation to TWU’s proposed law school on the basis that it was discriminatory to the LGBTQ community

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- The effect of the Law Societies denial of accreditation was that graduates of the proposed TWU law school would not be presumed fit to be granted licenses to practice law in BC or Ontario but have to individually apply for a certificate of qualification from the Federation of Law Societies of Canada
- TWU brought applications for judicial review of the Law Societies’ decisions
- The Ontario Court of Appeal upheld the decision of the law society of Ontario while the B.C. Court of Appeal ruled in favour of TWU
- Both decisions were appealed to the SCC and heard together

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- The decisions in the SCC were split 7-2 in favour of the Law Societies but two of the Judges who concurred with the majority result wrote separate reasons

2. The SCC’s Majority Ruling

- The majority held that, while the Law Societies’ decisions not to accredit TWU’s proposed law school infringed TWU’s religious freedom under the *Charter*, the decisions were reasonable because they proportionately balanced:
 - The deleterious effects on religious freedom with
 - The Law Societies’ statutory objectives of protecting the public interest by ensuring diversity and equality in the profession

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- Statutory objectives of the Law Societies
 - The majority found that the Law Societies' statutory objectives are, broadly speaking, to "uphold and maintaining the public interest in the administration of justice", which includes "upholding a positive public perception of the legal profession"
 - For the majority, the statutory objectives must be considered "in determining the requirements for admission to the profession including whether to approve a particular law school"
- Freedom of Religion
 - The majority followed established precedent that in order to establish a claim for infringement of freedom of religion a claimant must demonstrate:
 - That he or she "sincerely believes in a practice or belief that has a nexus with religion" and

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- That the impugned state conduct "interferes, in a manner that is more than trivial or insubstantial, with his or her ability to act in accordance with that practice or belief"
- In this case, the majority found that members of TWU's community have a sincere belief that studying in an evangelical Christian community contributes to their spiritual development, and that the universal adoption of the Community Covenant contributes towards creating an environment that allows TWU students to grow spiritually

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- Further, by interpreting the public interest in a manner that precludes accreditation of TWU's law school, the Law Societies interfered with the TWU community members' rights to grow spiritually through the study of law in an evangelical Christian environment in which students follow certain religious codes of practice
- Accordingly, TWU community members' religious rights were infringed by the Law Societies' decisions

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- The majority found that the Law Societies proportionally balanced the *Charter* protection of freedom of religion with their statutory objectives, as they did not significantly limit religious freedom, but rather only limited TWU's ability to open a law school with a mandatory Community Covenant, which the majority found restricted the conduct of others, including those of different religious beliefs
 - The majority found this limitation to be: "of minor significance because a mandatory covenant is not absolutely required to study law in a Christian environment in which people follow certain religious rules of conduct, and attending a Christian law school is preferred, not necessary, for prospective TWU law students"

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3. The SCC's Dissenting Opinion

- The dissenting opinion of two Justices found that:
 - "the only proper purpose of a law faculty approval decision is to ensure that individual graduates are fit [...] because they meet minimum standards of competence and ethical conduct"
 - Since TWU's proposed law school did not raise concerns of fitness of its graduates, the only defensible exercise of the Law Societies' statutory discretion was to accredit the school

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- The dissenting minority further stated that:
 - The purpose of TWU's admissions policy was to establish a code of conduct that supported its religious community rather than to exclude anybody
 - That no single group had been singled out, and
 - That "the unequal access resulting from the Covenant is a function of accommodating religious freedom, which itself advances the public interest by promoting diversity in a liberal, pluralist society"

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4. Commentary

- While the majority decision held that the infringement of freedom of religion was not significant enough to warrant overturning the decisions of the Law Societies not to accredit TWU's law school, the *Trinity Western* decision does not necessarily mean that religious freedom in Canada is in serious peril
- The *Trinity Western* decision does not preclude the creation of a faith-based law school
- The SCC noted that the Law Society of BC "was prepared to approve the law school if TWU agreed to remove [...] portions of the Covenant requiring students to abstain from 'sexual intimacy that violates the sacredness of marriage between a man and a woman'"

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- With respect to the Community Covenant itself, the majority recognized the Community Covenant's role in creating an environment that supported students' spiritual growth, stating that:
 - "TWU has the right to determine the rules of conduct which govern its members. Freedom of religion protects the rights of religious adherents to hold and express beliefs through both individual and communal practices"
 - However, the majority also held that "[t]he Covenant is a commitment to *enforcing* a religiously based code of conduct, not just in respect of one's own behaviour, but also in respect of other members of the TWU community [...]", with the effect of restricting the conduct of others

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- As such, the majority decision of the SCC would suggest that an aspirational code of conduct, rather than a mandatory covenant, may have resulted in a different decision from the SCC and possibly from the Law Societies themselves
- The codes of conduct of most faith based organizations would probably not be affected by the decisions in TWU
- In TWU the Charter applied to the decisions of the Law Societies because they, unlike most private faith based organizations, are state actors
- Faith based organizations have both the protections and obligations of provincial human rights legislation


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D. CONCLUSION

- These two decisions of the SCC impact two separate aspects of the freedom of religion under the *Charter*
 - The *Wall* decision upheld the autonomy of religious organizations in disciplining their own members in accordance with the tenets of their own faith
 - The *Trinity Western* decision, may be confined to its narrow ruling that mandatory codes of conduct that require adherence by others with different religious beliefs or no beliefs are unlikely to be upheld. This is quite different from expecting employees or recipients of services from faith based institutions to respect (not adhere to) the institutions' beliefs

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