Court File No. C61116

COURT OF APPEAL FOR ONTARIO

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Appellants

-and-

THE LAW SOCIETY OF UPPER CANADA

Respondent

FACTUM OF THE PROPOSED INTERVENERS CATHOLIC CIVIL RIGHTS LEAGUE and FAITH AND FREEDOM ALLIANCE

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PART I – STATEMENT OF FACTS

A. NATURE OF THE MOTION

1. This is a motion to intervene as a friend of the court brought by the Catholic Civil Rights League and Faith and Freedom Alliance (the "Moving Parties"). The Moving Parties seek leave to file a factum and to present oral submissions.

   Motion Record, Tab 1: Notice of Motion at pp.1.

2. The Moving Parties have a strong interest in these proceedings, as this appeal will have a significant impact on the fundamental freedoms of conscience and religion provided by section 2(a) of the *Canadian Charter of Rights and Freedoms* (the "***Charter***") for all Canadians.

B. FACTS

3. The Catholic Civil Rights League ("CCRL"), formed in 1985, is a national lay Catholic organization committed to working with the media to secure a fair hearing for Catholic or Christian positions on issues of public debate, countering anti-Catholic defamation, and lobbying government and intervening in court challenges in support of law and policy compatible with a Christian understanding of human nature and the common good.

   Motion Record Tab 2: Affidavit of Christian Elia at paras 3-6.

4. The Faith and Freedom Alliance ("FFA"), established in 2004, is a federally-incorporated, national, non-denominational Christian organization. It seeks to promote a Gospel-inspired conception of freedom of religion, conscience and expression, under constitutional and human rights legislation across the country. Specifically, it seeks to increase public awareness that the *Charter* is founded on the recognition of the "supremacy of God and the rule of law", and to raise public awareness regarding the potential dangers of secularism. The FFA has a large, nationally dispersed membership base composed of a number of Christian organizations, of various denominations, as well as numerous individuals. In addition, FFA's board of directors is comprised of individuals who hold leadership positions in a number of diverse Christian organizations.

Motion Record Tab 2: Affidavit of Christian Elia at para. 7.

5. A significant goal of the Moving Parties is to advocate for law and policy that respect, support and encourage the presence of religious beliefs, values and cultures, including Christianity, in the public sphere. The Moving Parties view such law and policy as essential elements of a free, democratic, tolerant and rich multicultural Canadian society. The Moving Parties promote their Christian values and objectives through education, conferences, public forums, seminars, publishing newsletters or journals, establishing and supporting local groups and chapters, organizing petitions, protests and media campaigns, and by supporting Christian advocacy, including, where appropriate, intervening in court cases and participating in government debate on important legal issues.

Motion Record Tab 2: Affidavit of Christian Elia at paras. 8- 11.

6. The Moving Parties have appeared before numerous Parliamentary committees, made submissions to various levels of government, participated in the drafting of legislation, and made submissions to boards, commissions, committees and tribunals, on issues engaging the *Charter*, the Québec *Charter of human rights and freedoms* (the "***Québec Charter***") and freedom of conscience and religion.

Motion Record Tab 2: Affidavit of Christian Elia at para. 19.

7. The Moving Parties have also, either separately or together, been granted leave to intervene in the past, as a friend of the court and as a party, in numerous cases in the Supreme Court of Canada, and other appellate and trial courts, involving some of the most significant *Charter* and social issues of the last 20 years. Such issues include secularism, public and private religious education, prostitution, free speech, same-sex marriage and other religious and conscience issues.

Motion Record Tab 2: Affidavit of Christian Elia at paras. 16, 17.

8. The knowledge, expertise and experience of the Moving Parties can be of assistance to the Court in the within appeal.

Motion Record Tab 2: Affidavit of Christian Elia at paras. 13 -15.

9. The Moving Parties are not-for-profit organizations and have limited financial resources. They rely upon fundraising, donations and the *pro bono* assistance of their members and volunteers to fulfill their important mandates.

Motion Record Tab 2: Affidavit of Christian Elia at paras. 3-7 .

PART II – ISSUE

10. The issue before the Court is whether the Moving Parties should be granted leave to intervene as friends of the court and, if so, the terms on which this motion should be granted.

PART III- ARGUMENT

Legal Test

11. The Court may grant leave to any person to intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

Rules of Civil Procedure, RRO 1990, Reg 194, Rules 13.02

12. Leave to intervene in the Court of Appeal as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them.

Rules of Civil Procedure, RRO 1990, Reg 194, Rules 13.03(2)

13. On a motion for intervener status the matters to be considered are:

    a. the nature of the case;

b. the issues that arise, and;

c. the likelihood of the moving party being able to make a useful contribution to the resolution of the matter without causing injustice to the immediate parties.

Peel (Regional Municipality) v Great Atlantic & Pacific Co. of Canada Ltd. 1990 CanLII 6886 (ON CA), (1990), 74 O.R. (2d) 164, (CA) at p. 167 [*Peel* cited to CanLII].

14. Where the intervention is by a public interest group and is in a *Charter* case, usually at least one of three criteria is met by the intervener:

a. that it has a real substantial and identifiable interest in the subject matter of the proceeding;

b. that it has an important perspective distinct from the immediate parties;

c. that it is a well-recognized group with a special expertise and a broadly identifiable membership base.

Bedford v. Canada (Attorney General), 2009 ONCA 669 (CanLII), 98 O.R. (3d) 792, at para. 2. (of note, the decision involved the Catholic Civil Rights League).

Public Interest Nature of the Case

15. The burden on the moving party should be heavier in private disputes, and leave should be more readily granted in public disputes. This appeal concerns broad questions of human rights, religious freedom and constitutional law in Canada, and is thus of the most public nature.

Peel supra at para 10.

16. Well-established non-profit public interest organizations are frequently granted intervener status, in light of their ability to bring a different perspective to issues before the court and provide assistance in deciding matters of broad public importance. The Moving Parties have well-established histories of participation in matters of law and public policy, especially those involving the *Charter's* interplay with secularism, religious culture and the preservation and enhancement of Canada's multicultural heritage.

> *Canadian Council of Churches v. R,* [1992] 1 SCR 236, 88 DLR (4th) 193, at p. 256 [*Churches* cited to SCR].
>
> *Zoe Childs v. Desormeaux* (2003), 67 OR (3d) 385, 231 DLR (4th) 311 2003 CanLII 47870 at paras 15-16 (ON CA) [*Childs* cited to CanLII].
>
> Motion Record Tab 2: Affidavit of Christian Elia at paras. 10-11.

The Moving Parties Have a Demonstrated Interest

17. The resolution of the issues in dispute on this appeal will require this Honourable Court to consider and interpret the nature of secularism, state neutrality and its limits, having regard to the freedom of conscience and religion and other values protected by the *Charter.*

18. The Moving Parties have a direct interest in the subject matter of this appeal. The Moving Parties are Christian organizations that advocate for the presence of Christian or religious beliefs and teachings in public debates. The interests of the Moving

Parties will be directly and adversely affected if secularism or state neutrality is understood to include a greater absence of religion in public matters. The recognition and implementation of *Charter* protected rights of freedom of conscience and religion goes to the heart of the Moving Parties' work and purpose.

Motion Record Tab 2: Affidavit of Christian Elia at paras.22-23.

The Moving Parties have a Useful and Different Perspective

19. The expertise and unique perspective of a proposed intervener is often an important consideration in granting leave to intervene. While the Moving Parties request the same appeal disposition as the Appellants , the Moving Parties do so from a fresh perspective . The Moving Parties, by reason of their special knowledge and expertise, may be able to provide information about the impact of the Court's judgment beyond the immediate interests of the parties.

> *Pinet v. Penetanguishene Mental Health Centre (Administrator)* (2006), 80 O.R. (3d) 139, 2006 CanLII 4952 at para 37 (ON SC) [*Pinet* cited to CanLII].
>
> Motion Record Tab 2: Affidavit of Christian Elia at para. 24.

20. Subject to efforts prior to the hearing of the appeal to avoid duplication with other party interveners, the Moving Parties intend to make some of the following submissions:

    a. Canada's democratic and constitutional tradition promotes pluralistic liberalism, where disagreements and different beliefs are encouraged and promoted.

b. Religious corporations, including educational institutions, in community with its staff, students and benefactors, stakeholders, advance a religious way of life that should not be infringed without demonstrable justification.

c. TWU and other religious institutions of higher learning enjoy constitutionally protected guarantees of freedom of conscience and religion, and they engage in free academic inquiry. While the observance of codes of conduct may vary at such institutions, the law has acknowledged the right of institutions to maintain such codes as an expression of their community's faith adherence.

d. The Society as a state actor is charged to ensure compliance with the *Charter*, so as to allow freedom of conscience, freedom of religion, freedom of thought, freedom of belief and freedom of expression. The Society's opposition to the accreditation of the proposed TWU law school failed to balance the competing rights at issue, and imposed a burden or encumbrance on prospective students who may seek to attend TWU's law school before being accepted into the Society. Such students will now be obliged (i) to petition the Society for entrance, in spite of the previous approval by the Federation of Law Schools approval of the TWU law school; (ii) qualify for admission in another province as a graduate of the TWU law school, and seek admission by "crossing over" from that province to the Society in Ontario; or (iii) await some other proposition before being allowed to practice law in Ontario as a TWU law school graduate. Such burdens are incompatible with the Society's stated vision and values. They impose a discriminatory imposition on TWU and/or prospective law students of that institution, which poses a threat to a free and democratic society.

e. The pre-determined denial of accreditation of an otherwise qualified law school, so as to disqualify graduates from entrance into the Society would be an unacceptable intrusion into the religious and conscientious liberty of such individuals. This court should engage in a reconciliation of rights so as to advance the goals of a truly authentic pluralistic Canadian society, rather than engage in trumping such recognized rights by other interests. The denial of accreditation based on the TWU Community Covenant further contravenes section 3.1 of the federal *Civil Marriage Act*, SC 2005, c 33.

f) Other existing Canadian Christian universities may seek accreditation for new or current academic programs. Christian universities in other jurisdictions may already provide degrees in law, for which graduates may seek to use for qualification and entrance to the Society. The Society should not be allowed to deny acceptance of such graduates in the absence of specific evidence of their inability to meet the admission standards of the Society.

g) If beliefs are sincerely held, and have a nexus with religion, a Court or quasi-judicial body should not adjudicate or interfere with such beliefs or religious obligations. A broad and expansive approach to religious freedom should not be narrowly construed prematurely.

21. The Court should exercise its discretion to grant leave to the Moving Parties to intervene in this case because the Moving Parties will focus their submissions on the issues concerning secularism, state neutrality, and discrimination, and their interplay with the freedom of religion and the values of pluralism and

multiculturalism under the *Charter*. Accordingly, it is respectfully submitted that the Moving Parties will make a useful contribution to resolution of the matter without causing injustice to the parties.

Motion Record Tab 2: Affidavit of Christian Elia at para.25.

Granting Leave Will Not Cause Delay or Prejudice to the Parties

22. The terms and conditions for granting leave to intervene as a friend of the court are suggested to include that the intervener (1) take the record as it is and not be permitted to adduce further evidence, (2) not seek costs on the appeal nor have costs awarded against it, (3) deliver its factum promptly, and (4) be limited as to time for oral argument on the appeal.

Peel supra at p 7.

23. The factum of the Appellant has not yet been received. However, the Moving Parties intend to address a restricted number of issues raised in this appeal, and they do not intend to repeat submissions made by the parties. The Moving Parties do not intend to file any additional factual material with the Court or to seek costs of the motions if leave is granted. Finally, the Moving Parties are prepared to work within the timeframe for the appeal as ordered by the Court.

Motion Record Tab 2: Affidavit of Christian Elia at paras. 25.

24. For the reasons above, granting leave to intervene will not substantially increase the costs or complexity of the appeal for judicial review, or cause prejudice or delay to the parties.

> *Louie v Lastman* (2001), 208 DLR (4th) 380, 2001 CanLII 2843 (ON CA) at para 13 [*Lastman* cited to CanLII].

The Moving Parties Satisfy the Test for Intervention

25. The Moving Parties submit that they are well-placed to bring a unique perspective to this appeal, and make useful and relevant submissions which will be of assistance to this Honourable Court in considering the broad legal and policy implications and the impact the appeal may have on persons not before the court whose positions may be similar but not the same as the Appellant.

26. It should be noted that the Divisional Court below dismissed the application of the Moving Parties to intervene in the hearing of the application, which is the subject matter of this appeal, alleging that that there should be some "balance" between the positions to be advocated when granting intervener status. (This position has not yet been adopted by the Court of Appeal).

> *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541 at para 10. (CanLii)

PART IV - ORDER REQUESTED

27. The Moving Parties request an order granting leave to intervene as friends of the court on the following terms:

a. the Moving Parties shall serve and file a factum not exceeding 10 pages (or such other length as this Honourable Court may deem appropriate) by the deadline set by this Court;

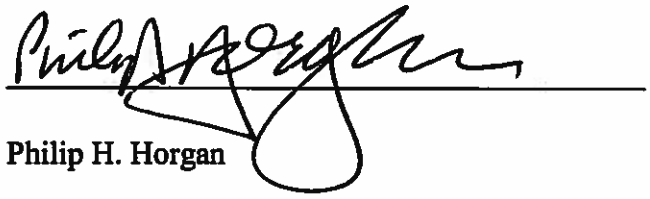
b. the Moving Parties shall be permitted to make oral submissions at the hearing not exceeding 10 minutes (or such other duration as this Honourable Court may deem appropriate);

c. the Moving Parties shall not file any additional evidence;

d. the Moving Parties shall not be entitled to, nor subject to, any costs of this motion or the appeal.

e. such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30th DAY OF NOVEMBER, 2015.



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PART V - TABLE OF AUTHORITIES

Legislation

Civil Marriage Act, SC 2005, c 33.

Rules of Civil Procedure RRO 1990, Regulation 194.

Jurisprudence

Bedford v. Canada (Attorney General), 2009 ONCA 669 (CanLII), 98 O.R. (3d) 792 (ON CA).

Canadian Council of Churches v. R, [1992] 1 SCR 236, 88 DLR (4th) 193 (SCC).

Louie v Lastman (2001), 208 DLR (4th) 380, 2001 CanLII 2843 (ON CA).

Peel (Regional Municipality) v Great Atlantic & Pacific Co. of Canada Ltd. 1990 CanLII 6886 (1990), 74 O.R. (2d) 164 (ON CA).

Pinet v. Penetanguishene Mental Health Centre (Administrator) (2006), 80 O.R. (3d) 139, 2006 CanLII 4952 (ON SC).

Trinity Western University v. Law Society of Upper Canada, 2014 ONSC 5541

Zoe Childs v. Desormeaux (2003), 67 OR (3d) 385, 231 DLR (4th) 311 2003 CanLII 47870 (ON CA).

APPENDIX A

Legislation

Relevant sections of the *Civil Marriage Act*, SC 2005, c 33.

3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

Relevant sections of the *Rules of Civil Procedure* RRO 1990, REGULATION 194.

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them.

APPENDIX B

Jurisprudence

Relevant excerpts from *Bedford v. Canada (Attorney General)*, 2009 ONCA 669 (CanLII), 2009 ONCA 669, 98 O.R. (3d) 792.

[2] The relevant jurisprudence provides considerable guidance to a court hearing such a motion. Where the intervention is in a Charter case, usually at least one of three criteria is met by the intervenor: it has a real substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well-recognized group with a special expertise and a broadly identifiable membership base: see Ontario (Attorney General) v. Dieleman (1993), 1993 CanLII 5478 (ON SC), 16 O.R. (3d) 32, [1993] O.J. No. 2587 (Gen. Div.). Most importantly, the overarching principle is that laid down by Dubin C.J.O. in Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada (1990), 1990 CanLII 6886 (ON CA), 74 O.R. (2d) 164, [1990] O.J. No. 1378 (C.A.), at p. 167 O.R.:

> Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

Relevant excerpts from *Canadian Council of Churches v. R,* [1992] 1 SCR 236, 88 DLR (4th) 193 (SCC):

p. 256 Intervener Status
It has been seen that a public interest litigant is more likely to be granted standing in Canada than in other common law jurisdictions. Indeed if the basis for granting status were significantly broadened, these public interest litigants would displace the private litigant. Yet the views of the public litigant who cannot obtain standing need not be lost. Public interests organizations are, as they should be, frequently granted intervener status. The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts. Yet that assistance is given against a background of established facts and in a time frame and context that is controlled by the courts. A proper balance between providing for the submissions of public interest groups and preserving judicial resources is maintained.

Relevant excerpts from *Louie v Lastman* (2001), 208 DLR (4th) 380, 2001 CanLII 2843 (ON CA):

[13] I am satisfied that the intervention order can be made without causing any injustice to the responding party. It is true that the intervention will expand the number of submissions to which the responding party will be obliged to reply but this, which is for the potential benefit of the court, is not an injustice. Further, having regard to the conditions I attach to the intervention order, the responding party may be compensated for any increased costs resulting from the intervention but will not be liable for costs in connection with it.

Relevant excerpts from *Peel (Regional Municipality) v Great Atlantic & Pacific Co. of Canada Ltd.* 1990 CanLII 6886 (1990), 74 O.R. (2d) 164 (ON CA):

p. 7
In the result, I would grant leave to the Appellant to intervene on such a basis subject to the following conditions:

(1) that the Appellant takes the record as it is and will not be permitted to adduce further evidence;
(2) that it will not seek costs on the appeals, but that costs may be awarded against it;
(3) that it file its factums within seven days of having been served with the factums of the Attorney General for Ontario;
(4) that the costs of this appeal will be costs in the appeal.

p. 167

Although much has been written as to the proper matters to be considered in determining whether an appeal for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the Appellant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

Relevant excerpts from *Pinet v. Penetanguishene Mental Health Centre (Administrator)* (2006), 80 O.R. (3d) 139, 2006 CanLII 4952 at para 37 (ON SC).

[37] The expertise and unique perspective of a proposed intervener is often an important consideration in granting leave to appeal. Howland C.J.O., as referred to by Howden J. in LePage made the following comments in a criminal proceeding where [page149] LEAF (an organization dedicated to research and the representation of women in constitutional matters) requested intervener status in a case regarding the former rape shield law:

> It is a question of granting the Appellant a right to intervene to illuminate a pending issue before the Court. While counsel for LEAF may be supporting the same

> position as counsel for the Attorney General for Ontario, counsel for LEAF, by reason of its special knowledge and expertise, may be able to place the issue in a slightly different perspective which will be of assistance to the Court.

Relevant excerpts from *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541.

[10] Third, it is also a principle that the fact that the proposed intervener is not indifferent to the outcome of the appeal is not a reason to deny it the right to intervene: *Oakwell Engineering Ltd. v. Enernorth Industries Inc.*, [2006] O.J. No. 1942 (C.A.) at para. 9. I would add one observation regarding the application of that principle, however. It seems to me that when there are multiple applicants for leave to intervene, some of which favour the position of the applicant/appellant while others favour the position of the respondent, the court should take into account the general desire that there should, in the end result, be some balance between the positions to be advocated when granting intervener status. While I accept that this would be a secondary consideration to the main considerations established by the decision in *Peel*, it is nonetheless a factor that should be considered in the overall mix.

Relevant excerpts from *Zoe Childs v. Desormeaux* (2003), 67 OR (3d) 385, 231 DLR (4th) 311 2003 CanLII 47870 (ON CA):

[15] Since the publication of this article the law of this province has developed to recognize the valid and important contribution that can be made in appropriate cases by friends of the court who may be advocates for a particular interpretation of the law. As Dubin C.J.O. succinctly stated in Peel (Regional Municipality) v. Great Atlantic & Pacific Company of Canada Ltd. 1990 CanLII 6886 (ON CA), (1990), 74 O.R. (2d) 164, 45 C.P.C. (2d) 1 (C.A.), at p. 167 O.R.:

> Although much has been written as to the proper matters to be considered in determining whether an appeal for intervention should be granted, in [page390] the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the Appellant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

[16] As articulated by Dubin C.J.O., this is the test for intervention by public interest groups. I am satisfied that although the position of MADD Canada is generally aligned with the position of the plaintiffs, it can "make a useful contribution" to the argument of the issues before the court. Further, I am satisfied that intervention by MADD Canada will not cause injustice to the respondents. As stated by Morden J.A. in *Louie v. Lastman* 2001 CanLII 2843 (ON CA), (2001), 208 D.L.R. (4th) 380, 152 O.A.C. 341 (C.A.), at p. 343 O.A.C.:

It is true that the intervention will expand the number of submissions to which the responding party will be obliged to reply but this, which is for the potential benefit of the court, is not an injustice. Further, having regard to the conditions I attach to the intervention order, the responding party may be compensated for any increased costs resulting from the intervention but will not be liable for costs in connection with it.

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT - and - **LAW SOCIETY OF UPPER CANADA**

Appellants

Respondent

Court of Appeal File No. C61116

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at
Toronto

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