Court of Appeal File No. C61116

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Applicants
(Appellants)

- and -

LAW SOCIETY OF UPPER CANADA

Respondent
(Respondent)

- and -

ATTORNEY GENERAL OF CANADA

Intervener
(Respondent)

FACTUM OF THE PROPOSED INTERVENER, THE CANADIAN SECULAR ALLIANCE

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PART I – OVERVIEW

1. The Canadian Secular Alliance (the "CSA") seeks leave to intervene as a friend of the Court in the appeal by Trinity Western University ("TWU") and Brayden Volkenant (together with TWU, the "Appellants") from the order of the Divisional Court dated July 2, 2015 (the "Appeal"), dismissing the Appellants' application for judicial review of the Law Society of Upper Canada's (the "Law Society") decision to refuse to accredit TWU's proposed law school and admit its graduates to the practice of law in Ontario.

2. The CSA respectfully submits that it ought to be granted intervener status in the Appeal because, among other reasons, it will provide an important perspective distinct from the other parties and interveners. In particular, if granted intervener status the CSA will argue that the

practice over which the Appellants seek the protection of freedom of religion does not fall within the scope of that freedom, and accordingly is not protected by it. The Appellants seek the state's accommodation of their desire to impose religious practices on other individuals in a state-accredited law school program. The CSA will submit that this is not a matter that falls under the protection of s. 2(a) of the *Charter*.

PART II – THE FACTS

3. The background to this appeal is well known and will not be repeated here. For convenience, the reasons of the Divisional Court are exhibited to the Affidavit of Justin Trottier, sworn November 23, 2015 (the "Trottier Affidavit").[1]

4. The CSA is a national not-for-profit organization with the mandate of, *inter alia*, advancing church-state separation and the neutrality of government in matters of religion. The guiding principles of the CSA and the types of initiatives it undertakes in furtherance of those principles are set out in paragraphs 3 through 11 of the Trottier Affidavit.[2] Given the CSA's mandate as set out in the Trottier Affidavit, the CSA submits that it has a direct and palpable interest in the Appeal. Indeed, the appropriate scope and applicability of freedom of religion is an issue that goes to the core of the CSA's mandate.

5. The CSA has intervened in cases concerning freedom of religion before: it did so in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, which concerned whether a prayer recited at the beginning of municipal council meetings along with the prominent display of religious symbols is contrary to the protection of freedom of conscience and the state's duty of religious neutrality. The Court in that case adopted a strong approach to the issue of state neutrality, consistent with the CSA's submissions.[3]

6. The CSA was not an intervener before the Divisional Court in this proceeding; however, by Order of Justice Bourgeois dated August 28, 2015, the CSA was granted leave to intervene at

[1] Exhibit D to the affidavit of Justin Trottier, sworn November 23, 2015 (the "Trottier Affidavit"); Motion Record of the Proposed Intervener, the Canadian Secular Alliance ("CSAMR"), tab 2D, p. 39.

[2] Trottier Affidavit, paras. 3-11; CSAMR, tab 2, pp. 12-13.

[3] Trottier Affidavit, para. 11; CSAMR, tab 2, p. 13.

the Nova Scotia Court of Appeal at the hearing of the Nova Scotia Barristers' Society's appeal of the Nova Scotia Supreme Court decision which overturned the Barristers' Society's decision to not recognize law degrees granted by TWU.[4]

7. An outline of the submissions the CSA proposes to make if granted intervener status is provided at paragraphs 14-16 of the Trottier Affidavit,[5] and include the following:

a. At the outset, it is important to accurately characterize the practice over which the Appellants seek the protection of freedom of religion, because it is this practice that is the subject of the claim to constitutional protection. It is imprecise and inaccurate to assert that the Appellants merely desire to teach and study law in an evangelical Christian environment. Rather, what they specifically seek is to teach and study law in a state-accredited program that requires all of its students to adhere to a prescribed set of evangelical Christian practices. Accordingly, the Appellants do not seek the absence of state intrusion into their beliefs and practices, but rather seek the state's accommodation (and indeed constitutional protection) of their desire to impose their religious practices on other individuals participating in an otherwise secular activity, thereby excluding individuals who cannot or choose not to behave in accordance with those practices.

b. The scope of freedom of religion does not capture the sort of practice (properly characterized) over which the Appellants seek its protection. Freedom of religion does not encompass practices which seek to coerce or constrain the behaviour of others for religious reasons; rather, freedom of religion is concerned with ensuring an absence of state constraint or coercion of religious belief and practice.

c. Even if the practice over which the Appellants seek constitutional protection did fall within the scope of freedom of religion, it nonetheless is not protected by that freedom because it is not, in this case, a religious practice.

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[4] Exhibit C to the Trottier Affidavit; CSAMR, tab 2C, p. 35.

[5] Trottier Affidavit, paras. 14-16; CSAMR, tab 2, pp. 13-17.

d. Even if this practice did fall within the scope of freedom of religion and was a religious practice, the Law Society has not infringed it.

e. In any event, the Law Society cannot accommodate the Appellants' practice because to do so would violate the principle of state neutrality in religious matters.

f. Moreover, the requisite "exceptional circumstances" which would direct that the state ought to accommodate the Appellants' request are absent.

g. Finally, even if the Law Society is found to have violated the Appellants' freedom of religion, given the nature of the practice in question (properly characterized), for the reasons set out above such violation is insubstantial and should be accorded relatively little weight when balanced against competing rights and/or analyzed through the *Doré* framework.

8. The Divisional Court performed the bulk of its analysis pursuant to the *Doré* framework, which presumes an infringement of the Appellants' freedom of religion. The Court acknowledged that a different approach to whether the Appellants' rights had been infringed "could be justified, one that would direct that those matters be considered in concluding whether there has been any infringement of the *Charter* right".[6] The CSA will argue in favour of such a different approach, one that applies a rigorous analysis to the question of whether the Appellants' freedom of religion has been infringed. In this regard, the CSA's submissions will address the issue raised, but not resolved, by the Divisional Court as to the proper threshold for finding an infringement of freedom of religion.[7]

9. Further, the CSA will submit that no breach of the Appellants' rights can be founded merely because the Appellants "sincerely adhere to evangelical Christian beliefs", or sincerely wish to create a law school with an evangelical Christian environment.[8] Rather, the sincerity of

[6] *Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250, at para. 86; Book of Authorities of the Canadian Secular Alliance ("BOA"), tab 2.

[7] *Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250, at para. 90; BOA, tab 2.

[8] *Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250, at para. 76; BOA, tab 2.

the Appellants' beliefs must be considered with regard to the specific practice over which they seek protection, characterized as set out in subparagraph 7.a, above. That is, the Appellants' must demonstrate a sincere belief that their religion directs that, if they are to teach and study law, they must do so in a state-accredited program that requires all of its students to adhere to a prescribed set of evangelical Christian practices, and rejects those students who cannot or choose not to do so.

10. Finally, the principle of state neutrality in religious matters and the question of whether the Appellants' practice ought to be accommodated by the state were not considered in any detail by the Divisional Court. The CSA will address these issues.

PART III – ISSUES AND THE LAW

11. The CSA seeks leave to intervene as a friend of the court pursuant to Rule 13.03(2) of the *Rules of Civil Procedure*.[9]

12. Justice Nordheimer considered the principles governing motions for leave to intervene as a friend of the court at paragraphs 3 through 10 of His Honour's reasons for deciding such motions before the Divisional Court, and noted that the parties did not dispute them. He concluded that a proposed intervener must demonstrate that they will make a useful and distinct contribution not otherwise offered by the other parties.[10]

13. Justice Nordheimer also noted that in *Charter* cases it is important for the Court to receive a diversity of representations, and that in public interest and public policy cases, such as this one, the threshold for granting intervener status is lower than it is for a private interest case.[11] The CSA submits that it plainly surpasses that threshold in the present circumstances.

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[9] R.R.O. 1990, Reg. 194.

[10] *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541, at para. 7; BOA, tab 3.

[11] *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541, at paras. 8-9; BOA, tab 3.

The CSA will make a useful and distinct contribution to the resolution of the Appeal

14. A critical element of the test for whether intervener status should be granted is whether the proposed intervener will make a useful and distinct contribution to the resolution of the appeal.[12]

15. As set out above, the CSA's submissions will focus on issues that were either not addressed by the parties or the Court in the decision being appealed, or were not, in the CSA's respectful submission, adequately addressed given the significance of those issues and this proceeding. In particular, in the CSA's respectful view, the submissions set out in subparagraphs 7.a, 7.b, 7.c, 7.e, and 7.f, above, have yet to be comprehensively considered and addressed in this proceeding.

16. Whereas this matter has so far been broadly focused and determined based on a balancing of the right asserted by the Appellants with other rights, the CSA will submit that no such balancing analysis is necessary because the Law Society has not violated the Appellants' rights. As such, the CSA will present a distinct perspective that has the potential to significantly alter the analytical framework through which the Court considers the Appeal.

17. Further, the CSA will submit that the proper prism through which to analyze the practice over which the Appellants seek constitutional protection is one which considers that the Appellants are seeking an accommodation, rather than asserting a constitutional right. This, again, has the potential to significantly alter the Court's analysis of this Appeal.

18. Moreover, the set of interveners who appeared before the Divisional Court was heavily weighted towards those who maintain that the Law Society *has* breached the Appellants' freedom of religion and/or association. The Christian Legal Fellowship, Justice Centre for Constitutional Freedoms, Evangelical Fellowship of Canada and Christian Higher Education Canada all argued not only that the Appellants' rights had been infringed, but further that the

[12] *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.), at p. 167; BOA, tab 1. *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541, at para. 7; BOA tab 3.

gravity of such infringement was such that, under the *Doré* framework, it outweighed the impact of the Appellants' practice on other *Charter* values.

19. On the other hand, the Law Society and the interveners supporting it did not focus their submissions – as the CSA would – on demonstrating that the Appellants' rights were not infringed. In fact:

a. Out on Bay Street and OUTlaws focused their submissions on how *Charter* and human rights values are to be balanced in the public interest, and did not specifically submit that the Appellants' freedom of religion had not been infringed.

b. The Criminal Lawyers' Association submitted only that: (1) a reasonableness standard should be applied to the Law Society's decision, (2) the Law Society was obliged to consider factors other than the adequacy of TWU's proposed law curriculum, and (3) the Law Society appropriately balanced competing *Charter* values.

20. Only the Law Society itself and the Advocates Society specifically argued that the Appellants' rights had not been breached; however, these submissions comprised only a fraction of their respective arguments, as both parties addressed several other issues, such as the applicable administrative law principles. No party before the Divisional Court made submissions resembling the series of arguments set out in paragraph 7, above. In the CSA's view, the present circumstances demand a careful and rigorous analysis of whether the Appellants' freedom of religion has actually been infringed. The CSA intends to present such an analysis.

21. The CSA therefore submits that granting it intervener status will result in a more thorough and balanced set of perspectives on the issue of whether the Appellants' freedom of religion actually has been infringed. As Justice Nordheimer recognized, it is important in *Charter* cases that the Court be presented with a diversity of representations. Further, where

some proposed interveners favour the appellant and some the respondent, there should "be some balance between the positions to be advocated".[13]

The CSA has a substantial interest in the subject matter of the Appeal

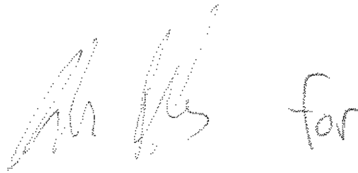
22. For the reasons set out at paragraphs 3 through 10 of the Trottier Affidavit, the CSA clearly has a substantial interest in the subject matter of the Appeal.

PART IV – ORDER REQUESTED

23. The CSA respectfully requests an Order granting it leave to intervene as a friend of the Court, permission to submit a factum of no more than 20 pages or such length as this Honourable Court deems appropriate, and permission to make oral arguments at the hearing of the Appeal of no more than 20 minutes or of such length as this Honourable Court deems appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 1, 2015



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[13] *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541, at paras. 9-10; BOA, tab 3.

SCHEDULE A – LIST OF AUTHORITIES

Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (1990), 74 O.R. (2d) 164 (C.A.).

Trinity Western University v. Law Society of Upper Canada, 2015 ONSC 4250.

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

SCHEDULE B – TEXT OF STATUTES, REGULATIONS AND BY-LAWS

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.**

LEAVE TO INTERVENE AS ADDED PARTY

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;
(b) that the person may be adversely affected by a judgment in the proceeding; or
(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

LEAVE TO INTERVENE AS FRIEND OF THE COURT

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.

LEAVE TO INTERVENE IN DIVISIONAL COURT OR COURT OF APPEAL

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.

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

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-and-

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Respondent
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