

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, THE EVANGELICAL FELLOWSHIP
OF CANADA and CHRISTIAN HIGHER EDUCATION CANADA**

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PART I – STATEMENT OF FACTS

1. On April 24, 2014, the Law Society of Upper Canada (“LSUC”) voted not to accredit Trinity Western University’s (“TWU”) proposed Law School and admit its graduates to the practice of law in Ontario.
2. On May 26, 2014, TWU filed an Application for Judicial Review of LSUC’s decision not to accredit TWU’s proposed Law School and admit its graduates to the practice of law in Ontario.
3. On July 2, 2015 the Divisional Court of Ontario made an order denying TWU’s Application for Judicial Review. The Evangelical Fellowship of Canada (the “EFC”) and Christian Higher Education Canada (“CHEC”) were interveners in the proceedings before the Divisional Court of Ontario.
4. The EFC and CHEC seek leave to intervene in these proceedings as friends of the Court.
5. The issues in these proceedings which EFC and CHEC would propose to address are:
 - (1) What it means to be a “free and democratic society”;
 - (2) What it means to be a secular society;
 - (3) the role of the state in sustaining and not inhibiting an authentic pluralism
 - (4) Whether there is room for religious individuals, communities and institutions in the public square, including the practice the law; and,
 - (5) Whether religious individuals and communities have the right to self-identify and to maintain their religious identities.

A. The Nature of the Proceedings

6. TWU appeals the Divisional Court of Ontario’s July 2, 2015 order which rejected its application for a judicial review of the LSUC’s decision not to accredit TWU Law School and admit its graduates to the practice of law in Ontario.

7. The questions before the LSUC was whether TWU Law School graduates will be qualified to practice law in Ontario. The LSUC concluded that because of the Community Covenant, and on the basis of TWU students' stated religious beliefs on marriage and sexuality that TWU Law School graduates would not be qualified to practice law in Ontario.
8. The question before the Divisional Court of Ontario was whether the LSUC decision was within its legislative authority and whether its decision contravened the *Charter of Rights and Freedoms*.
9. While the parties will make arguments on further issues, it is these points that are likely to be the focus of the EFC and CHEC's submissions, should leave be granted.

B. The Evangelical Fellowship of Canada and Christian Higher Education Canada's Interest in the Proceedings

(1) The Nature of the Organizations

10. Bruce Clemenger, President of the EFC, has deposed as follows:

Founded in 1964, the EFC is a national association of Protestant denominations, churches, church-related organizations and educational institutions. The EFC is interdenominational and represents a constituency of the following 42 denominations.

[...]

In addition to its affiliated denominations, over 100 other organizations and post-secondary education schools are affiliated with the EFC. It is estimated that there are approximately 4.2 million Protestant Evangelicals in Canada, representing approximately 12% of the Canadian population, of which approximately 2.1 million are members or adherents of EFC affiliated organizations. [paras. 3-4]

11. The EFC is an experienced intervenor. It has previously obtained leave to intervene in twenty-seven cases in the Supreme Court of Canada, including in *Trinity Western University v. British Columbia College of Teachers* [2001] 1 SCR 772, and thirty proceedings before lower courts, including in:

- a. *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25;
- b. *Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250;
- c. *Trinity Western University v. Law Society of British Columbia* (decision pending);
and,
- d. *Nova Scotia Barristers' Society v. Trinity Western University* (ongoing).

(see the Affidavit of Bruce Clemenger, at paras. 10-11).

12. Justin Cooper, Executive Director of CHEC, deposed as follows:

CHEC is a not for profit charity registered under paragraph 149(1)(f) of the *Income Tax Act*. It is an association of Christian higher education institutions across Canada that was created in Halifax, Nova Scotia in October of 2005.

CHEC's mission is to advance the efficiency and effectiveness of Christian Higher Education at member schools, including fostering institutional cooperation, and to raise public awareness of the value of Christian higher education in Canada.

[...]

CHEC currently has 34 members made up of accredited degree-granting universities, seminaries, graduate schools, Bible Colleges and Christian Liberal Arts Colleges. Trinity Western University ("TWU") is among its members. In total, CHEC serves over 17, 500 students in throughout Canada; 14, 000 undergraduates and 3500 graduate level students [paras. 3-5].

13. CHEC has a unique perspective to offer and unique experience as an association of Christian educational institutions across Ontario and Canada.

(2) The EFC and CHEC's Interest in the Proceedings

14. The EFC and CHEC have a unique perspective on the issues in this case.

15. Bruce Clemenger describes the EFC's perspective as follows:

The EFC takes the position and holds the belief that:

- a. Freedom of religion includes the right to associate with like-minded individuals;

- b. Freedom of religion includes not only the right to hold religious beliefs, but the right to live one's life according to those beliefs; and,
- c. Freedom of religion and freedom of association includes the right to self-identify and maintain a communal identity.
- d. In a free, democratic and plural society, the state should not inhibit but rather support an authentic pluralism that allows the full participation of religious communities in the public square.

The EFC believes that it can provide the Court with unique information, insight and a perspective that would be useful to it in considering the issues raised by this appeal, especially issues relating to the exercise of freedom of religion.

16. Justin Cooper describes CHEC's perspective as follows:

CHEC is the body that represents the collective interests of the majority, if not all of the Christian Higher Education Institutions in Canada. The right to freedom of association includes the right to practice one's religion, and it is in the classrooms of CHEC's members in which this right is arguably exercised. Collectively, this group therefore has a direct interest in the various issues raised in these proceedings, and yet these views are not necessarily represented by the parties to these proceedings. CHEC believes that the views of this community should be heard by the court, and that it is the most appropriate body to represent such views [para. 9].

17. In pursuit of these positions and beliefs, the EFC has intervened in a number of cases involving issues of freedom of religion and the practice of religion in the public square, and prepared and provided educational and analytical resources dealing with freedom of religion and conscience. In particular, the EFC intervened in:

Before the Supreme Court of Canada:

- (1) *The British Columbia College of Teachers v. Trinity Western University*, [2001] 1 S.C.R. 772 which dealt with the right of a private, faith-based university to require its students and employees to adhere to a Community Standards statement and whether such a requirement constituted a discriminatory practice;
- (2) *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 which considered the role parents' religious beliefs should play in the public education system;

- (3) *Syndicat Northcrest v. Amselem*, 2004 SCC 47 which dealt with the right of individuals to practice their faith as they determine;
- (4) *Her Majesty the Queen in Right of the Province of Alberta v. Hutterian Brethren of Wilson Colony, et al.*, [2009] 2 S.C.R. 567 which dealt with the collective aspects of freedom of religion;
- (5) *S.L. v. Commission scolaire des Chênes*, [2012] SCC 7 which dealt with the rights of parents to pass on their faith to their children and determine the means of religious education for their children;
- (6) *Saskatchewan Human Rights Commission v. William Whatcott, et al.*, [2013] SCC 11 which dealt with the rights of individuals to provide social, moral and religious commentary on social issues;
- (7) *Loyola High School v. Attorney General of Quebec*, [2015] 1 SCR 613 which dealt with rights of a private Catholic-Jesuit boys' school to teach a course on religion and ethics from a Catholic-Jesuit perspective;
- (8) *Mouvement laïque québécois, et al. v. City of Saguenay, et al.*, [2015] 2 SCR 3 which deals with the inclusion of a non-denominational prayer before town council meetings;

Before the Court of Appeal for Ontario:

- (9) In *Canadian Civil Liberties Association v. Ontario (Minister of Education)* [1990] OJ No 104; 71 OR (2d) 341 which dealt with the provision of religious education in public schools;

Other Courts:

- (10) Before the Ontario Court of Justice in *Bal v. Ontario* (1995), 21 O.R. (3d) 681 which dealt with the manner in which religious education could be provided in public schools;
- (11) Before the British Columbia Court of Appeal in *Chamberlain v. Surrey School*

District No. 36, 2000 BCCA 519 which considered the role parents' religious beliefs should play in the public education system;

- (12) Before the Nova Scotia Supreme Court in *Trinity Western v. Nova Scotia Barristers' Society*, 2015 NSSC 25 which considered whether a law society's decision not to accredit a faith-based law school complied with the *Charter*;
- (13) Before the Divisional Court of Ontario in *Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250, the proceedings which led to this appeal;
- (14) Before the Supreme Court of British Columbia in *Trinity Western University v. Law Society of British Columbia* (decision pending) which considered whether a law society's decision not to accredit a faith-based law school complied with the *Charter*; and,
- (15) Before the Nova Scotia Court of Appeal in *Nova Scotia Barristers' Society v. Trinity Western University* (appeal ongoing) which deals with the question of whether a law society's decision not to accredit a faith-based law school complies with the *Charter*.

18. In furtherance of these objectives, CHEC has engaged in the following projects:

- (1) The CHEC database: A database of research on member institutions, their graduates and their impact on Canadian society and the wider world;
- (2) Education Fairs: Fairs for Christian Higher Education institutions to showcase themselves to the public and answer questions from prospective students;
- (3) Meetings to foster collaboration between Presidents' of Member institutions;
- (4) Conferences and symposiums on topics relevant to member institutions. For example, a recent symposium was held on Indigenous Peoples and Christian Higher Education.

PART II – QUESTIONS IN ISSUE

19. The sole issue raised by this motion is whether the EFC and CHEC should be granted leave to intervene in this appeal as friends of the Court.

PART III – ARGUMENT

The Test on a Motion for Leave to Intervene

20. Rule 13.03(1) of the *Rules of Civil Procedure* vest the Court with broad jurisdiction to grant leave to intervene to a person who is not a party to the proceeding for the purpose of rendering assistance to the Court by way of argument.
21. The *Rules* offer two categories of intervention: as an added party (Rule 13.01); or as a friend of the Court (Rule 13.02). The EFC and CHEC seek to intervene in these proceedings as a friend of the Court.
22. The test for intervention under Rules 13.01 and 13.02 was set out by the Court of Appeal for Ontario in *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd.* as follows:

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.

Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd., (1990), 74 O.R. (2d) 164, [1990] OJ No. 1378 (Ont. CA), at para. 10 ["*Peel*"], **Book of Authorities of the Evangelical Fellowship of Canada and Christian Higher Education Canada ("EFC/CHEC Authorities")**, Tab 1.

23. As set out by this Court, a proposed intervener will only be granted leave to intervene if it can demonstrate that it will make a useful contribution to the argument.
24. In cases involving *Charter* issues, greater latitude is given in the admission of interveners because the Court recognizes that such cases involve a greater public interest, and situations where it is important to have a broad range of perspectives before the Court. A proposed intervener in a *Charter* case however, must still demonstrate that it has a direct

interest in and can make a useful contribution to the proceeding.

Canadian Blood Services v. Freeman, 2005 CarswellOnt 2154 [“*Blood Services*”], at paras. 15-16, *EFC/CHEC Authorities*, Tab 2.

The Submissions will be Useful and Different

25. The EFC and CHEC submit that their proposed intervention would offer a useful contribution to arguments in this proceeding and to the resolution of this appeal.
26. At present, and without intending to limit the range of submissions that these Proposed Interveners might wish to make, the EFC and CHEC can advise that they intend to advance the following points:
- (1) To be a “free and democratic society” means to be a society which respects and defends freedom of religion;
 - (2) In a free and democratic society, there is an obligation on the state to respect diversity, to accommodate differences and to foster and not inhibit an authentic pluralism;
 - (3) To be a secular and plural society is to recognize and include all religious beliefs and practices, not to exclude religious individuals from the public square;
 - (4) In a secular and plural society, the state and its actors are to be neutral with regard to religious and religiously-informed positions;
 - (5) There is room for religious individuals, communities and institutions in the public square, including in the practice of law; and,
 - (6) Religious individuals and communities can self-identify and can protect their religious identities.
27. Throughout these submissions, the EFC and CHEC will emphasize the importance of freedom of religion to a secular society and that a secular society must include, not exclude, religious individuals, communities and institutions in the public square.

28. The EFC and CHEC's submissions will be useful because they will provide a different perspective on the legal, public policy and constitutional issues before the Court. The EFC and CHEC will bring the perspective of a substantial component of the Protestant Evangelical Christians and Christian post-secondary educational institutions in Canada. The EFC and CHEC have knowledge of the subjects with which this case is concerned. The EFC has experience as an intervener before various Court across Canada including the Supreme Court of Canada.
29. The EFC and CHEC's perspective will be different from that of the Respondents, with whom they are opposed in interest.
30. The submissions of the EFC and CHEC are also likely to differ significantly from those of the Appellants and interveners, as they will focus mainly on what:
- a. it means to be a "free and democratic society";
 - b. it means to be a secular and plural society;
 - c. the role of the state in sustaining and not inhibiting an authentic pluralism
 - d. there is room for religious individuals, communities and institutions in the public square, including in the practice of law; and,
 - e. religious individuals and communities have the right to self-identify and to protect their religious identities.
31. In short, the EFC and CHEC's perspective on the issues is unique. The Court will therefore benefit from hearing it.

The EFC and CHEC's interest in the subject of the proceeding

32. In determining whether or not a proposed intervener has a sufficient interest in the proceedings, the Court considers a number of factors. Specifically,
- a) The intervener's interest must be a public interest but also one that is over and

above that of the general public.

- b) The proposed intervener must do more than state that it is an organization that is representative of certain groups across the country that agrees with one of the parties.
- c) Experience as an interest group is insufficient to meet the test.
- d) Witness experience is not helpful.
- e) Ability to give expert evidence on particular matters is non-determinative since that activity can be more appropriately undertaken by providing the expert testimony on behalf of one of the parties.
- f) Past role as an advocate and as an intervener may not be enough.
- g) Experience as a lobbyist is insufficient to meet the test; in some cases add lobbyists should not be given access to the courts.

Blood Services, at para. 17, *EFC/CHEC Authorities*, Tab 2.

- 33. The EFC is a national association of Protestant denominations, churches, church-related organizations and educational institutions. The EFC is interdenominational and represents a constituency of 42 denominations.
- 34. In addition to its affiliated denominations, over 100 other organizations which include 36 post-secondary education schools, including Trinity Western University, are affiliated with the EFC. It is estimated that there are approximately 4.2 million Protestant Evangelicals in Canada, representing approximately 12% of the Canadian population, of which approximately 2.1 million are members or adherents of EFC affiliated organizations.
- 35. The EFC therefore represents the interests of the post-secondary institutions which make-up its affiliates, including Trinity Western University. In addition to representing the interests of its affiliates, the EFC represents the interests of the approximately 2.1 million Protestant Evangelicals in Canada which are members or adherents of EFC affiliated organizations.
- 36. CHEC is a national association of Christian higher education institutions across Ontario and Canada. CHEC therefore represents the interests of 34 Christian educational institutions,

including TWU, and their students and graduates.

37. The EFC submits that in representing the interests of 36 Christian post-secondary institutions across Canada, including TWU, and in representing the interests of approximately 2.1 million Protestant Evangelicals in Canada, it has a direct interest in the issues being litigated before the Court.

38. CHEC submits that in representing the interests of 34 Christian post-secondary institutions across Canada, including TWU, and in representing the interests of approximately 17,500 students of Christian post-secondary education institutions, it has a direct interest in the issues being litigated before the Court.

The EFC and CHEC may be adversely affected by the outcome of the proceeding

39. If Divisional Court of Ontario's decision upholding the LSUC's decision not to accredit TWU Law School and admit its graduates to the practice of law in Ontario on the sole basis of their religious beliefs is upheld, the EFC and CHEC, their affiliates and their constituents will be adversely affected by the outcome of the proceedings.

40. The EFC represents 36 Christian post-secondary institutions across Canada. These post-secondary institutions share TWU's beliefs on the issue of marriage and sexuality. CHEC represents 34 Christian post-secondary institutions across Canada and approximately 17,500 students of these post-secondary institutions who share TWU's beliefs on the issue of marriage and sexuality.

41. If the LSUC's decision not to accredit TWU Law School and admit its graduates to the practice of law in Ontario on the basis of their religious beliefs is allowed to stand, the graduates of these other Christian post-secondary may be barred from entering their chosen profession.

Intervention by the EFC and CHEC is in the public interest

42. TWU identifies itself as a Protestant Evangelical institution.

43. It is estimated that there are approximately 4.2 million Protestant Evangelicals in Canada,

representing approximately 12% of the Canadian population, of which approximately 2.1 million are members or adherents of EFC affiliated organizations.

44. In addition to TWU, CHEC represents 33 other Christian post-secondary educational institutions across Ontario and Canada.
45. The EFC and CHEC represent the interests of an important minority group in Canada, the Protestant Evangelicals, including a number of Christian post-secondary institutions which includes TWU and their students and graduates.
46. The EFC has played an important role in the development of the law as it relates to freedom of religion, freedom of expression, freedom of association and the right to equal treatment under the law.
47. The EFC is an experienced intervener with a proven track-record before various Courts across Canada including the Supreme Court of Canada. The EFC was an intervener in *Trinity Western University v. College of Teachers* before the Supreme Court of Canada and the EFC's argument before that Court played a significant role in the Court's decision.

See para. 19 where the EFC's argument regarding the public dimension of freedom of religion was adopted by the Court, *EFC/CHEC Authorities*, Tab 3.

48. Further, the EFC and CHEC were interveners in:
 - a. *Trinity Western v. Nova Scotia Barristers' Society*, 2015 NSSC 25;
 - b. *Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250;
 - c. *Trinity Western University v. Law Society of British Columbia* (decision pending); and,
 - d. *Nova Scotia Barristers' Society v. Trinity Western University* (appeal ongoing).
49. As a national association of Christian post-secondary education institutions, CHEC has a unique perspective and experience to bring to the Court.

The EFC and CHEC's Proposed Intervention will not unduly delay the proceedings or

cause prejudice to a party**Undue delay**

50. The EFC and CHEC's proposed intervention will not unduly delay the proceedings. The EFC and CHEC are prepared to adhere to the timeline proposed by TWU or to any timeline set by this Court.
51. The EFC is an experienced intervenor, having intervened in over 50 proceedings at all levels of Court across Canada, including 27 appeals at the Supreme Court of Canada. The EFC is mindful therefore of the role of an intervenor.
52. As an association of 34 Christian educational institutions, CHEC has experience working with various parties on tight schedules. The EFC and CHEC will coordinate with other intervenors to avoid repetition and duplication of arguments and will abide by the schedule set by the Court.

Prejudice to a party

53. The EFC and CHEC seek only to intervene as friends of the Court and represent the interests of their constituency.
54. The EFC and CHEC will not seek to introduce new evidence or broaden the scope of the proceedings.
55. The EFC and CHEC's proposed intervention will therefore not prejudice any party.

PART IV – SUBMISSIONS REGARDING COSTS

56. The EFC and CHEC submit that all parties should bear their own costs of this motion. If leave to intervene are granted, the EFC and CHEC will seek no order as to costs and will ask that no award of costs be made against them.

PART V – ORDER SOUGHT

57. The EFC and CHEC seek an order granting it leave to intervene in these proceedings, permission to file a joint factum of 10 pages and make joint oral arguments of 10 minutes

at the hearing of this application for judicial review.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of November 2015.



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CASES	PARAGRAPHS CITED
<i>Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd.</i> , (1990), 74 O.R. (2d) 164, [1990] OJ No. 1378 (Ont. CA)	10
<i>Canadian Blood Services v. Freeman</i> , 2005 CarswellOnt 2154	15-17
<i>Trinity Western University v. British Columbia College of Teachers</i> , [2001] 1 SCR 772	19

PART VII – STATUTORY AUTHORITIES

***Rules of Civil Procedure*, R.R.O. 1990, REGULATION 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. R.R.O. 1990, Reg. 194, r. 13.01 (1).

(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. R.R.O. 1990, Reg. 194, r. 13.01 (2).

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. R.R.O. 1990, Reg. 194, r. 13.02; O. Reg. 186/10, s. 1.

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. R.R.O. 1990, Reg. 194, r. 13.03 (1); O. Reg. 292/99, s. 4; O. Reg. 186/10, s. 2.

(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. R.R.O. 1990, Reg. 194, r. 13.03 (2); O. Reg. 186/10, s. 2; O. Reg. 55/12, s. 1.

TRINITY WESTERN UNIVERSITY et al.

and

Appellants

THE LAW SOCIETY OF UPPER CANADA

Respondent

Court File No. M45342

COURT OF APPEAL FOR ONTARIO

Proceedings commenced at Toronto

**FACTUM OF THE PROPOSED INTERVENERS,
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