

**IN THE ONTARIO COURT OF APPEAL
(ON APPEAL FROM THE DIVISIONAL COURT)**

B E T W E E N:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANAT

Applicants
(Appellants in Appeal)

- and -

THE LAW SOCIETY OF UPPER CANADA

Respondent
(Respondent in Appeal)

FACTUM

Nature of the Motion:

- 1) This is a motion by Lawyers' Rights Watch Canada (LRWC), a not-for-profit corporation, for leave to intervene in this appeal under R.13.03 as a friend of the Court.
- 2) LRWC proposes to make submissions in respect of Canada's obligations under International Human Rights Law, and to international jurisprudence that this honourable Court may find persuasive touching on the issues raised, and LRWC submits this perspective will be both useful to the Court and distinct from those offered by the parties and other intervenors.
- 3) LRWC is prepared to limit its intervention in accordance with the demands of the parties for proposed intervenors, briefly that:
 - a) Intervenors shall serve a factum not exceeding ten pages within 25 days of service of the respondent's factum;
 - b) Within 15 days following service of the *last* of the intervenors' facta, the parties shall be entitled to serve a factum not exceeding 10 pages in reply;
 - c) Intervenors may present argument not exceeding 10 minutes, without raising new issues, adducing further evidence, or otherwise supplementing the record;

d)The parties may, and the intervenors shall, serve their appeal materials electronically;

e)The intervenors will not seek or be subject to an award of costs on intervention.

...and on this basis the present motion is unopposed by the parties.¹

Statement of Issues:

- 4) Can LRWC make a useful and distinct contribution to the just resolution of this issue not otherwise offered by the parties?

Submissions

- 5) The issues to be considered on a motion to intervene as a friend of the court were succinctly articulated by Dubin C.J.O, and applied by the honourable Divisional Court below in this matter by Justice Nordheimer:²

“...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.”³

- 6) LRWC agrees that in order to be ‘useful’, the contributions of a proposed intervenor must be distinct from those of the parties – and the other intervenors – as noted by McLachlin J in *R v Finta*⁴ and also correctly stated by the honourable Court below.
- 7) LRWC states that because the *Charter* issues raised in this case are important to the public interest, to the legal profession, and to the operation of the rule of law, the threshold for intervention is lower,⁵ and it is particularly important for the Court to receive a “diversity of representations”.⁶
- 8) The parties are not opposing the present motion and accordingly LRWC states that there is no question of injustice to the parties.

¹ Affidavit of Paul D. Copeland, sworn 22 November 2015, (“Copeland Affidavit”) at paragraph 13 and Exhibits A and B.

² *Trinity Western University and Brayden Volkenant v Law Society of Upper Canada*, 2014 ONSC 5541, Div. Ct., per Nordheimer J (“TWU 2014”).

³ *Peel (Regional Municipality) v Great Atlantic and Pacific Co. of Canada (1990)*, 74 O.R. (2d) 164, 1990 CanLII 6886 (ON CA).

⁴ *R. v. Finta*, [1993] 1 S.C.R. 1138 at 5, as quoted in TWU 2014.

- 9) Accordingly, LRWC states that the only question to be determined on motion is whether the proposed submissions will be useful and distinct.
- 10) LRWC proposes to make submissions to the Court in respect of Canada's international obligations to ensure rights to equality and non-discrimination, including under the *Universal Declaration of Human Rights* (the UDHR);⁷ the *International Covenant on Civil and Political Rights* (1966) (the ICCPR);⁸ the *International Covenant on Economic, Social and Cultural Rights* (the ICESCR);⁹ and the *American Declaration on the Rights and Duties of Man* (American Declaration),¹⁰ and the relationship between international law and Canadian law. LRWC has particular knowledge and expertise in these areas, and no party or intervenor has yet provided the Court with the advantage of this distinct perspective.¹¹

- 11) Canada is a Member of the United Nations and bound by the UDHR, which states at Art. 2:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The UDHR further provides at Art 8 that everyone has the right to an effective remedy by the competent national tribunals for acts violating these fundamental rights, a guarantee of implementation that is echoed in subsequent treaties and covenants.

- 12) Canada is a State Party to the *ICCPR*, which provides:

Article 2 Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 17(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

⁵ *Jones v. Tsige* (2011), 106 O.R. (3d) 721 (C.A.).

⁶ *Ontario (Attorney General) v. Dieleman* (1993), 16 O.R. (3d) 32 (Gen. Div.)

⁷ Online: <http://www.un.org/en/documents/udhr/>

⁸ Online: <http://www.un-documents.net/iccpr.htm>

⁹ Online: <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>

¹⁰ Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948.

¹¹ Copeland Affidavit at 12.

(2) Everyone has the right to the protection of the law against such interference or attacks.

13) The ICESCR protects equality rights to work at Art 6 and to education at Art 13. Art 13(2)(c) provides that “Higher education shall be made equally accessible to all”.

14) As a Member of the Organization of American States (OAS) Canada is bound to respect the provisions of the *American Declaration* which provides, *inter alia*:

Article II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

Article V. Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.

Article IX. Every person has the right to the inviolability of his home.

Article XII. Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity...

15) It is LRWC’s position that interpretations of such provisions of international human rights law instruments by United Nations (UN) treaty bodies, Special Procedures of the UN Human Rights Council, and the jurisprudence from regional courts and bodies are important to interpreting and applying similar *Charter* protections. In *R v Hape*, Justice LeBel wrote for the majority that

“[the Supreme] Court has also looked to international law to assist it in interpreting the *Charter*. Whenever possible, it has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada’s international obligations and the relevant principles of international law, on the other.”¹²

16) He then cited Dickson C.J. in *Re Public Service Employee Relations Act*, who went further in writing for the majority that:

¹² *R. v. Hape*, [2007] 2 SCR 292, 2007 SCC 26 at 55 (CanLII).

“[t]he content of Canada’s international human rights obligations is, in my view, an important indicia of the meaning of the “full benefit of the Charter’s protection”. I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.”¹³

17) LRWC submits therefore that its unique international human rights law perspective and knowledge of extra-Canadian jurisprudence on equality rights will be of assistance to the Court in justly interpreting and balancing the *Charter* obligations at issue in the present appeal.

Order Sought

18) LRWC seeks an Order permitting its intervention in the appeal as a friend of the court, in accordance with the Court’s timetable, which intervention shall be limited to 10 pages in writing and 10 minutes orally, and without seeking or being subject to an order of costs, all as set out in the draft Order that forms part of this motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

23 November 2015

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¹³ *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, 1987 CanLII 88 (SCC); see also *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (CanLII), [2007] 2 S.C.R. 391 at 70.

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**ONTARIO
COURT OF APPEAL**

Proceeding commenced at **TORONTO**

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