# COURT OF APPEAL FOR ONTARIO

DATE: 20151216
DOCKET: M45789, M45791, M45800, M45803, M45814, M45818, M45819, M45820, M45821, M45822, M45823, M45824, M45825, M45826, M45831 (C61116)

Hoy A.C.J.O.

BETWEEN

Trinity Western University and Brayden Volkenant

Applicants (Appellants)

and

The Law Society of Upper Canada

Respondent (Respondent)

and

Attorney General of Canada

Intervener (Respondent)

Ranjan K. Agarwal, for the applicants (appellants) Trinity Western University and Brayden Volkenant

Guy Pratte and Nadia Effendi, for the respondent Law Society of Upper Canada

Gavin Magrath, for the proposed intervener Lawyers' Rights Watch Canada

Susan Ursel and Ashley Schuitema, for the proposed intervener Canadian Bar Association

Alan L.W. D'Silva and Alexandra Urbanski, for the proposed intervener Canadian Civil Liberties Association

Tim Dickson and Arden Beddoes, for the proposed intervener Canadian Secular Alliance

Daniel Santoro and John Carpay, for the proposed intervener Justice Centre for Constitutional Freedoms

Marlys Edwardh, Frances Mahon and Paul J. Saguil, for the proposed intervener Out on Bay Street and OUTlaws

Philip Horgan, for the proposed intervener Catholic Civil Rights League and Faith and Freedom Alliance

Barry W. Bussey, for the proposed intervener Canadian Counsel of Christian Charities

Lauren Parrish, for the proposed intervener Seventh-Day Adventist Church in Canada

André Schutten, for the proposed intervener Association for Reformed Political Action

Albertos Polizogopoulos, for the proposed intervener Evangelical Fellowship of Canada and Christian Higher Education Canada

John Norris and Breese Davies, for the proposed intervener Criminal Lawyers' Association, in writing

Chris G. Paliare, for the proposed intervener the Advocates' Society (M45825)

Peter Jervis and Derek Ross, for the proposed intervener Christian Legal Fellowship

Sam Goldstein, for the proposed intervener Canadian Constitution Foundation

Heard: December 11, 2015

ENDORSEMENT

[1] Trinity Western University ("TWU") is an evangelical Christian University. It requires its students to agree to a Community Covenant which prohibits "sexual intimacy that violates the sacredness of marriage between a man and a woman". Because of that Community Covenant, the benchers of the respondent Law Society of Upper Canada ("LSUC") voted to deny accreditation to TWU's proposed law school. The Divisional Court dismissed TWU and Brayden Volkenant's application for judicial review of that decision. TWU and Mr. Volkenant have appealed that dismissal. The appeal engages important *Charter* issues.

[2] Fifteen organizations or groups seek leave to intervene in the appeal under r. 13.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 as a friend of the court.

[3] Eight of the proposed groups seek to support the appellants. Seven seek to support the LSUC. Six of the groups were granted leave by Nordheimer J. to intervene in the Divisional Court. Three of the groups were denied leave by Nordheimer J. to intervene in the Divisional Court. The remaining six groups did not seek leave to intervene at the Divisional Court.

[4] All of the proposed interveners have agreed to the terms of intervention proposed by the appellants. Those terms include that: factums are not to exceed ten pages; each intervener may present oral argument not exceeding 10 minutes

at the hearing of the appeal; and interveners are not entitled to raise new issues or adduce further evidence or otherwise supplement the record of the parties. As such, the appellants do not consent to or oppose any of the motions for leave to intervene.

[5] The LSUC consents to the groups that intervened before the Divisional Court being granted intervener status. It takes no position on whether the other proposed interveners should be granted leave to intervene. However, it submits that any and all interveners should be bound by the same terms and is amenable to the terms proposed by the appellants.

[6] Each of the proposed interveners either has a real substantial and identifiable interest in the subject matter of the appeal, has an important perspective distinct from the immediate parties, or is a well-recognized group with a special expertise and broadly identifiable membership base: *Bedford v. Canada (Attorney General)*, 2009 ONCA 669, 98 O.R. (3d) 792, at para. 2. Indeed, all have been granted intervener status in other court proceedings, including in many instances at the Supreme Court of Canada and in court proceedings regarding TWU in British Columbia and Nova Scotia.

[7] The real issue – given the number of groups seeking to intervene – is whether each of the proposed intervener's submissions will be useful and

different from those of the other parties: *R. v. Finta*, [1993] 1 S.C.R. 1138, at p. 1142.

[8] In order to assess the utility of the proposed interventions, I have reviewed the Divisional Court's reasons dismissing the appellants' judicial review application, Nordheimer J.'s reasons on the motions to intervene on the judicial review application, the appellants' factum on appeal and the factums of the proposed interveners on these motions. I have also considered the parties' oral submissions at the hearing of these motions. Having had the opportunity to review the other interveners' factums, some of the proposed interveners were able during the course of oral submissions to, very helpfully, narrow the focus of their proposed submissions to demonstrate that they would avoid duplication.

[9] Fourteen groups and individuals sought leave to intervene in the Divisional Court. Nordheimer J. provided careful reasons as to why he granted leave to intervene to six of these groups: Out on Bay Street and OUTlaws, The Criminal Lawyers' Association, The Advocates' Society, The Evangelical Fellowship of Canada and Christian Higher Education Canada, The Justice Centre for Constitutional Freedom, and The Christian Legal Fellowship. Three of those groups supported TWU and three supported the LSUC. As I noted above, the LSUC consents to those six groups being granted intervener status before this court. Presumably, this reflects a recognition that their submissions were useful to the Divisional Court and will be useful to this court. Further, in the course of

their oral submissions, these proposed interveners were generally able to indicate how they would focus their submissions.

[10] Thus, I grant leave to intervene on the appeal to the six interveners who appeared on the judicial review application. I will describe the terms of intervention below. I am satisfied that submissions of these interveners will be useful to the court.

[11] I also grant leave to intervene to the following groups, with respect to the matters indicated, and on the further terms I will describe below that apply to all interveners:

1. **Canadian Civil Liberties Association** ("CCLA"): The CCLA seeks to make submissions on the narrow issues of: (1) the possibility of the imposition of post-graduation sanctions by TWU, and the disciplinary quandary that such sanctions might create for the LSUC and; (2) the privacy implications associated with requiring prospective TWU students to agree to adhere to its Community Covenant. (I have not had the benefit of reviewing the record below. I note that TWU did not object at the hearing on the basis that this latter issue is a "new issue" and I therefore assume that it is not a "new issue".)
2. **Lawyers' Rights Watch Canada** ("LRWC"): LRWC proposes to make submissions restricted to Canada's international human rights obligations and

the significance of international human rights law in interpreting and applying the *Charter* protections at issue.

3. **Canadian Secular Alliance** ("CSA"): The CSA will focus on the scope of freedom of religion and submit that the LSUC decision does not breach s. 2(a) of the *Charter*. At this juncture, it appears to me that the CSA's submissions on this issue would be useful to the court. However, the LSUC has not yet filed its factum. The terms of intervention that I establish, below, require the interveners to avoid repetition. CSA shall ensure that it avoids repetition of arguments relating to s. 2(a) made by the LSUC (and, of course, other interveners.)
4. **Association for Reformed Political Action Canada** ("ARPAC"): ARPAC proposes to make submissions restricted to s. 15 of the *Charter.* While Nordheimer J. declined to grant ARPAC intervener status, TWU submits that the Divisional Court failed to address Mr. Volkenant's s. 15 rights. TWU addresses s. 15 only very briefly in its factum. Further submissions on s. 15 may be of assistance to the court.
5. **The Seventh Day Adventist Church in Canada** (the "Church"): The Church operates an evangelical Christian university in Alberta. It essentially proposes to argue that the LSUC's decision was outside of its jurisdiction. As TWU argues that the LSUC did not have jurisdiction, the Church shall ensure that its submissions are not duplicative of those made by TWU. In light of LRWC's

proposed submissions, the Church advises it will not make submissions regarding the impact of international law on the *Charter* rights at issue.

6. **Canadian Constitution Foundation** ("CCF"): Like TWU, CCF proposes to argue that the standard of review of the LSUC's decision should have been correctness, and not reasonableness. However, CCF appears to advance different reasons why correctness should be the standard, including focusing on LSUC's "track record" to submit that the LSUC has not always made good decisions. (It refers, as an example, to what it says was the LSUC's refusal to admit women in the 1800's. I assume that the record includes evidence of this.) It also proposes to argue – based on the existing record – that the Divisional Court gave insufficient weight to the historical importance of religion in Canada in balancing the competing *Charter* rights at play.
7. **Canadian Bar Association** ("CBA"): The CBA proposed to make a fairly wide range of submissions. While it narrowed the scope of its proposed submissions at the hearing, in my view, they remain largely duplicative of submissions that will be, or have been, made by other parties, including other established groups that represent the legal profession. I therefore grant them leave to make submissions that are restricted to the U.S. experience regarding the refusal of state actors to recognize or grant benefits to religious schools on account of discriminatory admission policies, to the extent that these submissions can be made on the existing record.

[12] I do not grant leave to intervene to the following groups:

1. **Canadian Council of Christian Charities** ("CCCC"): In essence, the CCCC submits that the LSUC gave insufficient weight to freedom of religion in balancing the *Charter* rights that were engaged. This argument is made by CCF.
2. **Catholic Civil Rights League and Faith and Freedom Alliance** (the "Alliance"): The Alliance's proposed submissions are, in my view, also duplicative. The Alliance appears to repeat the submission of The Evangelical Fellowship of Canada and Christian Higher Education Canada that a "free and democratic society" promotes an authentic pluralism and the submission of TWU that the LSUC failed to balance the competing *Charter* rights at issue. The latter submission will also be made by CCF through its proposed submission that the LSUC gave insufficient weight to freedom of religion.

[13] Nordheimer J. also declined to grant leave to intervene to CCCC and the Alliance.

[14] I am satisfied that the interveners that I have approved will provide the court with a diversity of representations reflecting the wide-ranging impact of the appeal.

[15] The number of interveners supporting the LSUC will slightly exceed the number supporting TWU. I have focused on the utility of the submissions in

making my determination, and not on achieving absolute parity in the number of interveners for and against. I also note that the scope of the submissions that will be made by some of the interveners supporting the LSUC is very limited.

[16] As to terms, I would adopt those proposed by TWU in its letter of December 4, 2015, but would add a cautionary note and two additional terms and modify one term.

[17] First, the cautionary note. The terms proposed by TWU include that the interveners' factums are not to exceed 10 pages in length. Because the scope of submissions that the interveners will make has been refined and narrowed, and because of the requirement that the interveners avoid repetition in their factums, I expect that most interveners will file factums that are shorter than 10 pages.

[18] Second, the additional terms. The terms proposed by TWU require the interveners to consult with each other to avoid repetition in their factums. For greater certainty, the interveners should also ensure that they avoid repetition of arguments made by the appellants and the LSUC in their factums. Also, I would ask the interveners to consult with each other and prepare a joint book of authorities that does not duplicate cases included in the parties' books of authorities. (Indeed, the court would be grateful if the parties also prepared a joint book of authorities.)

[19] Third, the modification. TWU proposed that the interveners each present oral argument not exceeding 10 minutes at the hearing of the appeal. I modify this term to state that oral argument shall be in the discretion of the panel. The number of interveners has increased. Once the panel has reviewed all factums filed and heard oral submissions from TWU and the LSUC, it will be in a position to determine to what extent oral submissions from the interveners would be of assistance to it.

[20] The terms of intervention are set out in Schedule A.

[21] I am mindful of Out On Bay Street and the OUTlaws groups' submission at the hearing that it should be entitled to oral argument. Out On Bay Street is a non-profit organization that facilitates the professional development of lesbian, gay, bisexual, transgender, and queer (LGBTQ) students as they transition through school and career and seeks to build a national professional network within the LGBTQ community. The OUTlaws groups are student groups at various law schools across Canada that have a long tradition of advancing the interest of LGBTQ law students. Out On Bay Street and OUTlaws say that they represent individuals who have historically been silenced and they need to be heard.

[22] I invite Out On Bay Street and OUTlaws to make that submission in their factum, for the consideration of the panel that will hear the appeal.

Alexandra Hy ACJO

# SCHEDULE "A"

1. The interveners shall be entitled to each serve and file a factum in the appeal not to exceed 10 pages in length within 25 days of service of the LSUC's factum.

2. Within 15 days after the last of the interveners' factums has been served, each of the appellants, TWU and the LSUC shall be entitled to serve and file a factum not to exceed 10 pages in length in reply to the interveners' factums.

3. The panel hearing the appeal may, in its discretion, permit any one or more of the interveners to present oral argument at the hearing of the appeal, not exceeding 10 minutes, on such issue or issues as the panel may identify.

4. The interveners are not entitled to raise new issues, adduce further evidence or otherwise supplement the record of the parties.

5. The interveners shall consult with each other to avoid repetition in their factums. They shall also avoid repetition of arguments made by the appellants and the LSUC in their factums.

6. The parties may serve the appeal books and compendiums, exhibit books and their factums and books of authorities on the interveners by delivering an electronic copy by email or file sharing application.

7. The interveners shall each serve their factum by delivering an electronic copy by email or file sharing application. The interveners shall consult with each other and prepare a joint book of authorities that does not duplicate cases included in the parties' books of authorities.

8. The interveners shall comply with any schedule that is ordered by the court for the delivery of materials for the appeal.

9. The interveners will not seek, nor will they be subject to, any award of costs, including the costs of the motions for leave to intervene.