

IN THE COURT OF APPEAL FOR ONTARIO

BETWEEN:

E.T.

Applicant
Appellant in the Appeal

and:

HAMILTON-WENTWORTH DISTRICT SCHOOL BOARD

Respondent

**FACTUM OF THE PROPOSED INTERVENER
CHRISTIAN LEGAL FELLOWSHIP**

CHRISTIAN LEGAL FELLOWSHIP

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Nature and context of the motion

1. In this motion, Christian Legal Fellowship (“CLF”) requests:

- a) That it be granted leave to intervene in this Appeal;
- b) That it be permitted to file a factum; and
- c) That it be permitted to make oral argument.

2. The Ontario Court of Appeal summarized the relevant jurisprudence on granting leave to intervene in *Bedford*:

[...] 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), 16 OR (3d) 32. Most importantly, the over-arching principle is that laid down by Dubin CJO in *Peel (Regional Municipality) v Great Atlantic and Pacific Co. of Canada* (1990), 74 OR (2d) 164 at 167:

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.

Bedford v Canada (Attorney General), 2009 ONCA 669 at para 2 [*Bedford*].

3. CLF respectfully submits that it should be granted leave to intervene in this Appeal as it satisfies all three (though the standard is “at least one”) of the criteria reiterated in *Bedford*, for granting leave to appeal in a *Charter* case:

- a. [nature of the case] This appeal raises matters of public interest, the resolution of which will have an effect on religious families, parents, and children who seek accommodation in public school, as well as the interpretation and application of *Charter* rights and freedoms by state decision makers.
- b. [issues that arise] The issues relate to *Charter* rights of religious minorities, the understanding and application of those rights in a secular state, and the appropriate role, scope, and weight to be afforded to *Charter* values in the administrative decision making process.
- c. [ability to make useful contributions] CLF is well-suited to make a substantial contribution to this case because of the expertise of its lawyers and membership in matters of freedom of religion and its well-established history of intervention in matters of public interest involving the *Charter of Rights and Freedoms*.

Bedford at para 2.

A. The Christian Legal Fellowship: its history and expertise

4. CLF, founded in the mid-1970s and incorporated in 1978, is a national non-profit association of over 650 lawyers, law students, law professors, retired judges, pre-law students, and others who share the Christian faith and support its work.

Affidavit of Ruth A.M. Ross, sworn April 27, 2017, Moving Party's Motion Record, Tab 2 ["Ross Affidavit"] at para 3.

5. CLF members elect a ten-member Board of Directors. CLF has two full-time employees and several volunteers and supports who assist in fulfilling its mandate. It has 14 local chapters meeting in cities across Canada and student chapters in most law schools in Canada.

Ross Affidavit at para 5.

6. While having no direct denominational affiliation, CLF has approximately 650 active members from more than 30 Christian denominations working in association together.

Ross Affidavit at para 6.

7. CLF was founded out of the conviction that for the Christian lawyer, the practice of law is a vocation, a calling from God. As Christian lawyers, CLF members are concerned with legal and constitutional questions facing the broader community and work with others to determine what justice requires in a free and democratic society.

Ross Affidavit at para 4.

8. One of CLF's objects is a commitment 'to encourage and facilitate among Christians in the vocation of law the integration of a biblical faith with contemporary legal, moral, social and political issues'. CLF thus examines the complex relationships amongst the practice of law, the Christian religious faith, and the tradition of Christian moral, legal, and political philosophy.

Ross Affidavit at para 7.

9. Another of CLF's objects is to encourage its members 'to do justice and show compassion'. In so doing, it seeks to further the public good by articulating how legal, moral, and religious principles can be applied to particular social and legal problems in Canada.

Ross Affidavit at para 9.

10. CLF fulfills these aspects of its mandate in part by educating its members through national conferences and seminars, publishing newsletters and journals, establishing and supporting local groups and chapters, as well as participating in public life through education and advocacy.

Ross Affidavit at para 8.

11. This includes, where appropriate, intervening in litigation as a friend of the court in those cases where the public good can be advanced by presenting principles of law, as well as moral, legal, and political philosophy that are consistent with, and illuminated by, Christianity.

Ross Affidavit at para 8.

12. CLF's quarterly *Christian Legal Journal* ("CLJ") provides information for and analysis of legal, political, and social issues which are of concern or interest to legal practitioners and scholars who identify with the Christian faith. The CLJ focuses on recent developments in Canadian law and past issues have included analyses of legal issues surrounding freedom of religion and freedom of conscience within educational institutions.

Ross Affidavit at para 10.

13. CLF has a well-established history of active involvement in matters of public policy and law, especially matters that involve the *Charter of Rights and Freedoms* ("the *Charter*"), and particularly the fundamental freedoms of conscience and religion, the right to equality, the principles of fundamental justice, and the principles of a free and democratic society, such as those at issue in this matter.

Ross Affidavit at para 11.

14. Members of CLF are regularly called upon to advise their clients and other persons regarding freedom of religion and conscience, religious discrimination, as well as constitutional and human rights protection. Members of CLF have also contributed to peer-reviewed scholarly legal journals (in Canada and internationally) on matters of constitutional law, religion, and moral, legal, and political philosophy.

Ross Affidavit at para 12.

15. CLF is a non-governmental organization (NGO) in Special Consultative Status with the Economic and Social Council of the United Nations. As part of its NGO status, CLF has presented written submissions in consultations before the United Nations on issues of religious defamation and the protection of religious minorities and incitement laws.

Ross Affidavit at para 13.

16. Through these activities and programs, CLF has developed an institutional legal knowledge and expertise – both through its formal educational programs and scholarly endeavours, as well as through the experiences of its membership – as to how, when, and to what extent the state can place limits on the rights to religious freedom held by Christian parents and students.

B. CLF's Previous Interventions

17. CLF was an intervener in both *S.L. v Commission Scolaire Des Chenes*, [2012] 1 SCR 235 and *Loyola High School v Attorney General of Quebec*, 2015 SCC 12 which considered religious freedom in public schools, the rights of parents to pass on their beliefs to their children, and the role of a secular, neutral state in protecting *Charter* rights while pursuing statutory objectives.

Ross Affidavit at para 15.

18. CLF was also an intervener in the various Trinity Western University cases which consider freedom of religion in the context of education, as well as the role of the state in circumscribing religious freedom within educational institutions (*Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31; *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25; *Trinity Western University and Brayden Volkenant v Law Society of Upper Canada*, 2015 ONSC 4250; *Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423).

Ross Affidavit at para 19.

19. In granting CLF's application for leave to intervene in *Leblanc*, the motions judge in the Superior Court for the District of Trois-Rivières noted that "(t)he CLF includes more than 500 jurists and possess an important degree of expertise in the areas of philosophy, morality, and ethics" [unofficial English translation].

Ginette Leblanc v Le Procureur Général du Canada et al (6 July 2012), Trois-Rivières 400-17-002642-110 (Qc Sup Ct) at para 45.

20. The Supreme Court of Canada and other courts have granted CLF intervener status, either individually or with others, in some 28 different matters, which cases are listed in the supporting Affidavit of Ruth Ross.

Ross Affidavit at paras 18-19.

21. Additionally, CLF has appeared before Parliamentary committees and has made representations to provincial governments and regulators on issues of conscience, religious freedom, human rights and other issues affecting the family and society.

Ross Affidavit at para 14.

C. CLF's interest in the issues

22. The issues in this petition are public issues that go beyond the effect on the Appellant E.T. and his children. Any judgment in this case will have a profound effect on access to and accommodation within public education for Canadians whose understanding of sexuality, ethics and morality are consistent with E.T.'s religious beliefs, and for any state actor tasked with assessing religious accommodation requests.

23. As stated above, CLF has developed an expertise in many of the issues being discussed in this appeal, particularly the scope of the constitutional protection of freedom of religion within public spheres. Relying on this expertise and extensive experience in similar matters, CLF can provide resources to assist the Court by presenting a perspective not provided by any other party.

24. An important consideration in this case is the scope and weight to be afforded to *Charter* values in the administrative decision making process, and particularly the extent to which new *Charter* values can be identified by a reviewing court and employed as a "counterweight" to a claimant's *Charter* rights in a balancing analysis. CLF has intervened in many other cases involving similar issues regarding the obligations of administrative decision makers whose decisions impact *Charter* rights and freedoms, including the scope of their authority, the concept of state neutrality relating to religion, and the role of other considerations – such as statutory requirements, the public interest, and *Charter* values - in making administrative decisions that impact *Charter* rights.

Ross Affidavit at para 16.

25. Through its court interventions, publications, and participation in public policy consultations, CLF has demonstrated a longstanding interest in how the freedom of religion bears on the public life and institutions, and how the rights of freedoms of religious parents and students – particularly those of religious minorities - can and ought to be accommodated and balanced in the context of a multicultural, pluralistic society.

26. As Canada’s largest association of Christian lawyers, CLF is uniquely positioned to comment on the issues being considered by this Honourable Court in this matter.

Ross Affidavit at paras 18-19.

D. CLF’s anticipated arguments

27. Set forth below is an outline of CLF’s anticipated arguments:

- A. It is inappropriate to subordinate constitutionally entrenched and carefully defined *Charter* rights to subjective and uncertain “*Charter* values” as occurred in the decision under appeal. As explained by the Ontario Court of Appeal in *Gehl v Canada*, the role that *Charter* values can play in judicial reasoning has been, and should continue to be, carefully circumscribed for many reasons, including:
 - i. A party who raises a *Charter* argument is entitled to a judicial determination as to whether that *Charter* right has been violated. While the state actor must have the opportunity to argue that limitations on that right are justified, an appeal by it to *Charter* values must not preempt a robust *Charter* rights analysis necessary to that judicial determination.

- ii. Whether the analytical framework comes from *Oakes* or from *Doré*, the basic constitutional requirement to justify a *Charter* infringement is the same: the infringement must minimally impair the *Charter* right. The decision below did not engage a minimal impairment analysis but substituted it with an appeal to “competing” *Charter* values.
- iii. A *Charter* values analysis such as that applied by the Honourable Court below places judges in the position of weighing moral priorities instead of making legal determinations as to whether actual rights violations have been factually established.
- iv. The *ad hoc* invocation of *Charter* values, such as “inclusivity” in the decision below, injects indeterminacy into the legal analysis and undermines legal certainty. It is irremediably subjective to select some *Charter* “values” from among others, and assign relative priority among *Charter* values, competing constitutional principles, and common law principles.
- v. *Charter* values have no doctrinal structure to guide their identification or application. These values are not a discrete set, have never been judicially catalogued or defined, and, unlike *Charter* rights, are not easily ascertained. A values analysis such as that applied in the decision below collapses the boundary between legally defined rights and freedoms, and vernacular, contestable understandings of the concepts.
- vi. The *Charter* must not be understood as an inherently inconsistent instrument. The concept of a *Charter* value, whatever the context, must

recognize *Charter* rights and freedoms as its inherent components.

While decision makers are entitled to take *Charter* values into account, they must do so in the context of determining whether a party's *Charter* rights and freedoms have been infringed, not to trump those very rights as if those rights are in competition with or subordinate to *Charter* values. *Charter* values are not free-standing legal instruments which trump *Charter* rights.

- B. An important component of religious freedom is the ability of parents to pass on their beliefs to their children, a principle which has received wide recognition in international human rights instruments such as the *International Covenant on Civil and Political Rights*.

E. Order Requested

28. CLF seeks to intervene in this Application on the following terms:

- a. That it be permitted to intervene as a friend of the court;
- b. That it be permitted to file a factum;
- c. That it be permitted to make oral argument;
- d. That it not be awarded any costs or have any costs awarded against it;
- e. That there be no costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of May, 2017.



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SCHEDULE “A”

LIST OF AUTHORITIES

Bedford v Canada (Attorney General), 2009 ONCA 669

Ginette Leblanc v Le Procureur Général du Canada et al (6 July 2012), Trois- Rivières 400-17-002642-110 (Qc Sup Ct)

SCHEDULE “B”**TEXT OF STATUES, REGULATIONS AND BY-LAWS**

Rules of Civil Procedure, R.R.O. 1990, REGULATION 194

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.

E.T. (Appellant)

and

HAMILTON-WENTWORTH DISTRICT SCHOOL BOARD
(Respondent)

Court of Appeal File No. C63149

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Hamilton

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