

VANCOUVER

FEB 18 2016

**COURT OF APPEAL
REGISTRY**

Court of Appeal File No. CA43367

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

Appellant

AND:

TRINITY WESTERN UNIVERSITY AND BRAYDEN VOLKENANT

Respondents

AND:

CHRISTIAN LEGAL FELLOWSHIP

Proposed Intervenor

NOTICE OF MOTION

(Application for Leave to Intervene by Christian Legal Fellowship)

**The Law Society of British
Columbia**

Counsel for the Appellant:

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Christian Legal Fellowship

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TAKE NOTICE that an application will be made by Christian Legal Fellowship ("CLF") to the presiding justice at The Law Courts at 800 Smithe Street, Vancouver, British Columbia, at 9:30 a.m. on March 30, 2016 for an order pursuant to Rule 36 of the *Court of Appeal Rules* that CLF be granted leave to intervene on the following terms and conditions:

1. That it be permitted to file a factum not to exceed 20 pages;
2. That it be permitted to present oral argument before the panel hearing the appeal;
3. That it not be awarded costs or have costs awarded against it; and
4. That no Party is required to provide physical photocopies of any documentation to CLF. All documentation will be provided by the Parties to CLF electronically by attachment to execdir@christianlegalfellowship.org. Should CLF request photocopies or the expenditure of any other disbursements from any Party to this appeal such Parties will be reimbursed by the CLF for any such expenditure or disbursement.

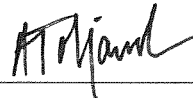
AND TAKE NOTICE that in support of the application will be read:

1. The filed affidavit of Robert Reynolds sworn on February 12, 2016; and
2. CLF's filed Memorandum of Argument on an Application for Leave to Intervene filed and served herewith.

The applicant anticipates that this application will be uncontested.

Dated: February 18, 2016

For:



Derek B.M. Ross
John R. Sikkema
Deina Warren

Counsel for the proposed intervenor
Christian Legal Fellowship

The CLF's application will take no more than 30 minutes to be heard.

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Appellant

AND:

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Respondents

AND:

CHRISTIAN LEGAL FELLOWSHIP

Proposed Intervenor

**MEMORANDUM OF ARGUMENT ON AN APPLICATION FOR LEAVE TO
INTERVENE BY CHRISTIAN LEGAL FELLOWSHIP**

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A. Overview

1. In this application, the Christian Legal Fellowship (“CLF”) requests that it be granted leave to intervene in this appeal, to file a factum, and to present oral argument at the hearing of the appeal.
2. Leave to intervene may be granted on a public law issue when the applicant has a public interest in the issue in question and can make a valuable contribution or bring a different perspective to a consideration of the issue that differs from that advanced by the parties.

Halalt First Nation v. British Columbia (Environment), 2012 BCCA 191 at paras 5-7

3. In general, and as elaborated below, CLF respectfully submits that its request should be granted because:
 - a. It represents the unique perspective of Canada's national association of Christian lawyers and law students; CLF's perspective has been found to be valuable by this Court and the Supreme Court of Canada in numerous cases on relevant *Charter* issues, including cases addressing similar issues to the case at bar.
 - b. CLF's membership is impacted by this decision, and CLF is the only lawyers' association that has intervened in this litigation taking the position that the Law Society of British Columbia's (“LSBC”) decision was incorrect or unreasonable for violating religious freedom, freedom of association, and religious equality in a manner that is not demonstrably justified in a free and democratic society.
 - c. CLF represents over 600 lawyers, law students, legal scholars, retired judges, and others from a broad range of Christian denominations and therefore provides a diverse perspective not otherwise represented by the parties or other intervenors in this appeal.

B. About the Proposed Intervenor, CLF

4. In granting CLF leave to intervene in *Carter v. Canada (Attorney General)*, 2012 BCCA 502 (Chambers), Madam Justice Nielson held at para. 43: “I accept that [CLF's] objectives, membership, and activities demonstrate the broad base

required as a threshold to seek intervenor status.”

5. The applicant CLF, founded in the mid-1970s and incorporated in 1978, is a national non-profit association of lawyers, law students, professors, retired judges, friends, and other professionals from over 30 Christian denominations. The CLF was founded out of the conviction that for the Christian lawyer, the practice of law is a vocation, a calling from God. As heirs to a tradition of legal thought that bears on many of the most pressing and constitutional questions of public life, the CLF believes it has the responsibility to continue to develop that tradition and work with others to determine what justice requires in a free and democratic society.
6. CLF includes among its current law student and lawyer members, those who hold undergraduate degrees from Trinity Western University (“TWU”).
7. 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’. Thus, CLF examines the complex relationships among the practice of law, the Christian religious faith, and the tradition of Christian moral, legal, and political philosophy. CLF is also dedicated to uniting Christians involved in the administration, practice, teaching and study of law by supporting their efforts to love and serve Jesus Christ and by equipping and motivating them to advocate for justice and religious freedom.
8. CLF fulfills its mandate by educating its members through national conferences and seminars, publishing newsletters and journals, and establishing local groups and chapters. CLF’s quarterly *Christian Legal Journal* provides analyses of legal, moral, and social issues, particularly matters of religious freedom, human rights, constitutional law and others, including the issues before this Court, that are of concern to legal practitioners and scholars who identify with the Christian faith. The *Christian Legal Journal* frequently includes articles by law students addressing the challenges that they face in seeking to lead authentically

Christian lives as students of law.

9. CLF ordinarily offers at its conferences Christian ethical and philosophical perspectives on the law and reflections on how to love God and neighbour in legal practice. At its core is the belief in the equality and inherent worth of every person who is created in the image of God.
10. For the past seven years, CLF has presented the Christian Legal Institute, a week-long academic program in which pre-law and law students study law along with moral, political, and legal philosophy from an underlying Christian perspective. Over 70 CLF law students and pre-law students have participated in this program, which is taught by CLF's lawyer and academic members, among others. These CLF members have chosen, as an expression of their religious faith, to study law in a religiously-associated community in the form of the Christian Legal Institute.
11. CLF further fulfills its mandate through advocacy, including, 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 and moral, legal and political philosophy that are consistent with, and illuminated by, Christianity.

C. Legal Basis for Application

12. This application is made pursuant to Rules 36 and 33 of the *Court of Appeal Rules*, BC Reg 297/2001.
13. Potential intervenors must have, if not a direct interest in the matter, a public interest in a public law issue in question, and make a valuable contribution or bring a different perspective to a consideration of the issue that differs from that advanced by the parties.

Halalt First Nation v. British Columbia (Environment), 2012 BCCA 191 at paras 5-7
14. In each case it is necessary to consider the nature of the issue and the degree of likelihood that intervenors will be able to make useful contributions to the

resolution of the issue, without injustice to the parties.

MacMillan Bloedel Ltd. v. Mullin (1985), 66 BCLR 207 (CA)

15. The issues in the present case are ones of great general and public importance in which CLF, the applicant to intervene, has a special interest and concern and in respect of which it is in a position, by reason of its experience and institutional knowledge of the issues, to make a valuable contribution.

MacMillan Bloedel Ltd.

16. There are significant public law issues at stake in this matter, particularly the scope and application of various *Charter* rights and freedoms, such as freedom of religion, conscience, belief, expression, and equality.

R. v. Watson, 2006 BCCA 234 at para 3

17. Given the nature of the issue, the case has a dimension that legitimately engages the interests of CLF, the presentation of which interests and perspective will be of assistance to this Court in the resolution of the issues without taking the litigation away from those directly affected by it.

R. v. Watson at para 3

D. CLF's Interest and Expertise in Matters under Appeal

18. CLF has an interest in the constitutional and legal issues raised in this appeal by the LSBC. The issues in this appeal are public law and constitutional issues that go beyond the effect on TWU and the law students and faculty who wish to study and teach there. Any judgment in this case will have a profound effect on public life for Canadians whose understanding of religious faith and association are consistent with the religious beliefs manifested by TWU, particularly on lawyers and law students who have sincerely held religious beliefs, including current and future members of CLF.

19. CLF has a longstanding interest in how freedom of religion and freedom of religious association bear on the practice of law, an interest which predates its intervention in *TWU v. BC College of Teachers*, 2001 SCC 31. The accreditation of the proposed faculty of law at TWU, and how the LSBC would respond to the

freedom of religion of lawyers and law students, has been a matter of great concern and direct relevance to CLF and its membership.

20. The Appellant, the LSBC, argues that “[i]nstruction in the law is not the practice of a religion,” an assertion which stands in stark contrast to CLF’s purpose and mission. A judicial affirmation of the proposition that religion is essentially separate from and largely irrelevant to the study and practice of law would undermine CLF’s purpose and mission.

Factum of the Appellant, at para 168.

21. The Appellant also cites the United States Supreme Court’s decision in *Christian Legal Society v. Martinez*, in which a majority held that a secular law school did not have to give official status to a private Christian club that required its members to sign a Statement of Beliefs. The Appellant specifically relies on the case’s suggestion that such groups need not be granted “equal access to law school facilities”. In so doing, LSBC’s submissions transcend the interests of prospective students of TWU’s law school, and have the potential to impact the rights of law students at secular institutions who wish to associate on the basis of, and publicly express, their religion within their secular law faculties, including many CLF law students attending secular law schools in Canada.

Factum of the Appellant, at para 170.

22. CLF has a well-established history of active involvement in matters of public policy and law, especially with respect to matters that involve the *Charter of Rights and Freedoms*, and particularly the fundamental freedoms of conscience and religion, thought, belief and opinion, association; freedom of expression; the right to equality; the principles of fundamental justice; and the principles of a free and democratic society.
23. With this well-established history comes significant institutional legal knowledge and expertise on these matters generally, and specifically on the constitutional issues at stake in the present case, namely freedom of conscience and religion, thought, belief and opinion, association and equality rights.

24. In particular, CLF has developed an institutional legal expertise – both through its formal educational programs and scholarly endeavours and through the experiences of its membership – as to how the regulation of the practice of law and legal education in Canada can place limits on the rights to religious freedom held by Christian lawyers and law students.
25. Members of CLF are regularly called upon to advise their clients and other persons regarding freedom of religion and conscience, religious discrimination, and 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. CLF is a non-governmental organization having Special Consultative Status with the Economic and Social Council of the United Nations.
26. Significantly, CLF was an intervenor in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, and *Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250. It has been granted leave to intervene in the appeals of the latter two cases. These cases involve very similar facts and issues to those raised in the present matter. CLF was also an intervenor in the decision giving rise to this appeal, *Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326.
27. In granting CLF's application for leave to intervene in *TWU v. LSUC*, Justice Nordheimer of the Superior Court of Justice (Divisional Court) noted: "In my view, CLF, given its membership, has a more direct role in the issues raised and more directly addresses some of the broader issues that the court will have to consider. I note, in particular, that CLF includes within its membership current law students who hold undergraduate degrees from TWU. They are a group that are directly affected by the issues raised in this judicial review application." (2014 ONSC 5541, at para. 46).

28. CLF has been granted intervenor status in at least 16 separate proceedings, and if interventions at different levels of court in the same matter are counted separately, the number is significantly higher. These include a number of leading freedom of religion or equality rights cases at the Supreme Court of Canada, such as:

- a. *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12;
- b. *Carter v. Canada (Attorney General)*, 2015 SCC 5;
- c. *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11;
- d. *SL v. Commission Scolaire Des Chênes*, 2012 SCC 7;
- e. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37;
- f. *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31; and
- g. *Vriend v. Alberta*, [1998] 1 SCR 493.

29. In addition, this Court has previously recognized CLF's unique and valuable perspective and contribution and granted CLF leave to intervene, either alone or in voluntary coalitions with others, on at least three occasions:

- a. *Carter v. Canada (Attorney General)*, 2012 BCCA 502.
- b. *R. v. Watson*, 2006 BCCA 234; and
- c. *Kempling v. College of Teachers (British Columbia)*, 2004 BCCA 535.

E. The Position to be Taken by CLF and Summary of Submission to be Advanced

30. CLF takes the position that the LSBC's decision was incorrect or unreasonable for violating religious freedom, freedom of association, and religious equality in a way that is not demonstrably justified in a free and democratic society. To avoid duplication, CLF has consulted and will continue to consult with other intervenors known to it. Set forth below is an outline of CLF's anticipated arguments:

- a. For the Christian law student and lawyer, the study and practice of law are important, practical expressions of their commitment to serving God and neighbour, and to fulfilling the Biblical mandate to advance justice. Law and religion are closely connected; the teaching, study, and practice of law cannot be considered essentially or wholly secular pursuits. Studying law in association with other students and faculty who share these convictions, and the religious faith, ethics, and values in which they are rooted, is not a mere "preference", but a constitutionally protected exercise and expression of their religion. This

constitutional protection is afforded by ss. 2 and 15 of the Charter and includes the right to study law within a religious community without restrictions imposed by the state or a state actor (such as the LSBC) based solely on one's religious faith or the ethical principles emanating from one's faith. It also includes the right not to be deprived of the equal opportunity to obtain a professional license or to suffer other state-imposed educational or professional impediments because of one's religiously informed conceptions and associations.

- b. Institutions that are religiously based, such as TWU and CLF, have freedom of religion under the *Charter* and international law, which includes the right of their members to associate on the basis of religious beliefs, and the right to teach and disseminate such beliefs, including religiously informed conclusions about the nature of marriage, sexuality, and sexual ethics. Violating these rights undermines institutional diversity and thereby deprives individuals of autonomy and choice.
- c. The decision of the LSBC not only violates the *Charter* rights of TWU and its current and prospective students, but has broader implications for the fundamental freedoms of all lawyers and law students – Christian and otherwise – to hold, manifest, and associate on the basis of religiously and conscientiously informed judgments, including those about the nature of marriage. If the LSBC holds it to be contrary to the public interest for a law faculty to support a conjugal conception of marriage, then logically the LSBC will also hold it to be contrary to the public interest for any lawyer, or any organization to which he or she belongs, to similarly reject a single, state-imposed conception of marriage. This is inconsistent with the nature of a free and democratic society.
- d. Legal professionals, law students, and the organizations to which they belong, are permitted to hold and publicly express divergent views. This is affirmed by the preamble of the *Civil Marriage Act*, SC 2005, c 33, which states that 'it is not against the public interest to hold and publicly express diverse views on marriage.' Such views, including those that uphold a conjugal conception of marriage, can be expressed in a way that positively demands equal respect for all persons.
- e. The decision of the LSBC is also contrary to its statutory duty to protect the public interest. The LSBC has substituted "public opinion" for "public interest", enforcing moral conformity with state-approved values on the part of prospective lawyers as a condition of obtaining a license to practice law. This marginalizes minorities, undermines religious diversity within the profession, and threatens the independence of the bar from state-imposed beliefs. The LSBC's decision also violates its duty of neutrality as a state actor. The LSBC must neither favour nor hinder any particular belief and must abstain from taking any position on a religious belief or non-belief.

31. CLF's proposed submissions are relevant to a number of specific issues raised in

this appeal, including the extent to which religious law students and faculty are “entitled to constitutional protection in the circumstances of this case” and whether “the Resolution is not aimed at, and does not interfere with, religious practices or the holding of religious beliefs” (Appellant’s factum, paras. 171 and 164). CLF’s proposed submissions are also directly relevant to the broader issues raised in this appeal, including considerations relating to what is in the “public interest”, particularly in the context of the administration of justice, and the impact of this decision on the integrity and honour of the legal profession and the rights and freedoms of legal professionals.

F. Why CLF’s Perspective is Unique and Useful to the Court

32. CLF represents legal professionals from over 30 Christian denominations, within which there is a broad spectrum of legal thought and whose views are not necessarily represented by either of the parties in this case. As stated above, CLF has developed expertise in many of the issues in this appeal, particularly the scope of the constitutional protection of freedom of religion within regulated professions such as law. Relying on this expertise and its extensive experience in similar matters, CLF can provide resources to assist the Court by presenting a perspective not offered by the main parties or other intervenors.
33. CLF is the only national association of lawyers involved in this litigation that is taking the position that the LSBC’s decision was incorrect or unreasonable for violating religious freedom, freedom of association, and religious equality in a manner that is not demonstrably justified in a free and democratic society.
34. CLF is the only faith-based association of lawyers and law students to have intervened in this litigation or in similar TWU litigation in other provinces. CLF’s members have a demonstrated interest in and history of associating for the purpose of studying and practicing law from a religiously-informed perspective.
35. In dispute in this case is the impact of the LSBC’s decision on religious freedom, freedom of association, and equality. The LSBC tries to downplay the impact,

stating that its Resolution “is not aimed at, and does not interfere with, religious practices or the holding of religious beliefs, as such” (Appellant’s factum, at para. 163). The LSBC pronounces upon what is and is not part of Christian religious belief and practice, asserting that Christians could freely associate for the purposes of holding, practicing, and expressing their beliefs without a Community Covenant like TWU’s (Appellant’s factum, at para. 166). CLF understands the connection between studying law as a community and, as a community, committing to honouring God in all aspects of life. CLF has been putting this belief into practice for almost 40 years. CLF therefore has a unique understanding and expertise as an organization and as a representative of its members of the depth and strength of nexus between faith and law.

G. Order Requested

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

- (a) That it be permitted to file a factum not to exceed 20 pages;
- (b) That it be permitted to present oral argument before the panel hearing the appeal;
- (c) That it not be awarded costs or have costs awarded against it; and
- (d) That no Party is required to provide physical photocopies of any documentation to CLF. All documentation will be provided by the Parties to CLF electronically by attachment to execdir@christianlegalfellowship.org. Should CLF request photocopies or the expenditure of any other disbursements from any Party to this appeal such Parties will be reimbursed by the CLF for any such expenditure or disbursement.

37. CLF respectfully requests that there be no costs of this application.

All of which is respectfully submitted.

Dated: February 18, 2016



For: **Derek B.M. Ross**
Jonathan R. Sikkema
Deina Warren
 Lawyers for the proposed intervenor
 Christian Legal Fellowship