

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

BETWEEN:

TRINITY WESTERN UNIVERSITY & BRAYDEN VOLKENANT

Appellants

and

THE LAW SOCIETY OF UPPER CANADA

Respondent

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

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BETWEEN:

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**FACTUM OF THE PROPOSED INTERVENER
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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 v Canada (Attorney General)*, 2009 ONCA 669, at para 2:

[...] 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 O.R. (3d) 32. Most importantly, the over-arching principle is that laid down by Dubin C.J.O. in *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada* (1990), 74 O.R. (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.

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, supra*, for granting leave to appeal in a *Charter* case, respectively:

- a. CLF is an association of over 600 lawyers, legal scholars, law students, and others, drawn from diverse Christian traditions, and its membership will be affected by this decision;
- b. CLF is the only lawyers’ association that intervened in the Divisional Court of Ontario in the Application taking the position that the Law Society’s decision was an unjustified violation of the section 2(a) and section 15 rights of TWU; CLF represents lawyers and law students from a broad range of Christian denominations and therefore provides a diverse perspective not otherwise represented by the parties or other interveners in this appeal;

- c. CLF is well-suited to make a substantial contribution to this case because of the expertise of its 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*;

i. **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 600 lawyers, law students, law professors, retired judges, pre-law students, friends, and other legal professionals who share the Christian faith and support its work.

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

6. While having no direct denominational affiliation, CLF has some 600 active members from more than 30 Christian denominations working in association together. The denominations include, but are not limited to: Anglican; Apostolic; Armenian Brotherhood; Baptist; Brethren in Christ; Christian Missionary Alliance; Chinese Alliance; Evangelical; Evangelical Missionary; Free Methodist; Greek Orthodox; Lutheran; Mennonite Brethren; Non-Denominational; Pentecostal; Presbyterian; Reformed; Roman Catholic; Salvation Army; Seventh-day Adventist; United Reformed; and Wesleyan.

7. CLF includes among its current law student and lawyer members, those who hold undergraduate degrees from Trinity Western University ("TWU").

8. 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, we are heirs to a tradition of legal thought that bears on many of the most pressing legal and constitutional questions facing our profession and the broader community. We believe it is our responsibility as Christian lawyers to continue to develop that tradition and work with others to determine what justice requires in a free and democratic society.

9. 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 among the practice of law, the Christian religious faith, and the tradition of Christian moral, legal, and political philosophy.

10. Specifically with respect to law students, CLF commits 'to encourage and support Christian students in preparation for their professional careers and in their spiritual development'.

11. CLF fulfills its mandate 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. 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 and moral, legal, and political philosophy that are consistent with, and illuminated by, Christianity.

12. 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 - as well as moral, legal, and political philosophy - with an underlying Christian viewpoint. 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.

13. 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 often includes legal analysis on religious freedom, human rights, constitutional, and other issues affecting the Christian community.

14. The CLJ frequently includes articles by law students addressing the challenges that they face in seeking to lead authentically Christian lives as students of law.

15. 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.

16. One of the objects of CLF 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.

17. 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.

18. In particular, CLF has developed an institutional legal knowledge and 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.

19. 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.

20. CLF is an 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.

B. CLF's Previous Interventions

21. Significantly, CLF was an intervener in *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, and *Trinity Western University and Brayden Volkenant v. Law Society of British Columbia* (Court file No. S-149837, Vancouver Registry). The latter three cases involve virtually identical facts and issues to those raised in the present matter.

22. 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).

23. In granting CLF’s application for leave to intervene in *Leblanc v. Le Procureur Général du Canada et al.*, no. 400-17-002642-110, 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”.

24. The Supreme Court of Canada and other courts have granted CLF intervener status, either individually or with others, in some 19 cases (some of which CLF was an intervener at multiple levels of court), which cases are listed in the Affidavit of Robert Reynolds, sworn November 27, 2015, at paragraph 22.

25. 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.

C. CLF’s interest in the issues

26. The issues in this petition are public issues that go beyond the effect on TWU and the students who wish to study there. Any judgment in this case will have a profound effect on public life for Canadians whose understanding of sexuality and marriage 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, and on members of other regulated professions.

27. 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 an expertise in many of the issues being discussed 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 extensive experience in similar matters, CLF can provide resources to assist the Court by presenting a perspective not provided by any other party.

28. CLF has a longstanding interest in how the freedom of religion bears on the practice of law, an interest which predates its intervention in *TWU v. BC College of Teachers* in 2001. The accreditation of the proposed faculty of law at TWU, and how the Law Society 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.

29. Prior to its proceedings on TWU accreditation, the Law Society of Upper Canada invited written submissions from the public. CLF made a written submission on March 26, 2014, which was endorsed by 206 of its members, including lawyers, law students, professors, and retired judges. In addition to the CLF Submission, several of CLF's members made individual written submissions. CLF and some of its individual members also made written submissions to the Law Societies of British Columbia, Nova Scotia, New Brunswick, Newfoundland and Labrador, and the Northwest Territories on the same matter.

D. CLF's anticipated arguments

30. Set forth below is an outline of CLF's anticipated arguments:

a. Religious law students have constitutionally protected rights to freely associate with

other students and faculty who share their religious faith and religious ethics and values in an academically accredited law school to study law within a religious community, without restrictions imposed by the state or a state actor such as the LSUC based solely on their religious faith or the ethical principles which are based on their faith. This 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;
- c. The decision of the Law Society will infringe the fundamental freedoms and equality rights of all lawyers and law students and law professors who exercise their freedom of religion as well as their freedom of thought, belief, opinion and association by joining a religiously based law school and entering into similar covenants or agreements as the TWU Community Covenant, or to otherwise hold and manifest religiously and conscientiously informed judgments, including those about the nature of marriage. The decision to study law within a religiously based community is a constitutionally protected exercise; it is inappropriate for the state to characterize it as a mere "preference" that is less deserving of protection simply because it might not be perceived by some as a "strict obligation" of religious adherence.

- d. The decision of the Law Society 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 – including those who have religious conceptions of marriage and sexuality. If the Law Society holds it to be contrary to the public interest for a law faculty to support a conjugal conception of marriage, then logically the Law Society will also hold it to be contrary to the public interest for any lawyer to similarly reject a single, state-imposed conception of marriage. This is inconsistent with the nature of a free and democratic society.
- e. The decision of the Law Society infringes the rights of law students and lawyers who obtain their legal education at TWU to equality before and under the law, and the right to equal benefit of the law, without discrimination based on religion.
- f. The *Charter* infringements outlined in paragraphs a.-e. above cannot be justified in a free and democratic society. There is no ‘balancing of rights’ in this decision: the appellants and those similarly impacted by the Law Society’s decision are the only rights-holders in the *Charter* analysis.
- g. 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 concept of marriage, can be expressed in a way that positively demands equal respect for all persons.
- h. The decision of the Law Society is also contrary to its statutory duty to protect the public interest by effectively requiring moral conformity with state-approved values

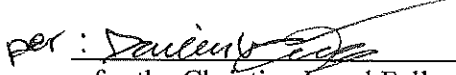
on the part of prospective lawyers as a condition of obtaining a license to practice law. This undermines religious diversity within the profession as well as the independence of the bar from state-imposed beliefs. This also violates the Law Society's duty of neutrality as a state actor. The Law Society must neither favour nor hinder any particular belief and must abstain from taking any position on a religious belief or non-belief.

E. Order Requested

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

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of December, 2015.

per: 

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TRINITY WESTERN UNIVERSITY AND BRADEN VOLKENANT
(Appellants)

and

LAW SOCIETY OF UPPER CANADA (Respondent)

Court of Appeal File No. C61116
Divisional Court File No. 250/14

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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CHRISTIAN LEGAL FELLOWSHIP**

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