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COURT OF APPEAL
REGISTRY

Court of Appeal File No. CA43367
Supreme Court File No. 149837
Vancouver Registry

IN THE COURT OF APPEAL OF BRITISH COLUMBIA

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(RESPONDENT)

AND:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS
(PETITIONERS)

AND:

WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND

PROPOSED INTERVENOR

MEMORANDUM OF ARGUMENT
(In support of the Application for Leave to Intervene)
(Pursuant to Rule 36 of the Court of Appeal Rules, B.C. Reg. 297/2001)

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PART 1: OVERVIEW

1. The West Coast Women's Legal Education and Action Fund ("West Coast LEAF") applies under Rule 36 of the *Court of Appeal Rules* for orders that:
 - a. West Coast LEAF be granted leave to intervene in this appeal;
 - b. West Coast LEAF be granted leave to file a factum of up to 20 pages in length;
 - c. West Coast LEAF be granted permission to apply to the panel hearing the appeal for leave to present oral argument; and
 - d. No costs be awarded for or against West Coast LEAF in respect of this application or the appeal itself.

2. West Coast LEAF submits that this appeal raises significant issues of public law that engage its interests as an equality-seeking organization. West Coast LEAF has a demonstrable historical and continuing interest in equality rights, including women's reproductive rights and the interaction between equality and religious freedoms. In addition, West Coast LEAF has a demonstrated and substantial interest in ensuring that Canadian law and the *Charter* are interpreted and applied in a manner consistent with the principles of substantive equality and do not exacerbate or perpetuate the disadvantage of historically marginalized groups, particularly women.

PART 2: THE APPEAL

3. Trinity Western University ("TWU") is an evangelical Christian university that seeks to have its law school accredited by the Law Society of British Columbia (the "LSBC").

4. All students and staff at TWU are required to commit to TWU's Community Covenant ("Covenant"). The Covenant discriminates on the basis of sex, sexual orientation and marital status because it requires students to abstain from engaging in sexual activity outside of marriage and/or with persons of the same sex. The Covenant also discriminates on the basis of sex in that it provides all signatories must "treat all persons with respect and dignity, and uphold their God-given worth from conception to death."
5. This appeal lies from TWU and Brayden Volkenant's application for judicial review of the LSBC's decision that TWU's law school is not an approved faculty of law for the purpose of the LSBC's admissions program (the "Decision").
6. In the Court below, Chief Justice Hinkson quashed the Decision. He ruled that the LSBC Benchers inappropriately fettered their discretion in making the Decision based on a referendum of the LSBC's membership and that TWU was not afforded procedural fairness in the Decision-making process.

Trinity Western University v. The Law of British Columbia, 2015
BCSC 2326 ("TWU v. LSBC")

7. Chief Justice Hinkson found that the LSBC had an obligation to consider and balance the *Charter* interests at stake. He also found that the Decision was made without proper consideration and balancing of the *Charter* rights at issue. Although Chief Justice Hinkson made these findings, he did not conduct a detailed analysis of the *Charter* rights at stake. He concluded that, given his decision that the Decision was invalid, it was unnecessary for him "to resolve the issue of the collision of the relevant *Charter* rights".

TWU v. LSBC, paras. 145, 152 and 153

8. On appeal, this Court is asked to determine whether the LSBC's Decision-making process satisfied administrative law requirements of procedural

fairness. It is also asked to consider whether the Decision is consistent with the *Charter*. The LSBC submits Chief Justice Hinkson was obligated to conduct a *Charter* analysis as described in *Doré v. Barreau du Québec*, 2012 SCC 120, to determine whether the Decision reflects a proportionate balancing of the *Charter* protections at play, including the equality rights of women. The LSBC further submits that the Decision does, in fact, reflect a constitutional reasoning process that properly balances TWU's *Charter* rights and equality interests.

LSBC Factum at paras. 152-153 and 161-184

PART 3: LEGAL FRAMEWORK FOR APPLICATION TO INTERVENE

9. An order granting leave to intervene in an appeal is discretionary, and may be made on any terms and conditions the Court considers appropriate. This Court may grant leave to intervene in circumstances where:
 - a. A party has a direct interest in an appeal; or
 - b. The appeal raises public law issues that legitimately engage the applicant's interests, and the applicant brings a different and useful perspective to those issues that will be of assistance in resolving them.

Carter v. Canada (Attorney General), 2012 BCCA 502 at paras.
11-13

J.I. Properties Inc. v. PPG Architectural Coatings Canada Ltd.,
2015 BCCA 240 at para. 14

10. In the latter circumstance, the Court will consider the factors articulated in *R. v. Watson and Spratt*, namely:

...the nature of the issue before the court (particularly whether it is a 'public' law issue); whether the case has a dimension that legitimately

engages the interests of the would-be intervenor; the representativeness of the applicant of a particular point of view or 'perspective' that may be of assistance to the court; and whether that viewpoint will assist the court in the resolution of the issues...

Carter at para. 13

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

11. In this case, West Coast LEAF does not assert a direct interest in the appeal, but rather submits that the appeal raises public law issues that fully engage West Coast LEAF's interest in advancing women's equality. West Coast LEAF respectfully submits that it would bring a unique and useful perspective to the issues central to this appeal and will be of assistance to the Court in resolving them.

PART 4: SUBMISSION REGARDING LEAVE TO INTERVENE

A. West Coast LEAF Expertise and Interest in this Appeal

12. West Coast LEAF has been an incorporated non-profit society in British Columbia and a federally registered charity since 1985. The mission of West Coast LEAF is to achieve equality by changing historic patterns of systemic discrimination against women through British Columbia based equality rights litigation, law reform and public legal education. It has a broad representative base.
13. Together with its national affiliate, LEAF, West Coast LEAF has intervened in 17 cases, including cases at the B.C. Supreme Court, the B.C. Court of Appeal, the Ontario Court of Appeal and the Supreme Court of Canada. In all of its interventions, West Coast LEAF's arguments have focused on the application

of principles of substantive equality to the development and application of the law.

14. West Coast LEAF has developed expertise on the concept of substantive gender equality and, in particular, on the use of statutory human rights and *Charter* equality rights in the interpretation and assessment of legislation, common law, and state action from a substantive equality perspective.
15. West Coast LEAF has strong experience as an intervenor before this Court and others and will not take the litigation away from the parties or raise new evidence or issues.
16. West Coast LEAF seeks leave to intervene in this case because of fundamental *Charter* issues raised by the parties including:
 - a. the need to protect reproductive freedom in order to advance women's equality;
 - b. the relationship between equality and freedom of religion; and
 - c. access to education for historically disadvantaged groups including sexual minorities and women.
17. West Coast LEAF submits that its interest in the litigation is substantial, although not direct. Its interest is in relation to the public law nature of this appeal and its implications for women and equality rights, matters which directly engage its mandate.

Affidavit of Kendra Milne affirmed February 17, 2016
("Milne Affidavit")

B. West Coast LEAF's proposed submission

18. West Coast LEAF seeks leave to intervene so that it may provide submissions regarding the section 15 *Charter* interests engaged by the Decision. It seeks leave to provide submissions regarding the effect of the Covenant on women, the test for substantive equality and how the promise of substantive equality should be balanced with other *Charter* rights in this case.
19. If granted leave to intervene, West Coast LEAF intends to make the following specific submissions:
 - a) The substantive equality analysis required by section 15 of the *Charter* "recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages". A substantive equality analysis rejects the "separate, but equal" reasoning used to justify discrimination in the past.

Kahkewistahaw First Nation v. Taypotat, 2015 SCC 30 at para 17
Moore v. British Columbia (Education), 2012 SCC 61 at para 30

- b) The Covenant is contrary to the equality guarantee because it discriminates based on sexual orientation and marital status given that it marks all sexual relationships that are not between heterosexual and married persons as reprehensible.

Miron v. Trudel, [1995] 2 S.C.R. 418 at paras. 151-153
M. v. H., [1999] 2 S.C.R. 3 at para. 64

- c) The Covenant is contrary to the equality guarantee because it discriminates based on pregnancy, which is discrimination based on sex. The Covenant renders female students uniquely subject to penalty

(including, but not limited to expulsion) for exercising autonomy over their own bodies. It also discriminates against them by rendering female students uniquely subject to monitoring by members of the TWU community, by fostering discriminatory views of female personal autonomy, and by limiting female access to health care and support, including but not limited to legal abortion.

Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219
Inglis v. British Columbia (Minister of Public Safety), 2013 BCSC 2309 at
 para. 547
R. v. Morgentaler, [1988] 1 S.C.R. 30 at para. 24

- d) The Covenant impacts women on the intersecting grounds of sex, sexual orientation, and marital status.

Inglis, supra at paras. 518 and 520
Withler, supra at para 63

- e) The Decision does not infringe TWU's *Charter* rights because the right to discriminate is not protected by the *Charter*. The furtherance of *Charter* rights "cannot undermine the very principles the *Charter* was meant to foster".

Reference re Same-sex Marriage, 2004 SCC 79 at para. 46

- f) The Decision is demonstrably justified in a free and democratic society in accordance with the *Charter*. In fact, the Decision reflects the only outcome consistent with the demands of the *Charter*.

Doré, supra

20. West Coast LEAF will not be focused on administrative law issues. Its proposed arguments focus on the need for *Charter* jurisprudence to fulfill its

promise of substantive equality to women. Given its extensive experience in such matters, it will provide a unique and knowledgeable voice to this issue.

C. The value of West Coast LEAF's proposed contribution

21. The issues raised in this appeal have implications for the fundamental rights of women to equality in general and to equal access to the legal profession. West Coast LEAF has significant experience and knowledge regarding women's equality rights as protected by section 15 of the *Charter*. As an equality-seeking group that works daily to identify, monitor, report upon, and eradicate systemic discrimination against women, it can meaningfully contribute to this proceeding by assisting the Court to fully consider the impact of the Covenant on women's equality rights.
22. West Coast LEAF's submissions will assist the Court by:
 - a. Drawing upon its extensive experience in advocating for equality rights to address changes to the legal test for substantive equality under section 15 of the *Charter* as pronounced by the Supreme Court of Canada in *Withler v. Canada (Attorney General)*, 2011 SCC 12 and subsequent decisions, including but not limited to the alleviation of the requirement for a comparator analysis and the recognition of the fact that discrimination can be experienced on multiple intersecting grounds;
 - b. Illuminating how TWU's Covenant uniquely impacts women of all sexual orientations in that it restricts their reproductive freedom and impacts them on the multiple grounds prohibited grounds of sex, sexual orientation and marital status; and
 - c. Providing submissions regarding the correct balancing of the rights at issue.

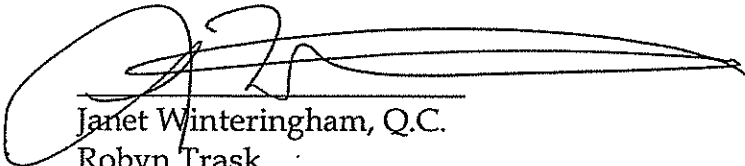
23. If granted leave to intervene, West Coast LEAF will, as much as possible, work in cooperation with the parties to ensure that its submissions do not duplicate those of the parties or intervenors or expand the lis between them.

PART 5: RELIEF SOUGHT

24. For the reasons set out above, West Coast LEAF respectfully requests:
- a. That it be granted leave to intervene in this appeal;
 - b. That it be permitted to file a factum of not more than 20 pages on or before a date to be specified by this Court;
 - c. That West Coast LEAF be granted access to the exhibits and portions of the Appeal Book referenced by the parties in their factums;
 - d. That it be granted permission to apply to the panel hearing the appeal for leave to present oral argument; and
 - e. That there shall be no costs of this application or costs of the appeal awarded for or against West Coast LEAF.

All of which is respectfully submitted.

Dated: February 17th, 2016.



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Counsel for West Coast LEAF

PART 6: AUTHORITIES

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