

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

**GLEN HANSMAN**

Appellant  
(Respondent)

AND:

**BARRY NEUFELD**

Respondent  
(Appellant)

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**MOTION RECORD FOR LEAVE TO INTERVENE**  
**BY WEST COAST LEGAL EDUCATION AND ACTION FUND**  
(Pursuant to Rules 47(1) and 55-59 of the *Rules of the Supreme Court of Canada*)

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**IN THE SUPREME COURT OF CANADA**  
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**GLEN HANSMAN**

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AND:

**BARRY NEUFELD**

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(Appellant)

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**NOTICE OF MOTION FOR LEAVE TO INTERVENE OF  
WEST COAST LEGAL EDUCATION AND ACTION FUND**  
(Pursuant to Rules 47(1) and 55-59 of the *Rules of the Supreme Court of Canada*)

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**TAKE NOTICE THAT** the Moving Party, West Coast Legal Education and Action Fund Association (“West Coast LEAF”) hereby applies to a Judge of this Honourable Court, pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, for an Order:

1. Granting West Coast LEAF leave to intervene in this appeal;
2. Permitting West Coast LEAF to file a factum of not more than ten (10) pages, or such other length as this Court deems appropriate;
3. Permitting West Coast LEAF to present oral argument at the hearing of this appeal of not more than five (5) minutes, or such other duration as this Court deems appropriate;
4. Providing that no order of costs of this motion and this appeal may be made for or against West Coast LEAF; and
5. Any such further or other Order as this Court deems appropriate.

**AND FURTHER TAKE NOTICE** that the motion shall be made on the following grounds:

1. As described in the affidavit of Rajwant Mangat, sworn May 8, 2022, West Coast LEAF is a non-profit organization that has a genuine and substantial interest in the issues raised in this appeal.
2. West Coast LEAF's mandate is to use the law to create a just and equal society for all women and people who experience gender-based discrimination. It carries out its mandate through litigation, law reform, and public legal education activities
3. West Coast LEAF has appeared before this Court on fifteen occasions as an intervener (as outlined at paragraph 14 of Rajwant Mangat's affidavit), in addition to numerous appearances before the Court of Appeal of British Columbia, the Supreme Court of British Columbia, and administrative decision-makers to address a variety of issues affecting gender equality, including the relevance and significance of substantive gender equality to the interpretation and application of legislation.
4. West Coast LEAF has a particular interest and expertise in the relationship between freedom of expression and substantive equality for women and people who experience gender-based discrimination, as well as the use of defamation lawsuits to silence them and their allies. It has intervened to make submissions about the equality interests of sexual assault survivors or transgender people as they intersect with issues of freedom of expression in *Bent v. Platnick*, 2020 SCC 23 and *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, *A.B. v. C.D.*, 2020 BCCA 11, and *Oger v. Whatcott (No. 7)*, 2019 BCHRT 58.
5. An important issue in this appeal is the proper interpretation and application of the *PPPA* in cases affecting vulnerable groups in society. If West Coast LEAF is granted leave to intervene, it will draw on its experience with respect to the social contexts and equality interests of sexual assault survivors and transgender people to make the submissions outlined below.
6. West Coast LEAF will argue that this Court should:

- a. Affirm substantive equality as a key interpretive principle in a purposive and contextual approach to the public interest weighing exercise under the *PPPA*;
- b. Establish a framework for assessing when “there is the possibility that the expression or claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the *Charter* or human rights legislation”; and
- c. Affirm the relevance and significance of a finding that there is the possibility that an expression or claim might provoke hostility against a vulnerable or protected group to the public interest weighing exercise.

7. West Coast LEAF will propose the following considerations for assessing when there is the possibility that an expression or claim might provoke hostility against an identifiably vulnerable group in society or a group protected under s. 15 of the *Charter* or human rights legislation:

- a. The analysis must be purposive, contextual, and driven by substantive equality considerations. This requires situating the expression or claim within its social context and considering the extent to which that context is marked by an unequal distribution of power, privilege, and freedom of expression.
- b. A threshold issue is whether an expression or claim implicates a vulnerable or protected group. At this stage, the connection between the expression or claim and the vulnerable or protected group should be defined expansively. A party does not need to be a member of a vulnerable or protected group for that group’s rights and interests to be considered. Moreover, more than one vulnerable or protected group can be considered. Vulnerable groups include or are in addition to groups protected by s. 15 of the *Charter* and human rights legislation. The overarching marker of vulnerability is substantive inequality in society, as indicated by characteristics including historical disadvantage, social and/or economic marginalization, the presence of prejudice and systemic discrimination against the group, unequal access to freedom of expression, and unequal access to justice.

- c. Whether there is “the possibility that the expression or claim might provoke hostility” against a vulnerable or protected group should be defined broadly and liberally and from the perspective of the affected group. “Hostility” extends beyond the narrow definition of hatred in the criminal law context and includes any conduct which has the effect of diminishing the dignity, equality, or security of members of a vulnerable or protected group. The terms “possibility” and “might provoke” requires an assessment of both potential and future impacts of an expression or claim; while the risk must be more than merely speculative, proving the harm and/or a causal connection is not required.
- i. With respect to an expression, the analysis should be sensitive to the presence of coded language or “dog whistles” which portray a denigrating meaning while using ordinary words.
  - ii. With respect to a claim, a finding may be made where the claim might suppress expressions which seek to advance the substantive equality of a vulnerable or protected group.
8. West Coast LEAF will argue that a finding that there is the possibility that an expression or claim might provoke hostility against a vulnerable or protected group is a central consideration in the public interest weighing exercise. Such expressions or claims lack social value; are contrary to the purpose of the *PPPA*; thwart the state’s interest in controlling discrimination; could encourage the improper use of the courts to silence the vulnerable; and are thus deserving of little to no legal protection.
9. West Coast LEAF will make the above submissions with references to the social contexts of transgender students (an extremely vulnerable group which is implicated by this case but whose interests are not directly represented by a party) and sexual assault survivors. It will also make references to other areas of law where expressive values are balanced with equality provisions and other related factors. This will illuminate how the *PPPA* could be interpreted harmoniously with other balancing exercises in constitutional and administrative law.

10. These arguments will be useful to the Court in deciding this appeal. The submissions will provide specific and concrete input on a purposive, contextual, and substantive equality-driven approach to the public weighing exercise under s. 4(2)(b) of the *PPPA*, including how courts should consider expressions or claims affecting the dignity, equality, and safety of a vulnerable or protected group. They will also situate these submissions within the real-world contexts of vulnerable groups implicated by the issues in the appeal and yet not represented by the parties—transgender students and sexual assault survivors. West Coast LEAF is not aware of another group speaking to the interests of sexual assault survivors in this appeal.
11. West Coast LEAF has been coordinating with the appellant and the other applicants for intervention on that side of the case to avoid duplication. West Coast LEAF believes its submissions will be distinct from both the appellant and those other proposed interveners, and it will continue to coordinate with those groups to avoid duplication.
12. Granting leave to intervene to West Coast LEAF will not prejudice any of the parties, but West Coast LEAF and its constituents will suffer prejudice if leave to intervene in this appeal is denied.
13. West Coast LEAF will not seek to supplement the record.
14. West Coast LEAF will abide by the schedule set by the Registrar for filing materials.

**AND FURTHER TAKE NOTICE** that the following documents will be referred to in support of such motion:

1. The affidavit of Rajwant Mangat, affirmed May 8, 2022; and
2. Such further and other material as counsel for West Coast LEAF may advise and this Honourable Court may permit.

DATED at Vancouver, British Columbia, this 9<sup>th</sup> day of May, 2022.



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**AFFIDAVIT OF RAJWANT MANGAT**

(In support of a Motion for Leave to Intervene)

(Pursuant to Rules 47(1)(b) and 57(1) of the *Rules of the Supreme Court of Canada*)

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I, RAJWANT MANGAT, lawyer, of the City of Vancouver, in the Province of British Columbia, AFFIRM AS FOLLOWS:

1. I am the Executive Director of the West Coast Legal Education and Action Fund Association ("West Coast LEAF") and as such have personal knowledge of the matters hereinafter deposed to, except where stated to be based on information and belief in which case I verily believe them to be true.
2. I am authorized to provide this affidavit in support of West Coast LEAF's motion for leave to intervene in this appeal.
3. I was called to the Bar of Ontario in 2004 and to the Bar of British Columbia in 2011. I joined West Coast LEAF as the Director of Litigation in March 2016. I became the Executive Director on September 3, 2019.
4. This appeal concerns the application of BC's *Protection of Public Participation Act*, SBC 2019, c. 3 (the "PPPA") to a defamation lawsuit by Barry Neufeld, a school board trustee, against Glen Hansman, the president of the BC's teacher's union. The expressions at issue took

place in the context of Mr. Hansman speaking out against Mr. Neufeld's derogatory remarks about LGBT people and attacks on an educational resource about sexual orientation and gender identity. The BC Court of Appeal overturned the BC Supreme Court's dismissal of the defamation lawsuit under the *PPPA* after concluding, in part, that the Chamber Judge had erred in his weighing of the competing public interests under s. 4(2)(b) of the *PPPA*. While this Court had said in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 that courts may consider, as part of the public interest weighing exercise, "the possibility that the expression or claim might provoke hostility against an identifiably vulnerable group," the Court of Appeal did not do so. It did not even mention that Mr. Hansman was speaking out on behalf of an extremely vulnerable group in society, transgender people.

5. The appeal raises important concerns about the interpretation and application of the *PPPA* in relation to expressions and claims affecting vulnerable groups. Substantive equality demands that the public interest weighing exercise meaningfully consider and account for the impacts of expressions or claims on vulnerable groups in the context of the unequal distribution of power, privilege, and freedom of expression in public debates.

6. West Coast LEAF has a demonstrable interest and ongoing expertise in the relationship between expression rights and substantive equality for women and people who experience gender-based discrimination, as well as the use of defamation lawsuits to silence them and their allies. Our work in this area has focused on the rights and interests of sexual assault survivors and transgender people, particularly those facing intersecting disadvantages.

7. West Coast LEAF seeks leave to intervene in this appeal on the basis of this long-standing interest and expertise, and its ability to provide a unique and useful perspective to aid the Court in its consideration of the issues on appeal.

#### **A. Background and Expertise of West Coast LEAF**

8. West Coast LEAF is a non-profit society incorporated in British Columbia and registered federally as a charity. West Coast LEAF's mandate is to use the law to create an equal and just society for all women and people who experience gender-based discrimination in British Columbia. Working in collaboration with community, West Coast LEAF uses litigation, law

reform, and public legal education to seek systemic change. West Coast LEAF's work takes place in six areas of focus: freedom from gender-based violence, access to healthcare, access to justice, economic security, justice for those who are criminalized, and the right to parent.

9. West Coast LEAF was formed in April 1985 when the equality provisions of the *Canadian Charter of Rights and Freedoms* came into force. From its founding until 2014, West Coast LEAF operated as an affiliate of a national organization, Women's Legal Education and Action Fund ("LEAF National") and much of its litigation work was carried out under the auspices of LEAF National. Beginning in 2009, West Coast LEAF began to carry out litigation in its own name.

10. During the last fiscal year, West Coast LEAF had approximately 460 members. As of May 8, 2022, West Coast LEAF employs 13 permanent staff members. It relies on the annual support of approximately 200 volunteers to carry out its work.

11. West Coast LEAF acts to promote the equality interests of all women and people who experience gender-based discrimination in British Columbia, including where gender intersects with other axes of marginalization such as Indigeneity, race, national origin, immigration status, sexual orientation, gender identity, gender expression, family or marital status, disability or ability, age, and class. It is committed to working in consultation and collaboration with other equality-seeking groups to ensure that West Coast LEAF's legal positions, law reform activities, and educational programming are informed by, and inclusive of, the diversity of human experience.

12. Litigation is one of West Coast LEAF's three program areas. Through litigation, West Coast LEAF has contributed to the development of equality rights jurisprudence and the meaning of substantive equality in Canada, both in specific challenges to discriminatory or unconstitutional laws and government actions; and in matters where statutory interpretation compromises the realization of substantive equality through the adverse effects of such interpretation. West Coast LEAF works to ensure that the law incorporates an intersectional analysis of discrimination and disadvantage.

**i. Experience before the Supreme Court of Canada**

13. West Coast LEAF has considerable intervention experience before the Supreme Court of Canada, both in its own name and, in earlier years, through its participation in interventions brought by LEAF while West Coast LEAF was operating under LEAF's auspices.

14. West Coast LEAF intervened in its own name in the following cases:

- a. *Attorney General of British Columbia v. Council of Canadians with Disabilities*, SCC File No. 39430 (appeal heard January 12-13, 2022; judgment reserved);
- b. *Barendregt v. Grebliunas*, SCC File No. 39533 (appeal allowed December 2, 2021; reasons to follow) (jointly with Rise Women's Legal Centre);
- c. *Ross McKenzie Kirkpatrick v. Her Majesty the Queen*, SCC File No. 39287 ("*Kirkpatrick*") (appeal heard November 3, 2021; judgment reserved);
- d. *A.S. v. Her Majesty the Queen, et al.*, SCC File No. 39516 ("*A.S.*") (appeal heard October 5-6, 2021; judgment reserved) (jointly with Women Against Violence Against Women Rape Crisis Centre ("*WAVAW*"));
- e. *Her Majesty the Queen v. J.J.*, SCC File No. 39133 ("*J.J.*") (appeal heard October 5-6, 2021; judgment reserved) (jointly with WAVAW);
- f. *Colucci v. Colucci*, 2021 SCC 24 (jointly with LEAF National);
- g. *Michel v. Graydon*, 2020 SCC 24;
- h. *Bent v. Platnick*, 2020 SCC 23 ("*Platnick*"), and *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 ("*Pointes*") (jointly with Atira Women's Resource Society, B.W.S.S. Battered Women's Support Services Association, and Women Against Violence Against Women Rape Crisis Centre);

- i. *Law Society of British Columbia v. Trinity Western University and Volkenant*, 2018 SCC 32;
  - j. *Schrenk v. British Columbia Human Rights Tribunal*, 2017 SCC 62;
  - k. *R v. Lloyd*, 2016 SCC 13;
  - l. *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2014 SCC 70;
  - m. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59;
  - n. *British Columbia (Ministry of Education) v. Moore*, 2012 SCC 61; and
  - o. *Downtown Eastside Sex Workers United Against Violence v. Canada*, 2012 SCC 45 (jointly with Justice for Children and Youth and ARCH Disability Law Centre).
15. Interventions brought by LEAF National, originating in British Columbia, in which West Coast LEAF was involved, include:
- a. *Rick v. Brandsema*, 2009 SCC 10;
  - b. *Blackwater v. Plint*, 2005 SCC 58 (jointly with the Native Women's Association of Canada and the DisAbled Women's Network of Canada);
  - c. *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 (jointly with the DisAbled Women's Network of Canada);
  - d. *R. v. Shearing*, 2002 SCC 58;
  - e. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69;
  - f. *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44;

- g. *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 SCR 3 (jointly with the DisAbled Women's Network of Canada and the Canadian Labour Congress);
  - h. *Eldridge v. British Columbia*, [1997] 3 SCR 624 (jointly with the DisAbled Women's Network of Canada);
  - i. *R. v. O'Connor*, [1995] 4 SCR 411 (jointly with the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, and the DisAbled Women's Network of Canada);
  - j. *Norberg v. Wynrib*, [1992] 2 SCR 226;
  - k. *R. v. Sullivan*, [1991] 1 SCR 489; and
  - l. *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.
16. West Coast LEAF provided background information and support to several LEAF National interventions originating in other jurisdictions, including:
- a. *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (N.A.P.E.)*, 2004 SCC 66;
  - b. *Thibaudeau v. Canada*, [1995] 2 SCR 627 (jointly the Charter Committee on Poverty Issues, Federated Anti-Poverty Groups of British Columbia, and the National Action Committee on the Status of Women); and
  - c. *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219.
- ii. Experience before lower courts, administrative decision-makers, and inquiries**
17. West Coast LEAF is intervening or has intervened before the Court of Appeal for British Columbia and the Supreme Court of British Columbia in the following cases:
- a. *R. v. Ellis*, Court of Appeal File No. CA4791 (appeal hearing scheduled for May 26, 2022);

- b. *T.L. v British Columbia (Attorney General)*, 2021 BCSC 2203;
- c. *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241;
- d. *A.B. v. C.D.*, 2020 BCCA 11 (“*A.B. v. C.D.*”);
- e. *British Columbia Civil Liberties Association and John Howard Society of Canada v. Canada (Attorney General)*, 2019 BCCA 228 (jointly with the Native Women’s Association of Canada);
- f. *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2018 BCCA 132 (jointly with the Community Legal Assistance Society) (leave to appeal to the SCC refused, SCC File No. 38157);
- g. *British Columbia Civil Liberties Association and John Howard Society of Canada v Canada (Attorney General)*, 2018 BCSC 62;
- h. *Denton v Workers Compensation Board*, 2017 BCCA 403 (jointly with the Community Legal Assistance Society);
- i. *Law Society of British Columbia v. Trinity Western University and Volkenant*, 2016 BCCA 423;
- j. *Scott v College of Massage Therapists of British Columbia*, 2016 BCCA 180 (“*Scott*”);
- k. *Trinity Western University and Volkenant v. Law Society of British Columbia*, 2015 BCSC 2326;
- l. *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2015 BCSC 534 (jointly with the Community Legal Assistance Society);
- m. *Villardell v Dunham*, 2013 BCCA 65;



- n. *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309;
  - o. *Friedmann v MacGarvie*, 2012 BCCA 445;
  - p. *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (the *Polygamy Reference*); and
  - q. *Downtown Eastside Sex Workers United Against Violence v Canada*, 2010 BCCA 439.
18. Additionally, West Coast LEAF has intervened or had interested party status before an administrative decision-maker or a commission of inquiry in the following cases:
- a. *RR v. Vancouver Aboriginal Child and Family Services Society*, BCHRT File No. 16765 (hearing concluded in July 2021; decision reserved);
  - b. *Oger v. Whatcott (No. 7)*, 2019 BCHRT 58 (“*Oger*”);
  - c. *National Inquiry into Missing and Murdered Indigenous Women and Girls* (Order dated August 17, 2017 granting participant status in Part II and Part III hearings) (final report released June 2019) and the *BC Missing Women Commission of Inquiry* headed by Hon. Wally Oppal, Q.C. (report released November 2012); and
  - d. *In the Matter of an Inquiry Pursuant to Section 63(1) of the Judges Act Regarding the Hon. Justice Robin Camp* (Canadian Judicial Council) (“the Camp Inquiry”) (report released November 29, 2016) (as part of a national coalition of six organizations).
19. Apart from its intervention work, West Coast LEAF is currently representing the plaintiff in *Single Mothers’ Alliance of BC v. British Columbia* (BC Supreme Court File No. S-1733843), a constitutional challenge to BC’s family law legal aid regime under ss. 7 and 15 of the *Charter* and s. 96 of the *Constitution Act, 1867*, 30 & 31 Vict, c. 3.
- iii. Law reform and public legal education activities**
20. West Coast LEAF’s second program area is law reform. West Coast LEAF’s law reform initiatives seek to ensure that all legislation and policies comply with guarantees of gender-

based equality found in the *Charter*, human rights legislation, and relevant international instruments to which Canada is a signatory. West Coast LEAF's law reform work consists of conducting comprehensive community-based research and analysis; drafting best practices and policy recommendations; and making submissions to governmental and other decision-makers on a range of issues affecting equality-seeking groups.

21. West Coast LEAF's third program area is public legal education. West Coast LEAF's educational programming aims to help residents of British Columbia understand and access their equality rights, and to think critically about the law as it affects them. West Coast LEAF's public legal education projects complement and support its litigation and law reform activities, based on the premise that the first step toward asserting rights is understanding them.

#### **B. West Coast LEAF's Interest in this Appeal**

22. An important issue in this case is the proper approach to considering the impacts of an expression or claim on a vulnerable group in society. West Coast LEAF has long worked to ensure that the interpretation and application of legislation such as the *PPPA* is consistent with substantive equality for women and transgender people, especially those facing intersecting disadvantages. Moreover, it has specific expertise in the equality interests of sexual assault survivors and transgender people as they intersect with issues of freedom of expression.
23. West Coast LEAF's work with respect to the substantive equality of sexual assault survivors and transgender people, including in the context of freedom of expression cases, forms a significant part of its litigation, law reform, and public legal education activities. The following is a selection of West Coast LEAF's relevant work:
  - a. In November 2021, West Coast LEAF intervened before this Court in *Kirkpatrick*<sup>1</sup>, which concerned the interpretation of consent to sexual activity under the *Criminal Code* and whether a person can make condom use a condition of their consent. West

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<sup>1</sup> *Ross McKenzie Kirkpatrick v. Her Majesty the Queen*, SCC File No. 39287.

- Coast LEAF made submissions about how the current approach to cases of condom sabotage or non-consensual condom removal may harm or retraumatize complainants.
- b. In November 2021, West Coast LEAF presented to anti-violence workers at the Ending Violence Association of BC's annual Training Forum on the topic of defamation law and the *PPPA* in the context of sexual assault allegations.
  - c. In February 2021, West Coast LEAF unsuccessfully sought leave to intervene before the BC Supreme Court in *PPPA* applications in the *Galloway v. A.B.* litigation, a defamation lawsuit against a woman who complained of sexual assault and her allies who spoke out to assist her. West Coast LEAF is currently seeking leave to intervene before the BC Court of Appeal in the appeals of the Supreme Court's decision on the *PPPA* applications (*Galloway v. A.B.*, 2021 BCSC 2344).
  - d. In October 2021, West Coast LEAF and WAVAW jointly intervened before the Supreme Court of Canada in *J.J.* and *A.S.*<sup>2</sup> These appeals concerned the rules of evidence in criminal sexual assault trials in relation to the complainant's private records and/or the complainant's sexual history, as well as the complainant's ability to participate in admissibility applications under those rules. West Coast LEAF and WAVAW made submissions about the relevance of the complainant's voice and perspective to the proper adjudication of admissibility applications.
  - e. In April 2021, West Coast LEAF made submissions to BC's Special Committee on Reforming the *Police Act*, which included submissions about systemic discrimination in policing against survivors of gender-based or sexual violence. Since
  - f. Since 2016, West Coast LEAF's project entitled *Dismantling the Barriers to Reporting Sexual Assault* has been identifying strategies to reduce barriers in the criminal justice system to reporting sexual assault in consultation with survivors, justice system actors, service providers, and activists. In November 2018, as part of this project, West Coast LEAF published "We are Here: Women's Experiences of the Barriers to Reporting

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<sup>2</sup> *A.S. v. Her Majesty the Queen, et al.*, SCC File No. 39516); *Her Majesty the Queen v. J.J.*, SCC File No. 39133.

Sexual Assault.” This report centred the voices of 18 women survivors of sexual assault who shared their experiences navigating the criminal justice system. In March 2020, West Coast LEAF published a toolkit for complainant’s counsel in criminal proceedings involving applications under ss. 276 and 278 of the *Criminal Code*.

- g. In June 2019, West Coast LEAF wrote to the government of British Columbia to urge the province to invest in a rights-based framework for survivors of sexual assault by committing to providing dedicated, sustained funding for community-based sexual assault crisis response teams and integrated sexual assault clinics across British Columbia. We were joined in this request by several BC-based umbrella and direct-service provider organizations who work to support survivors of sexual assault.
- h. In November 2019, West Coast LEAF intervened as part of a coalition of anti-violence organizations from British Columbia in *Platnick* and *Pointes*<sup>3</sup>. The coalition made submissions on the barriers to reporting or disclosing gender-based violence, including the use and threat of defamation lawsuits. It argued for an interpretation of Ontario’s *Protection of Public Participation Act* (upon which BC’s *PPPA* is modelled) which would empower survivors to report, disclose, and/or seek basic supports related to gender-based violence without the fear of being sued.
- i. In September 2019, West Coast LEAF intervened before the BC Court of Appeal in *A.B. v. C.D.*<sup>4</sup>, a family law dispute about a father’s efforts to block his transgender son’s access to gender affirming medical treatment, as well as the father’s harmful conduct arising from his rejection of his son’s gender. In his appeal, the father claimed that s. 2(b) of the *Charter* protected his right to misgender and deadname his son, to try to dissuade his son from accessing gender affirming care, and to share private information about his son with third parties. West Coast LEAF argued that the *Charter* did not apply in this case, or alternatively that the father’s *Charter* rights were subordinate to the child’s best interests.

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<sup>3</sup> *Bent v. Platnick*, 2020 SCC 23; *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22.

<sup>4</sup> *A.B. v. C.D.*, 2020 BCCA 11.

- j. In December 2018, West Coast LEAF intervened in *Oger*<sup>5</sup>, a human rights complaint concerning the scope of the BC *Human Rights Code*'s protection against publications containing anti-transgender hate speech. The respondent argued that his *Charter* rights to freedom of religion and freedom of expression authorised his distribution of posters which attacked a trans woman political candidate's gender identity. West Coast LEAF made submissions about the context of discrimination and hate speech against transgender people; and about the application of competing *Charter* rights and values to the interpretation of the *Code*'s protection against discriminatory publications.
- k. In June 2016, West Coast LEAF was part of a coalition of gender equality organizations from across Canada which intervened in the Camp Inquiry.<sup>6</sup> The Coalition made submissions on, among other things, low reporting rates of sexual assault, the lack of confidence among survivors of sexual assault in the criminal justice system, and the chilling effect that the perpetuation of rape myths and stereotypes has on reporting.
- l. In November 2015, West Coast LEAF intervened before the BC Court of Appeal in *Scott*.<sup>7</sup> This case concerned the ability of the College of Massage Therapists of BC to place interim conditions on the registrant's practice to protect the public while investigating a complaint of sexual misconduct. West Coast LEAF intervened to make submissions that the evidence required to establish a risk to the public must not result in the complainant's evidence being assessed on the basis of gendered myths and stereotypes about sexual violence.
- m. West Coast LEAF offers a range of public legal education resources and workshops aimed at educating the public about gender-based discrimination and forms of gender-based violence. In 2017, in part as a response to the requirement that all post-secondary institutions in British Columbia have in place sexual misconduct policies, West Coast LEAF developed a legal education project called "Only Yes Means Yes" about sexual assault and consent designed by and for post-secondary students. Along with the

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<sup>5</sup> *Oger v. Whatcott (No. 7)*, 2019 BCHRT 58.

<sup>6</sup> *In the Matter of an Inquiry Pursuant to Section 63(1) of the Judges Act Regarding the Hon. Justice Robin Camp* (Canadian Judicial Council).

<sup>7</sup> *Scott v College of Massage Therapists of British Columbia*, 2016 BCCA 180.

workshop, through which we have reached 977 students, faculty and staff, West Coast LEAF produced a social media-friendly video called “The Unfinished Story of Yes” about the development of sexual assault and consent law in Canada.

- n. Since 1999, West Coast LEAF has offered its “No Means No” workshop delivered to thousands of BC students aged 10-15 to empower youth to understand sexual assault and consent law. The workshop, developed in response to the Supreme Court of Canada’s decision in *R. v. Ewanchuk*, [1999] 1 SCR 330, delves into gendered myths and stereotypes about sexual assault.

### **C. West Coast LEAF’s Proposed Submissions**

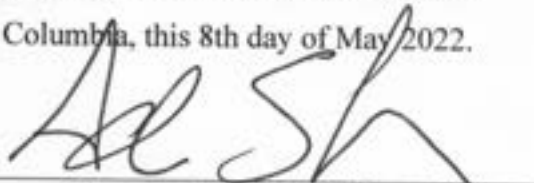
- 24. If granted leave to intervene in this appeal, and drawing from its interest and experience in the contexts of survivors of sexual assault and of transgender people, West Coast LEAF will argue that this Court should:
  - a. Affirm substantive equality as a key interpretive principle in a purposive and contextual approach to the public interest weighing exercise under the *PPPA*;
  - b. Establish a framework for assessing when there is the possibility that an expression or claim “might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the *Charter* or human rights legislation;” and
  - c. Affirm the relevance and significance of a finding that there is the possibility that an expression or claim might provoke hostility against a vulnerable group to the public interest weighing exercise.
- 25. West Coast LEAF will propose the following considerations for assessing when there is the possibility that an expression or claim might provoke hostility against an identifiably vulnerable group in society, including groups protected under s. 15 of the *Charter* or human rights legislation:
  - a. The analysis must be purposive, contextual, and driven by substantive equality considerations. This requires situating the expression or claim within its social

context and considering the extent to which that context is marked by an unequal distribution of power, privilege, and freedom of expression.

- b. A threshold issue is whether an expression or claim implicates an identifiably vulnerable group in society. At this stage, the connection between the expression or claim and the vulnerable group should be defined expansively. A party does not need to be a member of a vulnerable group for that group's rights and interests to be considered. Moreover, more than one vulnerable group can be considered. Vulnerable groups include but are not limited to groups with personal characteristics protected by s. 15 of the *Charter* and human rights legislation. The overarching marker of vulnerability is substantive inequality in society, as indicated by characteristics including historical disadvantage, social and/or economic marginalization, the presence of prejudice and systemic discrimination against the group, unequal access to freedom of expression, and unequal access to justice.
- c. Whether there is the possibility that an expression or claim "might provoke hostility" against a vulnerable group should be defined broadly and liberally and from the perspective of the vulnerable group. "Hostility" extends beyond the narrow definition of hatred in the criminal law context and includes any conduct which has the effect of diminishing the dignity, equality, or security of members of a vulnerable group. The terms "possibility" and "might provoke" requires an assessment of both potential and future impacts of an expression or claim; while the risk must be more than merely speculative, proving the harm and/or a causal connection is not required.
  - i. With respect to an expression, the analysis should be sensitive to the presence of coded language or "dog whistles" which portray a denigrating meaning while using ordinary words.
  - ii. With respect to a claim, a finding may be made where the claim might suppress expressions which seek to advance the substantive equality of a vulnerable group.

26. West Coast LEAF will argue that a finding that there is the possibility that an expression or claim might provoke hostility against a vulnerable group is a central consideration in the public interest weighing exercise. Such expressions or claims lack social value; are contrary to the purpose of the *PPPA*; thwart the state's interest in controlling discrimination; could encourage the improper use of the courts to silence the vulnerable; and are thus deserving of little to no legal protection.
27. West Coast LEAF will make the above submissions with references to the social contexts of transgender students (a vulnerable group which is implicated by this case but whose interests are not directly represented by a party) and sexual assault survivors. It will also make references to other areas of law where expressive values are balanced with equality provisions and other related factors. This will illuminate how the *PPPA* could be interpreted harmoniously with other balancing exercises in constitutional and administrative law.
28. If granted leave to intervene, West Coast LEAF will work in cooperation with the parties and any other proposed interveners to ensure that we offer a perspective that is non-duplicative, unique, and useful to the Court's determination of this appeal.
29. I make this affidavit in support of West Coast LEAF's application for leave to intervene and for no other or improper purpose.

AFFIRMED BEFORE ME at the City of  
Vancouver, in the Province of British  
Columbia, this 8th day of May 2022.

  
Commissioner for Taking Affidavits

in British Columbia

  
RAJWANT MANGAT

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