

Registry Nos. IMM-2977-17
IMM-2229-17
IMM-775-17

FEDERAL COURT

B E T W E E N:

**THE CANADIAN COUNCIL FOR REFUGEES, AMNESTY INTERNATIONAL, THE
CANADIAN COUNCIL OF CHURCHES, ABC, DE (BY HER LITIGATION
GUARDIAN ABC), FG (BY HER LITIGATION GUARDIAN ABC), MOHAMMAD
MAJD MAHER HOMSI, HALA MOHER HOMSI, KARAM MAHER HOMSI, REDA
YASSIN AL NAHASS AND NEDIRA MUSTEFA**

Applicants

-and-

**MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP AND THE
MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

Respondents

MOTION RECORD

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NOTICE OF MOTION

Pursuant to Rules 109 and 364(2)(b) of the Federal Courts Rules, SOR/98-106

TAKE NOTICE THAT pursuant to Rules 109 and 369 of the *Federal Courts Rules*, SOR/98-106, the Proposed Intervener will make a motion in writing at the Federal Court of Canada,

THE MOTION IS FOR:

- (a) an Order granting the Proposed Intervener leave to intervene; permitting them to file a memorandum of argument; permitting them to make brief oral submissions; and not permitting them to seek costs nor be liable for costs absent any abuse of process on their part.
- (c) such further and other order as this Honourable Court deems appropriate.

THE PROPOSED INTERVENER IS:

West Coast LEAF
Address: 555-409 Granville Street
Vancouver, BC
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THE GROUNDS FOR THIS MOTION ARE:

1. The case raises a serious justiciable issue;
2. The Proposed Intervener have a genuine interest in the issues under consideration in this application for judicial review;
3. The Proposed Intervener will apply sufficient skills and resources to make a meaningful contribution to the proceeding;
4. The Proposed Intervener wishes to participate by filing an intervener's memorandum and making brief oral submissions;
5. The participation of the Proposed Intervener will assist the determination of a factual or legal issue related to the judicial review application by providing different and valuable insights and perspectives in relation to determining the ambit of section 15 *Charter* protection in adverse effects sex discrimination cases;
6. It is in the interests of justice that the Proposed Intervener be able to participate in these proceedings;
7. Granting leave to intervene to the Proposed Intervener will not unduly complicate, interrupt or protract the proceedings;
8. The Proposed Intervener has complied with the procedural requirements set out in Rule 109 and 359-369 of the *Rules*;
9. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Affidavit of Kasari Govender, sworn on February 1, 2019.
2. Written Submissions in support of the motion.
3. Such further and other material as counsel may advise and this Honourable Court permit.

DATED at Vancouver, BC this 1st day of February, 2019



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AFFIDAVIT OF KASARI GOVENDER

I, KASARI GOVENDER, Barrister and Solicitor, 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 was called to the bar in Ontario in 2006 and in British Columbia in 2007. I joined West Coast LEAF as its Legal Director in 2008. I have served as West Coast LEAF's Executive Director since 2011. I am authorized to provide this affidavit in support of West Coast LEAF's application for leave to intervene in this case.
3. This case concerns the constitutionality of the Canada-US Safe Third Country Agreement, s. 101(1)(e) of the *Immigration and Refugee Protection Act* and s. 159.3 of the *Immigration and Refugee Regulations* (together, the "STCA Regime"). The Applicants have raised a challenge to the operation of the STCA Regime on the basis that it violates s. 7 and s. 15(1) of the Canadian *Charter of Rights and Freedoms*.
4. I understand that the STCA Regime operates to limit the ability of refugee claimants who travel through the United States and present at a land border port of entry to Canada to access refugee determination processes in Canada. With limited exceptions, such individuals are ineligible to make refugee claims at the Canadian border on the basis that they are presumed to have access to a fair refugee determination process in the United States. If an individual arriving to a land border port of entry from the United States does not meet a legislated exception, officers of the Canada Border Services Agency have no option but to return that individual to the United States.
5. The Applicants argue that the STCA regime deprives refugee claimants of their s. 7 rights to life, liberty and security of the person by exposing them to a risk of *refoulement* from the United States to persecution, torture or death, as well as to a risk of detention in the United States, and that these deprivations are not in accordance with the principles of fundamental justice because the STCA Regime is arbitrary, overbroad and violates the principle of non-*refoulement*. The Applicants also submit that the STCA Regime violates s. 15 of the *Charter* on the basis of sex because women refugees are a particular social group facing a disproportionately high risk of *refoulement* from the United States, the effect of which exacerbates their pre-existing disadvantage.
6. West Coast LEAF is concerned that the STCA Regime discriminates against female refugees seeking protection from gender-based persecution as it disproportionately limits their ability to seek and obtain a fair refugee determination process in the United

States and thus ultimately increases their risk of *refoulement*. West Coast LEAF seeks leave to intervene in this case to assist the Court in applying an appropriately contextualized analysis of the substantive equality claims at issue, particularly in respect of addressing the nexus between the claimed indirect, adverse-effects discrimination and the impugned legislative regime.

A. Background and Expertise of West Coast LEAF

7. 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 make change. In particular, West Coast LEAF aims to transform society by achieving: access to healthcare; access to justice; economic security; freedom from gender-based violence; justice for those who are criminalized; and the right to parent.
8. West Coast LEAF was created in April 1985, when the equality provisions of the *Charter* came into force. Prior to 2009, West Coast LEAF was a branch of a national organization, Women's Legal Education and Action Fund ("LEAF"). In 2009, West Coast LEAF became an affiliate of LEAF. Both LEAF and West Coast LEAF grew out of the efforts of a group of women who, starting in the early 1980s, worked to ensure that ss. 15 and 28 of the *Charter* would be effective in guaranteeing substantive equality. Since 2009, West Coast LEAF has involved itself in litigation in its own name. Since 2014, West Coast LEAF is no longer an affiliate of LEAF.
9. During the last fiscal year, West Coast LEAF had approximately 370 individual and organizational members. As of January 29, 2019, West Coast LEAF employs eight full-time staff and three part-time staff. West Coast LEAF relies on the support of approximately 200 volunteers to carry out its work.

10. West Coast LEAF acts to promote the equality interests of all women and gender diverse persons in British Columbia, regardless of their race, national origin, immigration status, sexual orientation, gender identity, gender expression, family or marital status, disability or ability, age, socio-economic status or any other personal characteristic. 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. West Coast LEAF works to ensure the law recognizes that the myriad ways in which discrimination and disadvantage are experienced – in relation to gender, race, and ability, for instance – are overlapping, intersecting and cannot be examined in isolation.
11. 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.
12. West Coast LEAF has intervened, or is intervening, in its own name in the following cases before the Court of Appeal for British Columbia and at the Supreme Court of Canada:
 - a. *British Columbia Civil Liberties Association and John Howard Society of Canada v Canada (Attorney General)* (BC Court of Appeal File No. CA45092) (appeal heard on November 13-14, 2018; judgment reserved);
 - b. *Law Society of British Columbia v. Trinity Western University and Volkenant*, 2018 SCC 32 and 2016 BCCA 423;
 - c. *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);
 - d. *Denton v Workers Compensation Board*, 2017 BCCA 403 (jointly with the Community Legal Assistance Society);
 - e. *Schrenk v British Columbia Human Rights Tribunal*, 2017 SCC 62;

- f. *Scott v College of Massage Therapists of British Columbia*, 2016 BCCA 180;
- g. *R v Lloyd*, 2016 SCC 13;
- h. *British Columbia Teachers' Federation v British Columbia Public School Employers' Association*, 2014 SCC 70;
- i. *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59;
- j. *Vilardell v Dunham*, 2013 BCCA 65;
- k. *British Columbia (Ministry of Education) v Moore*, 2012 SCC 61;
- l. *Friedmann v MacGarvie*, 2012 BCCA 445; and
- m. *Downtown Eastside Sex Workers United Against Violence v Canada*, 2012 SCC 45 (jointly with Justice for Children and Youth and ARCH Disability Law Centre) and 2010 BCCA 439.

13. West Coast LEAF has been granted leave to intervene or to participate as an interested party before the BC Supreme Court, an administrative decision-maker or an inquiry in the following:

- a. *Oger v Whatcott* (BCHRT File No. 16408) (complaint heard December 11-14 and 17, 2018) (judgment reserved);
- b. *British Columbia Civil Liberties Association and John Howard Society of Canada v Canada (Attorney General)*, 2018 BCSC 62;
- c. *National Inquiry into Missing and Murdered Indigenous Women and Girls* (Order dated August 17, 2017 granting participant status in Part II (institutional) and Part III (expert) hearings) (final report pending) and the BC Missing Women Commission of Inquiry headed by Hon. Wally Oppal, Q.C. (report released November 2012);
- 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)

(report released November 29, 2016) (as part of a national coalition of six organizations);

- e. *Trinity Western University and Volkenant v. Law Society of British Columbia*, 2015 BCSC 2326;
- f. *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2015 BCSC 534;
- g. *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309; and
- h. *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (the *Polygamy Reference*).

14. Apart from its involvement in litigation as an intervener, West Coast LEAF is currently litigating a constitutional challenge to the family law legal aid regime in British Columbia before the BC Supreme Court: *Single Mothers Alliance of BC and Nicolina Bell v British Columbia*, File No. S1733843 (Notice of Civil Claim filed April 26, 2017). The claim is brought under s. 7 and s. 15(1) of the *Charter* and s. 96 of the *Constitution Act, 1867*.

15. 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 equality for all women and people experiencing gender-based discrimination pursuant to 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 impacting equality-seeking groups.

16. Public legal education rounds out West Coast LEAF's program areas. 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. The program aims to transform public legal education, collaborate with

diverse equality-seeking groups, present workshops and talks to diverse audiences, and distribute public legal education materials. West Coast LEAF's public legal education projects complement and supports its litigation and law reform activities, based on the premise that the first step toward asserting rights is understanding them.

17. West Coast LEAF has significant expertise in applying the principles of substantive equality to constitutional and legislative interpretation, the development of the law, and state action that impacts the equality rights of women and gender-diverse persons. This expertise is grounded in an understanding that sex or gender inequality are often compounded and overlapping with other intersecting markers of stigma and disadvantage, such as race, immigration and refugee status, and disability.

B. West Coast LEAF's Expertise and Interest in this Case

18. This case concerns the constitutionality of the STCA Regime under s. 7 and s. 15(1) of the *Charter*. West Coast LEAF's interest in the case relates to the equality interests of female and gender diverse refugee claimants seeking protection in Canada, including those among them who are seeking protection from gender-based persecution. The case will require interpretation and application of s. 15(1) of the *Charter*. In particular, it will require understanding the nexus between the claimed discrimination and the impugned legislative regime in the context of a claim based on indirect, adverse effects discrimination. West Coast LEAF has considerable experience and knowledge concerning the interpretation of s. 15 of the *Charter*, and in applying an intersectional, subjective equality analysis to the experiences of diverse women, including refugees, women without status and women subjected to gender-based harms. West Coast LEAF's experience in this regard cuts across its litigation, law reform and educational programming.
19. Over the years, West Coast LEAF has intervened in the following cases to inform courts' interpretation of s. 15 to reflect the substantive equality the *Charter* is aimed at promoting and protecting:

- a. In *British Columbia Civil Liberties Association and John Howard Society v Canada (Attorney General)*, 2018 BCSC 62, West Coast LEAF intervened

to advance arguments calling for the court to assess the equality claims raised by the plaintiffs on the basis of their intersectional impacts on Indigenous women prisoners and women with disabling mental health impairments as these populations are disproportionately detained in higher security settings and placed into solitary confinements at higher rates. At the Court of Appeal (File No. CA45092), West Coast LEAF intervened jointly with the Native Women's Association of Canada to again argue that s. 15 of the Charter must be approached through a robust contextual and intersectional framing for a meaningful consideration of the discriminatory impacts of legislation or government actions.

- b. In the *Trinity Western University and Volkenant v Law Society of British Columbia* judicial review, West Coast LEAF intervened at three levels of court (2015 BCSC 2326, 2016 BCCA 423 and 2018 SCC 32) to argue that the courts' equality values analysis under the *Charter* must not become formalistic or rigid, fixated on the numbers of those adversely impacted at the expense of a robust understanding of how the adverse impact perpetuates pre-existing disadvantage serving ultimately to widen the gap between the claimants and others in society.
- c. West Coast LEAF intervened at the Supreme Court of Canada in *BC Teachers' Federation v BC Public School Employers' Association*, 2014 SCC 70, a case concerning the equal provision of parental leave supplemental employment benefits for birth mothers. West Coast LEAF highlighted the need for a substantive equality analysis under s. 15(1) to account for the disadvantage flowing from the underlying differences among individuals in society, providing a contextual analysis on the distinct burdens of child-bearing and child-rearing to ensure that substantive equality for one group does not come at the cost of the other.
- d. West Coast LEAF intervened in *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, a case involving the s. 7 and s. 15(1) rights of incarcerated women and their infants after the cancellation of a mother-

baby program at a provincial corrections facility. West Coast LEAF contributed to the court's analysis by arguing that, due to the multiple and intersecting grounds at issue in the case, a comparator approach to the equality analysis would be inappropriate. Ultimately the trial judge agreed with West Coast LEAF's analysis that the decision to cancel the program created a distinction on the grounds of race, ethnicity, disability and sex, and that the cancellation exacerbated the disadvantage suffered by women and their infants.

- e. West Coast LEAF participated in *Reference re Section 293 of the Criminal Code of Canada (BC)*, 2011 BCSC 1588 (the *Polygamy Reference*) to assist the court in its consideration of whether s. 293 of the *Criminal Code* infringes, among other provisions, s. 15 of the *Charter*. West Coast LEAF's analysis of the application of s. 15 focused on the proper consideration of human dignity in the analysis as a means for furthering the right to equality, not undermining the state's positive obligation to protect and promote substantive equality for groups who are particularly vulnerable.

20. West Coast LEAF is currently engaged in litigation challenging BC's family law legal aid regime under ss. 7 and 15(1) of the *Charter* and under s. 96 of the *Constitution Act, 1867* in *Single Mothers Alliance of BC and Nicolina Bell v. British Columbia* (BCSC File No. S1733843). Among other things, West Coast LEAF's equality analysis in this case will address the proper approach to understanding the nexus between the distinction engaged by the regime and the discriminatory, adverse impact of the regime on women and children.

21. West Coast LEAF's expertise in respect of s. 15's equality protection has been recognized as valuable in the context of non-*Charter* cases in which courts and tribunals are called upon to understand and interpret human rights legislation, or where other constitutional rights and obligations will be interpreted. West Coast LEAF has intervened on its own or in coalition with other organizations in the following cases arising outside the context of a challenge under s. 15 of the *Charter*:

- a. *Oger v Whatcott* (BCHRT File No. 16408) (heard December 11-14, 17, 2018, decision on reserve), concerning a complaint brought under s. 7 of the BC *Human Rights Code* prohibiting discriminatory publication. West Coast LEAF made submissions on the necessary contextual framing of the competing *Charter* values raised by the parties, and the purposes underlying the *Human Rights Code*'s protection from gender discrimination;
- b. *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2018 BCCA 132 and 2015 BCSC 534, concerning the dismissal of an adverse effects human rights complaint. West Coast LEAF's submissions concerned the nature of the evidence of connection required under human rights law to establish a *prima facie* case of discrimination.
- c. *Schrenk v British Columbia Human Rights Tribunal*, 2017 SCC 62, concerning the scope of the BC Human Rights Tribunal's jurisdiction to hear harassment complaints arising from employment where the complainant and respondent do not share an employer. West Coast LEAF argued that the *Human Rights Code* should be interpreted from an appreciation of the many ways in which substantive equality in the workplace is denied or undermined by harassment.
- d. *R v Lloyd*, 2016 SCC 13, concerning the constitutionality of a mandatory minimum sentence for drug offences. West Coast LEAF's submissions offered an interpretation of ss. 7 and 12 that accord with the *Charter*'s equality guarantees.
- e. *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 and *Vilardell v Dunham*, 2013 BCCA 65, concerning the constitutionality of civil court hearing fees. Among other things, West Coast LEAF argued for the recognition of substantive equality as a principle of fundamental justice.

- f. *British Columbia (Ministry of Education) v Moore*, 2012 SCC 61, a case concerning the duty to accommodate disability under BC’s human rights legislation in the context of education. West Coast LEAF’s submissions focused on the distinct legal frameworks that apply to discrimination claims brought under the *Charter* and human rights legislation and the need for maintaining a distinct analysis in the human rights context.
- g. *Downtown Eastside Sex Workers United Against Violence v Canada*, 2012 SCC 45 (jointly with Justice for Children and Youth and ARCH Disability Law Centre) and 2010 BCCA 439, concerning the test for public interest standing. West Coast LEAF argued that the test for public interest standing should be applied in a manner that promotes substantive equality and it should appreciate the real and systemic barriers to other reasonable and effective means for constitutional challenges to come before courts.

22. West Coast LEAF has a long history of work on the dimensions of gender-based harms, including considerable experience and expertise in identifying the way in which gender-based violence (such as sexual assault) impacts women’s equality. Some of our recent work in this area includes the following:

- a. West Coast LEAF is a participant with standing before the *National Inquiry into Missing and Murdered Indigenous Women and Girls*. West Coast LEAF has participated in the evidence gathering phase of the institutional and expert hearings, made oral closing submissions and provided the Commissioners with written final submissions in December 2018. West Coast LEAF’s recommendations to the National Inquiry focused on the need for the root causes of violence against Indigenous women and girls to be addressed as intersectional, gender-based and racially motivated.
- b. West Coast LEAF is currently engaged in an on-going, multi-year law reform project aimed at dismantling barriers to reporting sexual assault in Canada. As part of the project, in November 2018 West Coast LEAF published a report titled “We Are Here” centring the experiences of

survivors of sexual assault with the legal system generally and specifically in relation to reporting gendered and sexualized violence.

- c. As part of West Coast LEAF's public legal education programming, we deliver a workshop called *Only Yes Means Yes*. The curriculum is aimed at educating post-secondary students about how the law understands sexual assault and the legal and ethical responsibility to obtain consent. As a companion to the workshop, West Coast LEAF created a social-media friendly video called *The Unfinished Story of Yes*, exploring the evolution of sexual assault law in Canada. West Coast LEAF also offers a workshop called *No Means No* which is aimed at consent education for youth in grades 5-9.
- d. Since 2009, West Coast LEAF has published annual reports on, among other things, gender-based violence in BC, assessed in light of international standards (in particular, the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)). West Coast LEAF's most recent 2018 CEDAW Report Card, published in December 2018, emphasized BC's insufficient investment into gender-based violence prevention and response and lagging response to recommendations to address root causes of violence against Indigenous women and girls.
- e. In 2016, West Coast LEAF participated as part of a national coalition of women's organizations in an inquiry before the Canadian Judicial Council: *In the Matter of an Inquiry Pursuant to Section 63(1) of the Judges Act Regarding the Honourable Justice Robin Camp* (CJC report released November 29, 2016). The Coalition's submissions focused on reform of sexual assault law in Canada, the experience of sexual assault for particularly marginalized women, and the myths and stereotypes that continue to perpetuate sex discrimination in and through the legal system.
- f. In September 2016, West Coast LEAF made submissions to Status of Women Canada on the development of a federal strategy to combat gender-based violence. West Coast LEAF's recommendations ranged from

amendments to the *Divorce Act* to explicitly recognize family violence, to increased and sustained funding for social services that support women to leave abusive relationships, to amendments to immigration law and policy to ensure that women concerned about the risk of losing their status in Canada are not forced into dependency on their spouses.

- g. West Coast LEAF intervened in *Scott v College of Massage Therapists of British Columbia*, 2016 BCCA 180, a case concerning the evidentiary threshold applicable to decisions made by regulators of various health professions to impose limits or conditions on a registrant's practice if it considers that action necessary to protect the public pending an investigation or hearing of a complaint. West Coast LEAF provided submissions on the gendered nature of sexual violence, and on how reliance on debunked myths and stereotypes about sexual assault survivors had improperly influenced the decision-maker below.
- h. In May 2016, West Coast LEAF prepared a legal handbook in partnership with the Canadian Centre for Elder Law called *Roads to Safety*. The resource is aimed at helping older women survivors of violence understand their legal rights and options. As a companion to the handbook, we also distribute multilingual wallet cards listing sources of support and information for older women.
- i. In June 2014, as part of a larger project aimed at understanding how online spaces are used to perpetuate gendered harassment and discrimination, West Coast LEAF published a research report titled *Cybermisogyny: Using and strengthening Canadian legal responses to gendered hate and harassment online*. This work informed the development of *Trendshift*, a workshop aimed at educating youth about their rights and responsibilities online.
- j. In April 2014, West Coast LEAF prepared a briefing note recommending that the BC government pass an amendment to BC's *Residential Tenancy Act* allowing victims of domestic violence to end fixed-term tenancy agreements in order to flee domestic violence.

- k. *Friedmann v MacGarvie*, 2012 BCCA 445, a case concerning sexual harassment as *per se* discrimination under human rights law in the context of a tenancy. West Coast LEAF argued that proof of sexual harassment is proof of sexual discrimination under human rights law within the tenancy context and that this discrimination constitutes a form of gendered violence.

23. West Coast LEAF has engaged in advocacy promoting the equality rights of refugees and migrants, with particular attention to the experiences of women refugees and refugees experiencing gender-based persecution:

- a. In April 2018, West Coast LEAF recommended the Minister of Immigration, Refugees and Citizenship implement a formal, expedited process for women fleeing violent relationships or making refugee claims on the basis of gender-based persecution. We also recommended legislative reform to oblige immigration officers to consider the safety of female survivors of violence as a priority. These recommendations were discussed at two follow-up meetings with senior ministerial staff.
- b. Throughout 2018, West Coast LEAF participated in the Vancouver Police Department's community consultations on the development of a policy for those without legal status in Canada to access protection without fear. West Coast LEAF also prepared a formal submission to the Vancouver Police Department on promoting unbiased policing with a particular focus on the experience of diverse women experiencing gender-based violence and on persons without immigration status.
- c. In December 2017, West Coast LEAF advocated for adequate funding for immigration and refugee legal aid services, highlighting the impact that inconsistency and uncertainty in funding has on women fleeing gender-based persecution.
- d. In April 2016, West Coast LEAF called on the Burnaby Board of Education to establish a Sanctuary Schools policy that would ensure that all parents, regardless of their legal status in Canada, could access public education in

Burnaby for their children without fear that doing so would put themselves and their families at risk.

- e. In July 2015, West Coast LEAF urged the province to eliminate the three-month waiting period for newly arrived migrants to access provincial healthcare coverage, to ensure that those with precarious immigration status and those fleeing abuse would have safe and equitable access to healthcare.
- f. In January 2015, West Coast LEAF produced a position paper on sanctuary cities and called on the City of Vancouver to become a sanctuary city where everyone may access municipal services and police protection regardless of their legal status in Canada without fear of detention and deportation.
- g. In November 2014, West Coast LEAF joined others to oppose the federal government's attempt to allow provinces to restrict refugee claimants' and others without permanent residency ability to access social assistance.
- h. In December 2014, on the 30th anniversary of the adoption of the UN *Convention Against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment*, West Coast LEAF joined others in calling on the federal government to ratify the *Optional Protocol to the Convention Against Torture*.
- i. In 2012, West Coast LEAF prepared a position paper on violence against women without immigration status, recommending, among other things, that the federal government conduct a gender audit of immigration and refugee laws, regulations, policies and practices.

C. West Coast LEAF's Proposed Submissions

24. If granted leave to intervene, West Coast LEAF proposes to make the following submissions:

Outline of Proposed Submissions

25. West Coast LEAF seeks leave to intervene in this case to assist the Court in its analysis of the Applicants' adverse effects discrimination claim under s. 15(1) of the *Charter*. While adverse effects discrimination has been long-recognized as infringing s. 15(1) of the *Charter* and essential to remedy in the fulfillment of the *Charter*'s vision of substantive equality, courts have struggled to develop a consistent and comprehensive framework for such claims.
26. Since the decisions of this Court and the Federal Court of Appeal in the earlier STCA litigation, the test for establishing an infringement of s. 15(1) of the *Charter* has been reformulated and further refined. In *Kapp*¹ and affirmed in *Withler*², the Supreme Court of Canada returned to its original statement on substantive equality in *Andrews*³ and developed a two-part test for establishing an infringement of s. 15(1) requiring claimants to first establish that the impugned law creates a distinction based on an enumerated or analogous ground, and second, to demonstrate that the distinction creates a disadvantage for the claimant by perpetuating prejudice or stereotyping. The second step of this test was most recently recast by the Supreme Court to query whether the law imposes burdens or denies benefits such that it reinforces, perpetuates, or exacerbates disadvantage.⁴
27. If granted leave to intervene in this case, West Coast LEAF intends to focus its submissions on two key elements of the Court's analysis of adverse effects discrimination claims under s. 15.
- a. First, we will argue that courts must engage in a full contextual analysis to appreciate indirect, adverse effects discrimination, and that such an analysis in this case must begin by considering the pre-existing disadvantage experienced by women survivors of violence. This pre-existing disadvantage is directly linked to the barriers women experience in making

¹ *R. v. Kapp*, 2008 SCC 41.

² *Withler v. Canada (Attorney General)*, 2011 SCC 12.

³ *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.

⁴ *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 25 ("APP").

refugee claims, and again particularly so where those claims allege gender-based persecution as recognized in Canadian law.

- b. Second, we intend to set out a number of considerations the Court should apply when assessing the connection or nexus required between the distinction created by the law and the disadvantage created or perpetuated as a result in an adverse effects discrimination claim under s. 15(1).

28. West Coast LEAF's proposed intervention will approach the s. 15(1) analysis from the perspective that women refugees presenting at a land port of entry to Canada are denied the equal protection and equal benefit of Canada's refugee determination process as a result of the STCA Regime, a legislated denial of access to a remedial process. The STCA Regime operates to prevent these claimants from seeking refuge in Canada, forcing them to seek asylum in the United States, where their disadvantage is exacerbated, resulting in an increased risk of *refoulement* as established by the Applicants' Record in this case.

Contextual analysis of the impact of the challenged law

29. In an adverse effects discrimination claim, the necessary contextual approach requires particular attention to the claimant's own experience, including the way in which multiple and overlapping characteristics may compound her disadvantage. Without an appreciation of the manifold ways in which the impugned laws affect the claimant, courts risk obscuring the actual impact of the challenged laws and shortcutting the substantive equality analysis at the heart of the Charter protection. Courts must look at the actual impact of the challenged law accounting for social, political, economic and historical factors concerning the claimant group.⁵

30. West Coast LEAF will argue that the US refugee determination system perpetuates prejudice against female refugees and stereotypes about asylum-seekers who have experienced violence. In making this argument, West Coast LEAF will draw on the Applicants' Record and Canadian law's long-standing recognition that women who

⁵ *Withler* at para. 39

experience violence and refugee claimants who have experienced gender-based persecution especially face unique challenges in accessing legal processes. These challenges include the reluctance to disclose experiences of violence, and the systemic nature of the violence they face.⁶

31. Almost without exception, refugee claims based on gender persecution are made by women. Gender-based claims for protection are typically related to family or domestic violence, acts of sexual violence, forced marriage, punishment for transgression of social mores, coerced family planning, or female genital mutilation.⁷ Canada has recognized the special difficulties faced by women asylum seekers in making their legal claims for protection. This recognition is the basis for the promulgation of the Immigration and Refugee Board's ("Board") *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* over twenty-five years ago ("*Guidelines*"). The Board has acknowledged that women asylum seekers may be reluctant to disclose their experiences of violence.⁸ Since their adoption, the *Guidelines* have been continually relied upon by refugee decision-makers and this Court in review of their decisions.⁹

32. West Coast LEAF will argue that through its implementation of a mandatory STCA Regime, Canada has worsened the disadvantage experienced by female asylum seekers and asylum seekers with claims of gender-based persecution. These individuals seeking access to protection in Canada are instead subjected to the US refugee determination system where there are additional obstacles to their ability to access including, the one-year filing deadline, the restricted definition of "particular social group" and an onerous and flawed nexus requirement. Instead of appreciating the special hurdles women asylum seekers face, an additional bundle of barriers that perpetuate stereotypes are put in their way. This is especially problematic given that Canada does itself recognize the

⁶ *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution*; For example, the Supreme Court refers to the concept of "battered women's syndrome" in *R. v. Lavallee*, [1990] 1 SCR 852 and "rape myths" in *R v. Seaboyer*, [1991] 2 SCR 577 at para. 171.

⁷ UNCHR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 2002

⁸ *Guidelines* at D."Special Problems at Determination Hearings"

⁹ See for example: *Sakova v. Canada (Citizenship and Immigration)*, 2008 FC 149 at paras. 13-14

unique barriers and pre-existing disadvantage experienced by this vulnerable population.

33. West Coast LEAF will address how these additional obstacles perpetuate stereotypes about women who have experienced violence. For example, the one year filing deadline corresponds with the stereotype that if women do not quickly report allegations of violence there is reason to doubt the veracity of their account. Further, in the precedential decision of Attorney General Jeff Sessions in the *Matter of A-B*, a woman's claim of gender persecution based on domestic violence fails in part because the violence she experienced is regarded as a personal matter between partners and not part of a larger systemic problem of gender-based violence. West Coast LEAF will argue, in the context of gender persecution claims, these obstacles in the US refugee determination system correlate to outdated myths about how a woman who has experienced violence will behave and an antiquated understanding of domestic violence as a personal matter rather than a systemic one.¹⁰

Nexus and causation in the substantive equality analysis

34. Since *Withler*, the Supreme Court of Canada has further refined the substantive equality analysis to account for the particular evidentiary challenges that arise when proving indirect discrimination. Accepting that s. 15(1) offers robust protection for both formal and substantive equality claims, courts have been vexed by the question of whether, to what extent, and how a nexus or a connection should be proven between the claimed distinction and the adverse effects experienced by the claimant.¹¹
35. If granted leave to intervene, West Coast LEAF intends to develop two principles relevant to the question of the nexus between the two steps of the s. 15(1) analysis where an adverse-effects discrimination claim is made:

¹⁰ Musalo Supplementary Affidavit, Applicants' Record, Vol.9 at paras. 9-24.

¹¹ See, for example, *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30.

a. Choice is not a relevant consideration in a nexus analysis

36. In some early *Charter* equality cases, the notion of a claimant's choice to engage in particular activities factored significantly in the courts' consideration of adverse-effects discrimination.¹²
37. The Supreme Court of Canada recently dismissed Canada's arguments about the relevance of choice in a causation analysis in the *Bedford* case.¹³ The Court held that whether it was the choice of a person to engage in sex work, an inherently risky activity, was irrelevant to determining the nexus between Canada's laws and the claimants' increased risk of harm as a result of those laws. While the Court was specifically addressing section 7 arguments, West Coast LEAF will argue that the Court's analysis of the import of choice in causation is also relevant to the nexus analysis in an adverse effects discrimination case.

b. Adverse-effects discrimination calls for a flexible approach

38. If granted leave, West Coast LEAF will develop two points on the measure of proof regarding the nexus between the claimed distinction and perpetuation of disadvantage in an adverse effects discrimination claim. In light of the highly contextual nature of equality claims – particularly where an ostensible neutral law is challenged on the basis that it adversely impacts some – courts must take a flexible and generous approach to understanding how the claimed distinction may create disadvantage in the context of a particular legislative regime.
39. Section 15(1) does not require a “but for” causal connection between the enumerated or analogous distinction and the adverse effects of the law. A disproportionate impact on historically disadvantaged claimants and/or a disproportionately harmful impact on a subset of those claimants may suffice to establish that the distinction is discriminatory.

¹² See for example the SCC decision in *Symes v. Canada*, [1993] 4 SCR 695 where the Court relied in part of the mother's choice to incur the childcare expenses, instead of her husband.

¹³ *Canada (Attorney General) v. Bedford*, [2013] 3 SCR 1101 at paras. 79-92.

40. First, it has long been recognized by the Supreme Court that a claim of discrimination under s. 15(1) does not require every member of an enumerated or analogous group to experience the law as discriminatory for it to be found as so. For instance, not all women have to experience the discrimination alleged in order for particular women to make out a sex discrimination claim.¹⁴
41. Second, it does not matter if an impugned law only affects a small number of the members of the group.¹⁵ The number of people affected bears no relationship to the existence of the discrimination they suffer, or its seriousness. Focusing on the number of affected people distracts from the central question as to whether the distinction and the adverse effects are connected to a prohibited ground.
42. I have reviewed the written submissions included in this Motion Record and confirm that they are an accurate reflection of West Coast LEAF's proposed submissions should leave to intervene in this case be granted.
43. If granted leave to intervene, West Coast LEAF will work in cooperation with the parties and any other interveners to ensure that that we offer a perspective that is non-duplicative, unique and useful to the Court's determination of this case.

¹⁴ *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 000; *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252.

¹⁵ See *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 94-95.

44. 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)
1st day of February 2019.)

Rajwant Mangat)
A Commissioner for taking Oaths in)
British Columbia)

RAJWANT MANGAT
BARRISTER + SOLICITOR
NOTARY PUBLIC
WEST COAST LEAF
555 - 419 GRANVILLE -
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V6C 1T2

Kasari Govender
KASARI GOVENDER

FEDERAL COURT

B E T W E E N:

**THE CANADIAN COUNCIL FOR REFUGEES, AMNESTY INTERNATIONAL, THE
CANADIAN COUNCIL OF CHURCHES, ABC, DE (BY HER LITIGATION
GURADIAN ABC), FG (BY HER LITIGATION GUARDIAN ABC), MOHAMMAD
MAJD MAHER HOMSI, HALA MAHER HOMSI, KARAM MAHER HOMSI, REDA
YASSIN AL NAHASS AND NEDIRA MUSTEFA**

Applicants

-and-

**MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP AND
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

Respondents

WRITTEN SUBMISSIONS

Pursuant to Rule 364(2)(e) of the Federal Courts Rules, SOR/98-106

OVERVIEW:

1. This is a motion for an Order granting the Proposed Intervener, West Coast Legal Education and Action Fund (“West Coast LEAF”), leave to intervene in the above-listed matter.
2. This case concerns important constitutional issues relating to the operation of the Canada-United States Safe Third Country Agreement (“STCA”), the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (“IRPA”) and the *Immigration and Refugee Protection Regulations*, (SOR/2002-227) (“the Regulations”).
3. The STCA is an agreement between Canada and the United States for shared responsibility concerning refugee determination when claimants who have traveled through one country present at the land border of the other. The STCA, s. 101(1)(e) of IRPA, and s. 159.3 of the

Regulations (together, the “STCA Regime”) work to limit the ability of refugee claimants who travel through the United States and present at a land port of entry to Canada to access refugee determination processes in Canada. These individuals are (with few, enumerated exceptions) ineligible to make refugee claims at the Canadian border on the basis that they are presumed to have access to a fair refugee determination process in the United States (and vice versa). If an individual seeking protection under the *Refugee Convention* presents at a land port of entry and does not meet an STCA exception enumerated at s. 159 of the *Regulations*, officers of the Canada Border Services Agency (“CBSA”) have no discretion to depart from finding that that individual is ineligible to make a refugee claim in Canada.

4. The Applicants submit that the combined effect of the STCA Regime unjustifiably infringes s. 7 and s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (“*Charter*”).
5. The Applicants argue that the STCA Regime engages s. 7 rights to life, liberty and security of the person by exposing refugee claimants to a risk of *refoulement* from the United States to persecution, torture or death, as well as to a risk of detention in the United States. These deprivations of life, liberty and security of the person are not in accordance with the principles of fundamental justice because the STCA Regime is arbitrary, overbroad, and it violates the principle of non-*refoulement*.
6. The Applicants also submit that the STCA Regime unjustifiably infringes the right to substantive equality protected by s. 15(1) of the *Charter*. Female asylum seekers face an increased risk of *refoulement* from the United States, the effect of which exacerbates the pre-existing disadvantage they experience as a particularly vulnerable and marginalized social group.
7. The Applicants’ Record includes evidence of serious obstacles that disproportionately disadvantage women refugees and increase their risk of *refoulement* on the basis of their sex/gender. These include: (1) the requirement of US asylum law that the vast majority of asylum seekers must make their claims within one year of entry to the country; (2) that, where they do not file within the year, to avoid *refoulement* they must meet a higher evidentiary standard to obtain withholding of removal protection; (3) an overly restrictive

and divergent from international law approach to defining a particular social group; and (4) inconsistency in the adjudication of domestic violence protection claims in the United States.

8. This case provides the Court with an opportunity to consider the interplay between the increased risk of *refoulement* arising from the STCA Regime and the equality rights of women asylum seekers. The jurisprudence under s. 15(1) of the *Charter* has evolved significantly since this question was first considered by this Court. Over the last decade of equality rights under the *Charter*, the test for determining infringements of s. 15 has been refined, especially with respect to the analytical approach taken to understanding indirect, adverse effects discrimination as claimed here.
9. West Coast LEAF is well-positioned to assist the Court in this regard. West Coast LEAF has substantial expertise and interest in ensuring that Canadian law and the *Charter* are interpreted and applied in a manner consistent with the principles of substantive equality. West Coast LEAF has knowledge and expertise in interpreting s. 15 of the *Charter* and in applying an intersectional, substantive equality analysis to the experiences of diverse women, including refugees and women subjected to gender-based violence.
10. West Coast LEAF seeks leave to intervene to provide the Court with useful and unique submissions that would assist the Court in determining the s. 15 *Charter* claims made in this case.
11. As detailed in the submissions that follow, West Coast LEAF will argue that the effect of the STCA regime must be properly understood and contextualized as part of a refined s. 15 analysis. Such an analysis must consider the pre-existing disadvantage experienced generally by women survivors of violence, and is directly linked to the barriers women survivors of violence face in making refugee claims. Against this backdrop, West Coast LEAF's submissions will consider how the impugned laws (the STCA Regime) worsen the disadvantage of women asylum seekers. West Coast LEAF will also set out a number of considerations relevant to assessing the nexus required between the distinction created by the law and the disadvantage created or perpetuated as a result in an adverse effects discrimination claim.

12. West Coast LEAF respectfully requests that leave be granted to present this useful and distinct perspective to the Court.

PART I – THE FACTS:

13. West Coast LEAF relies on the record filed herein, and on the facts as set out in the Applicants' Record.

PART II – THE ISSUES:

14. This motion raises the following issue: Should West Coast LEAF be granted leave to intervene in this matter?

PART III – THE LAW AND ARGUMENT

Criteria for Granting Intervener status:

15. In *Sport Maska*,¹ the Federal Court of Appeal re-affirmed that the criteria for consideration of a motion to intervene remain those set out in *Rothmans*.² *Rothmans* requires the Court to consider the following factors in deciding whether or not to grant leave to intervene:

- a) Is the proposed intervener directly affected by the outcome of the proceeding?
- b) Does there exist a justiciable issue and a veritable public interest?
- c) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
- d) Is the position of the proposed intervener adequately defended by one of the parties to the case?
- e) Can the Court hear and decide the case on its merits without the proposed intervener?
- f) Are the interests of justice better served by the intervention of the proposed third party?

¹ *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44.

² *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1989] F.C.J. No. 707.

16. Some controversy had arisen as to the applicable law for consideration of a motion for intervention following the Order in *Pictou Landing*.³ In *Pictou Landing*, Stratas J.A. questioned the utility of several of the *Rothmans* factors and proposed a revised list of factors to be considered by the court when deciding whether or not leave to intervene should be granted. The Federal Court of Appeal clarified in *Sport Maska* that the modified and expanded factors set out by Stratas J.A. in *Pictou Landing* are not significantly different to warrant a change in the governing jurisprudence on the question of motions for leave to intervene.⁴
17. The Federal Court of Appeal emphasized that the criteria used in determining whether an intervention is warranted need to be kept flexible, finding that Stratas J.A.'s concerns about certain aspects of the *Rothmans* test could be dealt with by ascribing more or less weight to a particular factor depending on the nature of the case.⁵ The Federal Court of Appeal also held that a number of the expanded factors articulated by Stratas J.A. in *Pictou Landing* could be considered within the factor "Are the interests of justice better served by the intervention of the proposed third party?"
18. Using this flexible approach and following the guidance from Stratas J.A. in *Pictou Landing* and the cases of *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 102 and *Prophet River First Nation v. Canada (Attorney General)*, 2016 FCA 120 decided after *Sport Maska*, it is West Coast LEAF's position that little weight should be ascribed to the following factors:
 - In relation to the first factor, as a public interest intervener, West Coast LEAF, a non-profit legal organization, will not be directly affected by the outcome of this case. West Coast LEAF certainly has an interest in the outcome, but will not be directly affected. As noted in *Prophet River*⁶ this first factor from the *Rothmans* test should not be of import to the decision as being "directly affected" is required for full party status in a judicial review and West Coast LEAF is not seeking full party status.

³ *Canada v. Pictou Landing First Nation*, 2014 FCA 21 (per Stratas J.A.).

⁴ *Sport Maska* at para. 39.

⁵ *Sport Maska* at para. 42.

⁶ *Prophet River* at para. 5.

- The third factor regarding whether there is “an apparent lack of any other reasonable or efficient means to submit the question to the Court?” should also be ascribed little weight in this case. Again, as noted by the Court of Appeal in *Prophet River*: “This is irrelevant. The question is before the Court and it will be decided whether or not the moving parties are before the Court.”⁷
 - In relation to the fifth factor, while the Court can certainly hear and decide this case on its merits without West Coast LEAF’s participation, the Proposed Intervener submits that its participation in the case will assist the Court by providing unique and valuable insights and perspectives on the s. 15 *Charter* claims raised by the Applicants. These arguments are developed under the other *Rothmans* criteria as explained below.
19. In the case at bar, the central applicable factors from *Rothmans* are: (1) whether there is a veritable public interest in this case; (2) whether the position of the Proposed Intervener is adequately defended by one of the parties to the case; and (3) whether the interests of justice are better served by the intervention of the Proposed Intervener.
- i. There is a veritable public interest in the case at bar
20. This case engages a veritable public interest. The question before the Court relates to the constitutionality of the STCA Regime and its impact goes well beyond these individual and institutional applicants. Apart from the relief sought on behalf of the individual applicants, systemic relief is also sought, namely declarations concerning the *vires* of section 159.3 of the *Regulations*, its inconsistency with Canada’s international obligations under the *Refugee Convention* and the *Convention Against Torture* and declaratory relief under s. 52 of the *Constitution Act, 1982* for violations of ss. 7 and 15(1) of the *Charter*.
21. The case directly concerns Canada’s constitutional obligations and obligations at international law. Adjudication of this case will require the Court to consider the scope of those obligations in the context of Canada’s broad regulatory powers concerning its refugee determination process. The outcome of the case will have an impact on non-citizens seeking access to Canada’s refugee determination process, on individuals and organizations

⁷ *Prophet River* at para. 5.

advocating on behalf of refugee claimants in Canada, or otherwise providing support and assistance to refugee claimants. The case will also have implications for the continuing development of *Charter* jurisprudence, especially in relation to the elaboration of the evidentiary threshold and causal nexus for equality claims on the basis of sex/gender discrimination.

22. For these reasons, West Coast LEAF submits that the case raises genuine issues of public interest.

ii. West Coast LEAF offers different and valuable insights and perspectives

23. If granted leave, West Coast LEAF's submissions will not be duplicative of the parties', nor will they be extraneous to the discrete issues under consideration by the Court. West Coast LEAF will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter. West Coast LEAF proposes to make the following submissions if granted leave to intervene in this case.

Outline of Proposed Submissions⁸

24. West Coast LEAF seeks leave to intervene in this case to assist the Court in its analysis of the Applicants' adverse effects discrimination claim under s. 15(1) of the *Charter*. While adverse effects discrimination has been long-recognized as infringing s. 15(1) of the *Charter* and essential to remedy in the fulfillment of the *Charter*'s vision of substantive equality, courts have struggled to develop a consistent and comprehensive framework for such claims.

25. Since the decisions of this Court and the Federal Court of Appeal in the earlier STCA litigation, the test for establishing an infringement of s. 15(1) of the *Charter* has been reformulated and further refined. In *Kapp*⁹, (2008 SCC 41) and affirmed in *Withler*¹⁰, the Supreme Court of Canada returned to its original statement on substantive equality in

⁸ Affidavit of Kasari Govender ("Govender Affidavit") at paras. 15-32

⁹ *R. v. Kapp*, 2008 SCC 41.

¹⁰ *Withler v. Canada (Attorney General)*, 2011 SCC 12.

*Andrews*¹¹ and developed a two-part test for establishing an infringement of s. 15(1) requiring claimants to first establish that the impugned law creates a distinction based on an enumerated or analogous ground, and second, to demonstrate that the distinction creates a disadvantage for the claimant by perpetuating prejudice or stereotyping. The second step of this test was most recently recast by the Supreme Court to query whether the law imposes burdens or denies benefits such that it reinforces, perpetuates, or exacerbates disadvantage.¹²

26. If granted leave to intervene in this case, West Coast LEAF intends to focus its submissions on two key elements of the Court’s analysis of adverse effects discrimination claims under s. 15.

- a. First, West Coast LEAF will argue that courts must engage in a full contextual analysis to appreciate indirect, adverse effects discrimination, and that such an analysis in this case must begin by considering the pre-existing disadvantage experienced by women survivors of violence. This pre-existing disadvantage is directly linked to the barriers women experience in making refugee claims, and again particularly so where those claims allege gender-based persecution as recognized in Canadian law.
- b. Second, West Coast LEAF intends to set out a number of considerations the Court should apply when assessing the connection or nexus required between the distinction created by the law and the disadvantage created or perpetuated as a result in an adverse effects discrimination claim under s. 15(1).

27. West Coast LEAF’s proposed intervention will approach the s. 15(1) analysis from the perspective that women refugees presenting at a land port of entry to Canada are denied the equal protection and equal benefit of Canada’s refugee determination process as a result of the STCA Regime, a legislated denial of access to a remedial process. The STCA Regime operates to prevent these claimants from seeking refuge in Canada, forcing them to seek

¹¹ *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.

¹² *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 25 (“APP”).

asylum in the United States, where their disadvantage is exacerbated, resulting in an increased risk of *refoulement* as established by the Applicants' Record in this case.

Contextual analysis of the impact of the challenged law

28. In an adverse effects discrimination claim, the necessary contextual approach requires particular attention to the claimant's own experience, including the way in which multiple and overlapping characteristics may compound her disadvantage. Without an appreciation of the manifold ways in which the impugned laws affect the claimant, courts risk obscuring the actual impact of the challenged laws and shortcutting the substantive equality analysis at the heart of the *Charter* protection. Courts must look at the actual impact of the challenged law accounting for social, political, economic and historical factors concerning the claimant group.¹³
29. West Coast LEAF will argue that the US refugee determination system perpetuates prejudice against female refugees and stereotypes about asylum-seekers who have experienced violence. In making this argument, West Coast LEAF will draw on the Applicants' Record and Canadian law's long-standing recognition that women who experience violence and refugee claimants who have experienced gender-based persecution especially face unique challenges in accessing legal processes. These challenges include the reluctance to disclose experiences of violence, and the systemic nature of the violence they face.¹⁴
30. Almost without exception, refugee claims based on gender persecution are made by women. Gender-based claims for protection are typically related to family or domestic violence, acts of sexual violence, forced marriage, punishment for transgression of social mores, coerced family planning, or female genital mutilation.¹⁵ Canada has recognized the special difficulties faced by women asylum seekers in making their legal claims for protection. This

¹³ *Withler* at para. 39

¹⁴ *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution*; For example, the Supreme Court refers to the concept of "battered women's syndrome" in *R. v. Lavallee*, [1990] 1 SCR 852 and "rape myths" in *R v. Seaboyer*, [1991] 2 SCR 577 at para. 171.

¹⁵ UNCHR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 2002

recognition is the basis for the promulgation of the Immigration and Refugee Board's ("Board") *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* over twenty-five years ago ("*Guidelines*"). The Board has acknowledged that women asylum seekers may be reluctant to disclose their experiences of violence.¹⁶ Since their adoption, the *Guidelines* have been continually relied upon by refugee decision-makers and this Court in review of their decisions.¹⁷

31. West Coast LEAF will argue that through its implementation of a mandatory STCA Regime, Canada has worsened the disadvantage experienced by female asylum seekers and asylum seekers with claims of gender-based persecution. These individuals seeking access to refugee protection in Canada are instead subjected to the US refugee determination system where there are additional obstacles to their ability to access protecting, including the one-year filing deadline, the restricted definition of "particular social group" and an onerous and flawed nexus requirement. Instead of appreciating the special hurdles women asylum seekers face, an additional bundle of barriers that perpetuate stereotypes are put in their way. This is especially problematic given that Canada does itself recognize the unique barriers and pre-existing disadvantage experienced by this vulnerable population.
32. West Coast LEAF will address how these additional obstacles perpetuate stereotypes about women who have experienced violence. For example, the one-year filing deadline corresponds with the stereotype that if women do not quickly report allegations of violence there is reason to doubt the veracity of their account. Further, in the precedential decision of Attorney General Jeff Sessions in the *Matter of A-B*, a woman's claim of gender persecution based on domestic violence fails in part because the violence she experienced is regarded as a personal matter between partners and not part of a larger systemic problem of gender-based violence. West Coast LEAF will argue, in the context of gender persecution claims, these obstacles in the U.S refugee determination system correlate to outdated myths

¹⁶ *Guidelines* at D, "Special Problems at Determination Hearings".

¹⁷ See for example: *Sakova v. Canada (Citizenship and Immigration)*, 2008 FC 149 at paras. 13-14.

about how a woman who has experienced violence will behave and an antiquated understanding of domestic violence as a personal matter rather than a systemic one.¹⁸

Nexus and causation in the substantive equality analysis

33. Since *Withler*, the Supreme Court of Canada has further refined the substantive equality analysis to account for the particular evidentiary challenges that arise when proving indirect discrimination amounting to an adverse impact on the claimant. Accepting that s. 15(1) offers robust protection for both formal and substantive equality claims, courts have been vexed by the question of whether, to what extent, and how a nexus or a connection should be proven between the claimed distinction and the adverse effects experienced by the claimant.¹⁹

34. If granted leave to intervene, West Coast LEAF intends to develop two principles relevant to the question of the nexus between the two steps of the s. 15(1) analysis where an adverse-effects discrimination claim is made:

a. Choice is not a relevant consideration in a nexus analysis

35. In some early *Charter* equality cases, the notion of a claimant's choice to engage in particular activities factored significantly in the courts' consideration of adverse-effects discrimination.²⁰

36. The Supreme Court of Canada recently dismissed Canada's arguments about the relevance of choice in a causation analysis in the *Bedford* case.²¹ The Court held that whether it was the choice of a person to engage in sex work, an inherently risky activity, was irrelevant to determining the nexus between Canada's laws and the claimants' increased risk of harm as a result of those laws. While the Court was specifically addressing s. 7 arguments, West

¹⁸ Musalo Supplementary Affidavit, Applicants' Record, Vol.9 at paras. 9-24

¹⁹ See, for example, *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30.

²⁰ See for example the SCC decision in *Symes v. Canada*, [1993] 4 SCR 695 where the Court relied in part of the mother's choice to incur the childcare expenses, instead of her husband.

²¹ *Canada (Attorney General) v. Bedford*, [2013] 3 SCR 1101 at paras. 79-92.

Coast LEAF will argue that the Court’s analysis of the import of choice in causation is also relevant to the nexus analysis in an adverse effects discrimination case.

b. Adverse-effects discrimination calls for a flexible approach

37. If granted leave, West Coast LEAF will develop two points on the measure of proof regarding the nexus between the claimed distinction and perpetuation of disadvantage in an adverse effects discrimination claim. In light of the highly contextual nature of equality claims – particularly where an ostensible neutral law is challenged on the basis that it adversely impacts some – courts must take a flexible and generous approach to understanding how the claimed distinction may create disadvantage in the context of a particular legislative regime.
38. Section 15(1) does not require a “but for” causal connection between the enumerated or analogous distinction and the adverse effects of the law. A disproportionate impact on historically disadvantaged claimants and/or a disproportionately harmful impact on a subset of those claimants may suffice to establish that the distinction is discriminatory.
39. First, it has long been recognized by the Supreme Court that a claim of discrimination under s. 15(1) does not require every member of an enumerated or analogous group to experience the law as discriminatory for it to be found as so. For instance, not all women have to experience the discrimination alleged in order for particular women to make out a sex discrimination claim.²²
40. Second, it does not matter if an impugned law only affects a small number of the members of the group.²³ The number of people affected bears no relationship to the existence of the discrimination they suffer, or its seriousness. Focusing on the number of affected people distracts from the central question as to whether the distinction and the adverse effects are connected to a prohibited ground.

²² *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 000; *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252.

²³ See *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 94-95.

41. It is our submission that the proposed arguments offer “different and valuable insights and perspectives” from the Applicants that would be of benefit to the Court. The focus of West Coast LEAF’s work is on sex discrimination and substantive equality, key issues at play in this case. It is in the interest of justice to grant West Coast LEAF motion to intervene.
42. In assessing whether it is in the interest of justice to allow an intervention, the Federal Court of Appeal in *Prophet River* identified the following considerations:²⁴ (1) whether the intervention is compliant with the objectives and will advance the objectives set out in Rule 3 and the mandatory requirements in Rule 109; (2) whether the moving party has a genuine interest in the matter such the Court can be assured that the proposed intervener has the necessary skills, knowledge and resources and will dedicate them to the matter before the Court; (3) whether the matter has assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the parties before the Court; and (4) whether the moving party has been involved in earlier proceedings in the matter.

West Coast LEAF meets the procedural requirements of Rule 109(2)

43. Rule 109 requires a proposed intervener to “set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.” West Coast LEAF has done so in the enclosed motion record. The enclosed affidavit of support from Kasari Govender, Executive Director of West Coast LEAF is “detailed and well-particularized” as required by the Federal Court of Appeal in *Pictou Landing*. As discussed below, it sets out the expertise of the organization, the nature of its proposed intervention and how it will be of assistance to the Court. Based on this record, the Court is able to adequately assess the remaining considerations and determine whether, on balance, intervener status should be granted to West Coast LEAF.

Granting this motion is consistent with Rule 3

²⁴ *Prophet River* at para. 6.

44. Granting this motion is consistent with Rule 3 of the *Federal Courts Rules*, SOR/98-106 which provides that the Court adopt “the just, most expeditious and least expensive determination of every proceeding on its merits.” We note that the parties’ further memoranda of arguments have not yet been filed. As such, there will be an opportunity for the parties to respond to the Proposed Intervener’s arguments and West Coast LEAF does not seek any change to the schedule as determined by the Court.
45. West Coast LEAF’s proposed intervention does not raise any issues that are not already under review and, as such it will not “unduly complicate or protract the proceedings.” West Coast LEAF seeks the opportunity only to submit a written memorandum and make brief submissions at the oral hearing.

*West Coast LEAF has a genuine interest in this matter*²⁵

46. West Coast LEAF has been an incorporated non-profit society in British Columbia and a federally registered charity since 1985. 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 closely with communities directly impacted, West Coast LEAF uses litigation, law reform and public legal education to make change across several areas of concern: access to healthcare, access to justice, economic security, gender-based violence, criminalization and detention; family law and parenting. The organization has a broad representative base.
47. West Coast LEAF acts to promote the equality of all women and gender-diverse persons in British Columbia regardless of race, national origin, immigration status, sexual orientation, family or marital status, disability, age, and socio-economic status. West Coast LEAF’s work is informed by its recognition that intersecting multiple and overlapping markers of disadvantage pose unique, complex challenges to achieving substantive equality in the law. West Coast LEAF has developed expertise in applying an intersection lens to the implementation of constitutional rights, such that its legal arguments, educational

²⁵ See *Govender Affidavit* at paras. 7-23.

programming, and law reform activities are informed by, and inclusive of, multiple experiences of disadvantage.

48. In coalition with others or on its own, West Coast LEAF has been granted leave to intervene in numerous cases, including cases before the British Columbia Supreme Court, the British Columbia Court of Appeal and the Supreme Court of Canada. In its interventions, West Coast LEAF's submissions focus on the application of the principles of substantive equality to the development and application of the law. To that end, West Coast LEAF has developed expertise on substantive gender equality and on the use of *Charter* equality rights and statutory human rights in the interpretation and assessment of legislation, the common law and state action.
49. This case requires understating how the principles of substantive equality are reflected in the application of s. 15(1) to a legislative regime. As described in further detail in the Affidavit of Kasari Govender, West Coast LEAF has intervened in cases to assist courts with this analysis in numerous contexts, including the following:
 - a. *British Columbia Civil Liberties Association and John Howard Society of Canada v. Canada (Attorney General)*, 2018 BCSC 62, appeal heard November 11-12, 2018, judgment on reserve (BC Court of Appeal File No. CA45092);
 - b. *Trinity Western University and Volkenant v. Law Society of British Columbia* at the BC Supreme Court (2015 BCSC 2326), the BC Court of Appeal (2016 BCCA 423) and the Supreme Court of Canada (2018 SCC 32);
 - c. *BC Teachers' Federation v. BC Public School Employers' Association*, 2014 SCC 70;
 - d. *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309; and
 - e. *Reference re Criminal Code of Canada (BC)*, 2011 BCSC 1588.
50. West Coast LEAF is also presently engaged in a constitutional challenge concerning the constitutionality of BC's family law legal aid regime under ss. 7 and 15(1) of the *Charter*,

and s. 96 of the *Constitution Act, 1982, Single Mothers' Alliance et al v British Columbia*, BCSC File No. S173843.

51. West Coast LEAF has additionally intervened on its own or in coalition with others to address principles of substantive equality outside the context of a s. 15(1) analysis in the following cases described in more detail in the Affidavit of Kasari Govender:

- a. *Oger v. Whatcott*, BC Human Rights Tribunal File No. 16408 (complaint heard December 11-14 and 17, judgment reserved);
- b. *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, 2015 BCSC 534 and 2018 BCCA 132, leave to appeal to the SCC refused (SCC File No. 38157);
- c. *Schrenk v. British Columbia Human Rights Tribunal*, 2017 SCC 62;
- d. *R v. Lloyd*, 2016 SCC 13;
- e. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 and *Vilardell v. Dunham*, 2013 BCCA 65;
- f. *British Columbia (Ministry of Education) v. Moore*, 2012 SCC 61; and
- g. *Downtown Eastside Sex Workers United Against Violence v. Canada*, 2012 SCC 45 and 2010 BCCA 439.

52. This case concerns the impact of the STCA Regime on women and children seeking access to Canada's refugee determination system presenting at a land port of entry in Canada. Analysis of the claims includes understanding women as a particular social group in refugee law and the impact of gender-based violence on those seeking asylum. West Coast LEAF has developed considerable experience in the area of gender-based violence. Recent work in this area includes the following:

- a. West Coast LEAF is a participant with standing before the *National Inquiry into Missing and Murdered Indigenous Women and Girls*. West Coast LEAF has

participated in the evidence gathering phase of the institutional and expert hearings, made oral closing submissions and provided the Commissioners with written final submissions in December 2018. West Coast LEAF's recommendations to the National Inquiry focused on the need for the root causes of violence against Indigenous women and girls to be addressed as intersectional, gender-based and racially motivated.

- b. West Coast LEAF is currently engaged in an on-going, multi-year law reform project aimed at dismantling barriers to reporting sexual assault in Canada. As part of the project, in November 2018 West Coast LEAF published a report titled "We Are Here" centring the experiences of survivors of sexual assault with the legal system generally and specifically in relation to reporting gendered and sexualized violence.
- c. As part of West Coast LEAF's public legal education programming, we deliver a workshop called *Only Yes Means Yes*. The curriculum is aimed at educating post-secondary students about how the law understands sexual assault and the legal and ethical responsibility to obtain consent. As a companion to the workshop, West Coast LEAF created a social-media friendly video called *The Unfinished Story of Yes*, exploring the evolution of sexual assault law in Canada. West Coast LEAF also offers a workshop called *No Means No* which is aimed at consent education for youth in grades 5-9.
- d. Since 2009, West Coast LEAF has published annual reports on, among other things, gender-based violence in BC, assessed in light of international standards (in particular, the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)). West Coast LEAF's most recent 2018 CEDAW Report Card, published in December 2018, emphasized BC's insufficient investment into gender-based violence prevention and response and lagging response to recommendations to address root causes of violence against Indigenous women and girls.
- e. In 2016, West Coast LEAF participated as part of a national coalition of women's organizations in an inquiry before the Canadian Judicial Council: *In the Matter of*

an Inquiry Pursuant to Section 63(1) of the Judges Act Regarding the Honourable Justice Robin Camp (CJC report released November 29, 2016). The Coalition's submissions focused on reform of sexual assault law in Canada, the experience of sexual assault for particularly marginalized women, and the myths and stereotypes that continue to perpetuate sex discrimination in and through the legal system.

- f. In September 2016, West Coast LEAF made submissions to Status of Women Canada on the development of a federal strategy to combat gender-based violence. West Coast LEAF's recommendations ranged from amendments to the *Divorce Act* to explicitly recognize family violence, to increased and sustained funding for social services that support women to leave abusive relationships, to amendments to immigration law and policy to ensure that women concerned about the risk of losing their status in Canada are not forced into dependency on their spouses.
- g. West Coast LEAF intervened in *Scott v College of Massage Therapists of British Columbia*, 2016 BCCA 180, a case concerning the evidentiary threshold applicable to decisions made by regulators of various health professions to impose limits or conditions on a registrant's practice if it considers that action necessary to protect the public pending an investigation or hearing of a complaint. West Coast LEAF provided submissions on the gendered nature of sexual violence, and on how reliance on debunked myths and stereotypes about sexual assault survivors had improperly influenced the decision-maker below.
- h. In May 2016, West Coast LEAF prepared a legal handbook in partnership with the Canadian Centre for Elder Law called *Roads to Safety*. The resource is aimed at helping older women survivors of violence understand their legal rights and options. As a companion to the handbook, we also distribute multilingual wallet cards listing sources of support and information for older women.
- i. In June 2014, as part of a larger project aimed at understanding how online spaces are used to perpetuate gendered harassment and discrimination, West Coast LEAF published a research report titled *Cybermisogyny: Using and strengthening Canadian legal responses to gendered hate and harassment online*. This work

informed the development of *Trendshift*, a workshop aimed at educating youth about their rights and responsibilities online.

- j. In April 2014, West Coast LEAF prepared a briefing note recommending that the BC government pass an amendment to BC's *Residential Tenancy Act* allowing victims of domestic violence to end fixed-term tenancy agreements in order to flee domestic violence.
 - k. *Friedmann v MacGarvie*, 2012 BCCA 445, a case concerning sexual harassment as *per se* discrimination under human rights law in the context of a tenancy. West Coast LEAF argued that proof of sexual harassment is proof of sexual discrimination under human rights law within the tenancy context and that this discrimination constitutes a form of gendered violence.
53. West Coast LEAF has also engaged in advocacy promoting the equality rights of refugees and migrants, with particular attention to the experiences of women and those experiencing gender-based violence:
- a. In April 2018, West Coast LEAF recommended the Minister of Immigration, Refugees and Citizenship implement a formal, expedited process for women fleeing violent relationships or making refugee claims on the basis of gender-based persecution. We also recommended legislative reform to oblige immigration officers to consider the safety of female survivors of violence as a priority. These recommendations were discussed at two follow-up meetings with senior ministerial staff.
 - b. Throughout 2018, West Coast LEAF participated in the Vancouver Police Department's community consultations on the development of a policy for those without legal status in Canada to access protection without fear. West Coast LEAF also prepared a formal submission to the Vancouver Police Department on promoting unbiased policing with a particular focus on the experience of diverse women experiencing gender-based violence and on persons without immigration status.

- c. In December 2017, West Coast LEAF advocated for adequate funding for immigration and refugee legal aid services, highlighting the impact that inconsistency and uncertainty in funding has on women fleeing gender-based persecution.
- d. In April 2016, West Coast LEAF called on the Burnaby Board of Education to establish a Sanctuary Schools policy that would ensure that all parents, regardless of their legal status in Canada, could access public education in Burnaby for their children without fear that doing so would put themselves and their families at risk.
- e. In July 2015, West Coast LEAF urged the province to eliminate the three-month waiting period for newly arrived migrants to access provincial healthcare coverage, to ensure that those with precarious immigration status and those fleeing abuse would have safe and equitable access to healthcare.
- f. In January 2015, West Coast LEAF produced a position paper on sanctuary cities and called on the City of Vancouver to become a sanctuary city where everyone may access municipal services and police protection regardless of their legal status in Canada without fear of detention and deportation.
- g. In November 2014, West Coast LEAF joined others to oppose the federal government's attempt to allow provinces to restrict refugee claimants' and others without permanent residency ability to access social assistance.
- h. In December 2014, on the 30th anniversary of the adoption of the UN *Convention Against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment*, West Coast LEAF joined others in calling on the federal government to ratify the *Optional Protocol to the Convention Against Torture*.
- i. In 2012, West Coast LEAF prepared a position paper on violence against women without immigration status, recommending, among other things, that the federal government conduct a gender audit of immigration and refugee laws, regulations, policies and practices.

54. West Coast LEAF submits that its cross-cutting experience in gender discrimination, violence against women and the experiences of women without legal status will enable it to make meaningful contributions to the issues before the Court.

Public, important and complex issues raised in this case

55. The Court's answers to the questions involved in this case transcend the applicants herein. The Court's decision will impact Canadian refugee law and policy generally by either lifting or securing barriers for refugee claimants who enter Canada at land border ports of entry. The Court's decision will also shape the emerging jurisprudence articulating the proper approach to assessing the nexus between the distinction claimed at the first stage of the two-part test under section 15(1) and the disadvantage claimed in the second stage. As courts have struggled with addressing substantive equality claims brought on the basis of indirect and adverse effects discrimination, this Court's analysis of the s. 15(1) claim in this case will be especially significant.

56. West Coast LEAF submits that this is certainly a case in which the issues under consideration have assumed a public, important and complex dimension requiring the Court to be exposed to perspectives beyond those offered by the parties before the Court.

Involvement in earlier proceedings

57. This proceeding arises at the appropriate court of first instance and as such there are no earlier proceedings. A similar challenge was brought to the STCA and Canadian legislation, and West Coast LEAF did not seek leave to intervene in those earlier proceedings at this Court or at the Federal Court of Appeal. West Coast LEAF submits that this factor of the interests of justice analysis be given little to no weight as the earlier proceedings took place over a decade ago and West Coast LEAF's organizational capacity was significantly more limited at that time.

58. In all of these circumstances, it is in the interests of justice that West Coast LEAF be granted leave to intervene.

IV: COSTS

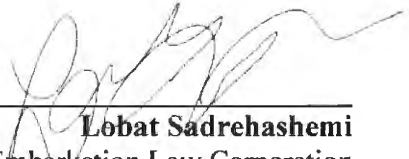
59. West Coast LEAF respectfully requests that there should be no order as to costs in respect of the within motion for leave to intervene. This motion takes place in the general context of immigration law and therefore the principles in Rule 22 of the *Federal Court Immigration Rules* should apply. West Coast LEAF has acted diligently and expeditiously and without prejudice to any party.

PART V- ORDER SOUGHT:

60. Based on the above, it is respectfully requested that the Court issue an order granting West Coast LEAF leave to intervene in this judicial review.


61. If leave to intervene is granted, West Coast LEAF respectfully requests that it be permitted to file a memorandum of argument and make brief oral submissions at the hearing of this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st day of February 2019.



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