

PRINCE GEORGE
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COURT REGISTRY

FAX FILED

File No. 2158960
Prince George Registry

In the Supreme Court of British Columbia

IN THE MATTER OF THE JUDICIAL REVIEW PROCEDURE ACT

R.S.B.C. 1996, c. 241

Between:

28APR21 2101349 ROSA 20.00
58914 2158960

T.L.

Petitioner

And:

Attorney General of British Columbia and Jennifer Burns delegate of the Director under the
Child, Family and Community Services Act

Respondents

NOTICE OF APPLICATION

Name of applicants:

West Coast Legal Education and Action Fund Association ("West Coast LEAF")

To:

T.L.
c/o Paul D. LeBlanc, Barrister & Solicitor
1057 3rd Avenue
Prince George, BC, V2L 3E3

And to: **Attorney General of British Columbia and Jennifer Burns**
Ministry of Attorney General
Legal Services Branch
1201 – 865 Hornby Street
Vancouver, BC, V6Z 2G3
Attn: Micah Weintraub and Emily Lapper

TAKE NOTICE that an application will be made by the applicant to the presiding judge at the courthouse at 250 George Street, Prince George, British Columbia, on ~~May 14, 2021, at 10:00~~ ^{the advise of the} a.m. by way of videoconference for the orders set out in Part 1 below. ^{week of May 10, 2021.}

Part 1: ORDERS SOUGHT

1. West Coast LEAF is granted leave to intervene in this proceeding.
2. West Coast LEAF may file written submissions not exceeding 10 pages in length.
3. West Coast LEAF may make oral submissions not exceeding 60 minutes in length.
4. West Coast LEAF will not be entitled to costs from any party nor will it be liable for costs to any party.
5. Such further and other relief as this Honourable Court may deem just.

Part 2: FACTUAL BASIS

A. The Judicial Review

1. The Petitioner is the mother of two children who are currently in the interim custody of their paternal grandmother under the supervision of the Director. The Director removed the Children from the Petitioner's custody due to contested concerns about the Petitioner's

mental health, substance use, and poor household management. The parties will be scheduling a hearing before the Provincial Court to determine whether the children are in need of protection.

2. When assessing whether to remove the children from the Petitioner's custody, the Director requested the Petitioner's medical and psychiatric records from her health care providers pursuant to s. 96 of the *Child, Family and Community Service Act*, RSBC 1996, c. 46 ("CFCSA"). Section 96 entitles the Director to any "necessary" information within the custody or control of a "public body" or a "person," subject only to solicitor-client privilege. Section 96 does not contain any procedural safeguards, such as a review process or a requirement that the Director provide notice of its request to the person to whom the information pertains.
3. In this judicial review, the Petitioner seeks a declaration that s. 96 of the *CFCSA*, to the extent that it authorizes the collection of information related to a person's health, unjustifiably infringes ss. 7 and 8 of the *Charter* and is of no force and effect. The Petitioner also seeks orders aimed at preventing the Director from using health information already obtained pursuant to s. 96 of the *CFCSA* and from obtaining further health information through outstanding s. 96 requests.

B. West Coast LEAF

4. 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 BC. 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.

5. West Coast LEAF was created in April 1985 when the equality provisions of the *Charter* came into force. Before 2009, West Coast LEAF was a branch of a national organization, Women's Legal Education and Action Fund ("LEAF National"). In 2009, West Coast LEAF became an affiliate of LEAF National. Since then, West Coast LEAF has involved itself in litigation in its own name. As of 2014, West Coast LEAF is no longer a formal affiliate of LEAF National however the two organizations continue to collaborate from time to time.
6. During the last fiscal year, West Coast LEAF had approximately 460 members. As of April 21, 2021, West Coast LEAF employs 11 permanent staff members. It also relies on the support of approximately 200 volunteers to carry out its work.
7. West Coast LEAF acts to promote the equality interests of all women and people in BC who experience marginalization on the basis of their gender expression and gender identity, including where gender intersects with other axes of marginalization such as race, national origin, immigration status, Indigeneity, sexual orientation, 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.
8. 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 or government actions, as well as 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.
9. West Coast LEAF has considerable experience as an intervener or interested party before the Supreme Court of Canada, the BC Court of Appeal, and the BC Supreme Court, as well as before administrative tribunals and committees and boards of inquiry. In addition to its

intervention work, West Coast LEAF is currently litigating a constitutional challenge to BC's family law legal aid regime before the BC Supreme Court.¹

10. 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 sex and 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 impacting equality-seeking groups.

11. Public legal education rounds out West Coast LEAF's major program areas. West Coast LEAF's educational programming aims to help residents of BC 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.

12. West Coast LEAF has engaged in extensive work across its program areas to support families engaged in the child welfare system and advocate for child welfare reform, with a particular focus on addressing the overrepresentation of Indigenous families. In summary:

- a. West Coast LEAF is an intervener in an ongoing hearing before the BC Human Rights Tribunal, *RR v. Vancouver Aboriginal Child and Family Services Society*. R.R. alleges that Vancouver Aboriginal Child and Family Services Society—a delegated Aboriginal agency of the Ministry of Children and Family Development—denied her custody of and access to her children because of discriminatory assumptions about her ability to parent as an Indigenous mother with mental health disabilities. West Coast

¹ For a more detailed discussion of West Coast LEAF's litigation activities, please see Affidavit 1 of Rajwant Mangat, paras. 13 to 16

- LEAF was granted leave to make submissions with respect to the social context underlying the complaint, including systemic discrimination against Indigenous families.
- b. West Coast LEAF has commenced a three-year project, entitled the Child Welfare Advocacy Communities of Practice Project, aimed at building community capacity to support families engaged in the child welfare system. The project is currently structured around working groups of parent's counsel lawyers, front-line child welfare advocates, and Indigenous parents, caregivers, and community members.
 - c. In September 2019, West Coast LEAF published a law reform report titled *Pathways in a Forest: Indigenous guidance on prevention-based child welfare*. This report was developed collaboratively with Indigenous elders, caregivers, and organizations and highlights ways in which the child welfare system can shift from an apprehension-based model to a prevention-based model.
 - d. In June 2019, West Coast LEAF made submissions to the province's Budget 2020 consultations which called on the province to fund financial and community supports for families involved in the child welfare system.
 - e. In March 2018, West Coast LEAF prepared a briefing note calling on the Ministry of Child and Family Development to improve policies and administrative practices to avoid stigmatizing families in need of support services. West Coast LEAF also made submissions to the Ministry of Social Development and Poverty Reduction's BC Poverty Reduction Strategy, calling on the strategy to pay specific attention to the need for families at risk to receive support services without delay or stigma.
 - f. In February 2017, West Coast LEAF made submissions to the Standing Committee on Children and Youth on the *Representative for Children and Youth Act*, urging the committee to recommend maintaining the statutory jurisdiction of the Representative for Children and Youth to monitor, review and audit child protection services in BC.

- g. In July 2016, West Coast LEAF published a law reform report titled *High Stakes: The impacts of childcare on the human rights of women and children*. This report called on the province to take urgent action to provide childcare immediately to those families with the greatest need, including families at risk of engagement with the child protection system.
- h. In September 2014, West Coast LEAF published a law reform report titled *Able mothers: the intersection of parenting, disability and the law*. This report explored systemic discrimination against mothers with disabilities in BC, including in their interactions with the child welfare system.
- i. Between 2008 and 2018, West Coast LEAF published an annual CEDAW Report Card, which monitored BC's compliance with the UN's Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"). In 2019, West Coast LEAF expanded the focus of this monitoring to include an assessment of BC's progress on ensuring gender-based equality for all people who experience marginalization on the basis of their gender expression and identity. Both the earlier project and the 2019/2020 Report Card graded BC's progress toward substantive equality in areas including child welfare.

Part 3: LEGAL BASIS

A. Test on an Application to Intervene

- 13. This Court has inherent jurisdiction to grant leave to intervene, which it will exercise more readily in cases raising public law issues.

Choi v. Brook at the Village on False Creek Developments Corp., 2013 BCSC 1535, para. 7.

- 14. Intervenor status may be granted to an applicant without a direct interest in the case if the following test is met:

- a. The applicant has a public interest in a public law issue in question, and
- b. The applicant can make a valuable contribution or bring a different perspective to a consideration of the issues on the appeal that differs from that advanced by the parties.

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

West Coast LEAF has a public interest in a public law issue in question

15. The legal issues in this case transcend the interests of the parties before this Court and reflect upon the implications of a parent's constitutionally protected right to be free from unreasonable search and seizure in the context of the child welfare system. Questions of search and seizure mark the nebulous boundary where individual rights collide with state power and the demands of public safety. Contextually informed limits on the Director's power to search and seize a parent's confidential health information are critical to preventing indiscriminate and discriminatory intrusions on marginalized parents' privacy interests, which will in turn improve confidence in the child welfare system.

16. As demonstrated in the section above, West Coast LEAF has a substantial and genuine interest in promoting rights and interests of parents engaged in the child welfare system. Moreover, West Coast LEAF has developed relevant expertise through its varied work in the areas of child welfare advocacy and reform, as well as through its extensive litigation work in constitutional challenges which affect the meaning and realization of substantive equality in Canada.

West Coast LEAF's submissions will be relevant, helpful, and different

17. If granted leave to intervene, the Proposed Interveners will make the following arguments with respect to the reasonableness test under s. 8 of the *Charter*:

- a. In the absence of meaningful evidentiary and procedural safeguards, s. 96 of the CFCSA does not protect individuals from indiscriminate and discriminatory intrusions on their privacy. The significance of s. 96's lack of safeguards must be understood in its social context, including the colonial underpinnings of the child welfare system. Bias, prejudice and stereotypes continue to infuse the child welfare system and contribute to the system's disproportionate involvement in the lives of Indigenous families and other families who experience inequality along one or more axes of marginalization, including disability.
- b. The collection of health information under s. 96 thus carries the risk of reflecting and extending the uneven gaze of state surveillance and control on marginalized families, which ultimately undermines the CFCSA's protective purpose. In particular, where the Director seeks to access or use a parent's health information, "common sense" judgments about the "necessity" or relevance of such information may be tied to invalid and discriminatory assumptions about the ability of parents with mental or physical disabilities to take care of their children. Those who experience overlapping inequalities—such as disabled parents who are Indigenous and/or poor—are especially vulnerable to such beliefs.
- c. Further, where irrelevant or unduly prejudicial health information informs the Director's decisions about the custody of or access to a child, this may cause or contribute to arbitrary state interference in the parent-child relationship. It can take weeks or months for a parent to challenge the basis of a Director's custody or access decision in a court hearing, if they choose to challenge the decision at all. In the meantime, the Director's decision may cause significant and long-lasting harms to the affected family.
- d. West Coast LEAF will make the above submissions with particular attention to the rights, interests and experiences of mothers, who are more likely to be the caregivers of their children and thus more susceptible to the arbitrary application of s. 96.

18. West Coast LEAF's submissions will differ from those of the parties by situating the reasonableness of searches and seizures under s. 96 of the CFCSA within the context of the child welfare system's deeply embedded biases, prejudices and stereotypes. In light of this context, West Coast LEAF will highlight the disconnect between s. 96's lack of meaningful safeguards and the CFCSA's protective purpose.

19. West Coast LEAF's submissions will be based on the record already before the Court in this judicial review and it does not seek to adduce fresh evidence. West Coast LEAF takes no position on the facts or the application of the law to the facts, except to the extent reference to the facts is necessary to contextualize the legal issues.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Rajwant Mangat, Affirmed April 27, 2021; and
2. The pleadings herein.

The applicants estimate that the application will take one hour.

[Check the correct box]

- This matter is within the jurisdiction of a master.
- This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must

- (a) file an application response in Form 33 within 5 days after the date of service of this notice of application or, if the application is brought under Rule 9-7 of the Supreme Court Civil Rules, within 11 days after the date of service of this notice of application, and
- (b) at least 2 days before the date set for the hearing of the application, serve on the applicant 2 copies, and on every other party one copy, of a filed copy of the application response and the other documents referred to in Rule 9-7 (12) of the Supreme Court Civil Rules.

Date: April 28, 2021

....."S. Runyon".....

Signature of Sarah Runyon and Kate Feeney,
Counsel for Applicants

Address for Service:
Marion & Runyon, Criminal Lawyers
1250-A Cedar Street
Campbell River, B.C. V9W 2W5
Attn: Sarah Runyon

To be completed by the court only:

Order made

in the terms requested in paragraphs of
Part 1 of this notice of application

with the following variations and additional terms:

.....
.....
.....

Date:

Signature of Judge Master

APPENDIX

*[The following information is provided for data collection purposes only
and is of no legal effect.]*

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- discovery: comply with demand for documents
- discovery: production of additional documents
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation

- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts