

VANCOUVER

Court Of Appeal File No. CA45711

MAR 13 2019

COURT OF APPEAL
COURT OF APPEAL
REGISTRY

BETWEEN:

COUNCIL OF CANADIANS WITH DISABILITIES

APPELLANT
(PLAINTIFF)

AND:

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(DEFENDANT)

NOTICE OF MOTION

TO: Council of Canadians with Disabilities (Appellant)

AND TO: Its Solicitors:

Michael Feder, Q.C. and Katherine Booth
McCarthy Tetrault LLP
Suite 2400 – 745 Thurlow Street
Vancouver BC V6E 0C5
Fax No.: 604-622-5614
Email: kbooth@mccarthy.ca

Laura Johnston
Community Legal Assistance Society
Suite 300 – 1140 West Pender St.
Vancouver, BC V6E 4G1
Fax No.: 604-685-7611
Email: ljohnston@clasbc.net

TO: The Attorney General of British Columbia (Respondent)

AND TO: Its Solicitors:
Mark Witten
Ministry of Attorney General
Legal Services Branch
1301 – 865 Hornby Street
Vancouver BC V6Z 2G3
Fax No.: 604-660-6797
Email: Mark.Witten@gov.bc.ca


TAKE NOTICE THAT AN APPLICATION will be made by West Coast Legal Education and Action Fund ("West Coast LEAF") to the presiding justice at The Law Courts, 400 - 800 Hornby Street, Vancouver, British Columbia, V6Z 2C5, British Columbia, at 9:30am on Tuesday, April 9, 2019 for an order pursuant to Rule 36 of the *Court of Appeal Rules* that:

- (a) West Coast LEAF be permitted to file a factum of not more than 10 pages on or before a date to be specified by this Honourable Court;
- (b) West Coast LEAF may apply to the division hearing the appeal for leave to make oral submissions at the hearing of the appeal;
- (c) West Coast LEAF be entitled to receive electronic copies of the appeal record, transcripts, appeal book, factums, replies, books of authorities and any other documents filed by the parties; and,
- (d) No costs be awarded for or against West Coast LEAF in respect of this application or the appeal itself.

AND TAKE NOTICE THAT in support of the application will be read the affidavit of Kasari Govender, affirmed on March 12, 2019.

The applicant anticipates that this application may be contested.

Dated: March 13, 2019



Jason Harman

This application will take no more than 30 minutes to be heard.

This application is filed by:

Tim Dickson, Jason Harman and Rajwant Mangat
Solicitors for West Coast Legal Education and Action Fund

JFK Law Corporation
Suite 340 - 1122 Mainland Street
Vancouver, BC V6B 5L1
Tel. No.: 604.687.0549 / Fax No.: 604.687.2696

AND TO: Its Solicitors:
Mark Witten
Ministry of Attorney General
Legal Services Branch
1301 – 865 Hornby Street
Vancouver BC V6Z 2G3
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Email: Mark.Witten@gov.bc.ca

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AND TAKE NOTICE THAT in support of the application will be read the affidavit of Kasari Govender, affirmed on March 12, 2019.

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Tim Dickson, Jason Harman and Rajwant Mangat
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MAR 13 2019

Court of Appeal File No. CA45711

COURT OF APPEAL
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BETWEEN:

COUNCIL OF CANADIANS WITH DISABILITIES

APPELLANT
(Plaintiff)

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(Defendant)

**MEMORANDUM OF ARGUMENT ON AN APPLICATION
FOR LEAVE TO INTERVENE**

**COUNCIL OF CANADIANS WITH
DISABILITIES**

**ATTORNEY GENERAL OF
BRITISH COLUMBIA**

MICHAEL FEDER, Q.C.
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A. OVERVIEW

1. West Coast Legal Education and Action Fund (“West Coast LEAF”) applies under Rule 36 of the *Court of Appeal Rules* for an order that it be granted leave to intervene in the present appeal and that the style of cause be amended accordingly, on the following terms:
 - a. West Coast LEAF is entitled to file a factum of not more than 10 pages in length;
 - b. West Coast LEAF may apply to the division hearing the appeal for leave to make oral submissions at the hearing of the appeal;
 - c. West Coast LEAF be entitled to receive electronic copies of the appeal record, transcripts, appeal book, factums, replies, books of authorities and any other documents filed by the parties; and,
 - d. No costs be awarded for or against West Coast LEAF in respect of this application or the appeal itself.
2. This case raises important access to justice concerns regarding the ability of organizational public interest plaintiffs to assert public interest standing in order to mount challenges to the constitutionality of legislation and seek relief under s. 52(1) of the *Constitution Act, 1982*. Among other things, the Court will be called upon to consider the development and application of the doctrine of public interest standing, the relationship between public interest standing and constitutional remedies, and the role of organizational plaintiffs in constitutional litigation.
3. West Coast LEAF has significant interest and expertise in making the justice system accessible to those who are often disproportionately adversely impacted by laws and government action, such as women and other people experiencing gender-based discrimination. As described in further detail below, West Coast LEAF has a demonstrable and ongoing interest in ensuring a broad and purposive approach to public interest standing, particularly where the underlying case raises allegations of systemic oppression.

4. West Coast LEAF will bring a distinct and valuable perspective to the issues before the Court in this appeal.

B. LEGAL FRAMEWORK – INTERVENOR APPLICATIONS

5. An order granting leave to intervene in an appeal is discretionary, and may be made on any terms and conditions the Court considers appropriate.¹
6. This Court may grant leave to intervene in circumstances where:
 - a. The applicant has a direct interest in the litigation; or,
 - b. The case raises public law issues that legitimately engage the applicant's interests, and the applicant, notwithstanding its lack of a direct interest in the litigation, will nevertheless make a valuable contribution or bring a fresh perspective to the issues under consideration.²
7. The factors considered by the Court in deciding whether to exercise its discretion to grant leave to intervene include the following:
 - a. The nature of the intervenor and its interest in the appeal;
 - b. The issues under appeal;
 - c. The intervenor's proposed contribution to the appeal; and,
 - d. Whether the intervenor's proposed contribution will be useful and different, without taking the litigation away from the parties.³
8. West Coast LEAF respectfully submits that it should be granted leave to intervene in this appeal because:
 - a. It has an indirect but substantial interest in the important issues raised in the appeal and the development of the law of public interest standing;
 - b. It will make unique contributions to the issues before the Court without taking the litigation away from the parties; and,
 - c. The appeal concerns constitutional issues of public interest which engage West Coast LEAF's interest as an organization advocating for the

¹ *Carter v Canada (Attorney General)*, 2012 BCCA 502 (Chambers) at para 11.

² *Friedmann v MacGarvie*, 2012 BCCA 109 (Chambers) [*Friedmann*] at paras 12-19; *R v Kapp* 2005 BCCA 247 (Chambers) [*Kapp*] at para 11.

³ *Friedmann* at paras 21-28.

constitutional rights of marginalized persons, and to which West Coast LEAF will bring a useful perspective.

C. ARGUMENT

9. The following sections will identify the applicant and its interest in this appeal; summarize the submissions the applicant intends to make if granted leave to intervene; and explain why those submissions will be both useful to the Court and distinct from those of the parties.

West Coast LEAF and its Interest in the Appeal

10. 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 the community, West Coast LEAF uses litigation, law reform, and public legal education to make change. 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.⁴
11. West Coast LEAF acts to promote equality for 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. West Coast LEAF is committed to working in consultation and collaboration with other equality-seeking groups to ensure that its 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 that the law recognizes and addresses the overlapping and intersecting ways in which discrimination and disadvantage are experienced – in relation to gender, race, and disability, for instance.⁵

⁴ Affidavit of Kasari Govender, affirmed March 12, 2019 (“Govender Affidavit”) at para 7.

⁵ Govender Affidavit at para 10.

12. West Coast LEAF has intervened, or is intervening, in its own name in numerous cases, including cases before this Court, at the British Columbia Supreme Court and the Supreme Court of Canada. West Coast LEAF is also presently engaged in litigation on behalf of an individual and an organizational plaintiff who have brought a constitutional challenge to the provision of family law legal aid services.⁶
13. West Coast LEAF's legal submissions have been shaped by the organization's significant expertise in applying principles of substantive equality to the development and application of the law and state action impacting the lives of women and gender-diverse persons. This expertise is grounded in an understanding that sex and gender inequality are often compounded by and overlapping with other intersecting markers of stigma and disadvantage, such as race and disability.⁷
14. This case concerns the application of the public interest standing test refined by the Supreme Court of Canada in *Downtown Eastside Sex Workers United Against Violence v Canada (Attorney General)*, 2012 SCC 45 [SWUAV]. West Coast LEAF participated in the hearing of that case before this Court as an intervenor (2010 BCCA 439) and before the Supreme Court of Canada as an intervenor in coalition with Justice for Children and Youth and ARCH Disability Law Centre.⁸
15. West Coast LEAF has long-advocated to ensure equal access to justice for marginalized and vulnerable populations. Some of West Coast LEAF's recent work on access to justice is described below:⁹
 - a. SMA legal aid challenge: West Coast LEAF developed and is currently litigating a constitutional challenge to BC's family law legal aid scheme on behalf of an organizational plaintiff, the Single Mothers' Alliance of British Columbia and one individual plaintiff. The notice of civil claim was filed in

⁶ *Single Mothers' Alliance of BC Society and Nicolina Bell v British Columbia* (BCSC File No. S1733843) (Notice of Civil Claim filed April 26, 2017); Govender Affidavit at paras 12 and 14.

⁷ Govender Affidavit at para 17.

⁸ Govender Affidavit at paras 12 and 20.

⁹ See Govender Affidavit at para 20, where these and other West Coast LEAF activities in the area of equal access to justice are describe in further detail.

the Supreme Court of British Columbia on April 26, 2017. The case was filed on behalf of the Single Mothers' Alliance and two individual plaintiffs, one of whom has discontinued her involvement in the action.

- b. *Denton v. Workers Compensation Board*, 2017 BCCA 403, leave to appeal to SCC refused, 37923 (October 25, 2018): West Coast LEAF intervened before this Court jointly with the Community Legal Assistance Society (CLAS). This case concerned judicial review of a decision denying workers' compensation to an individual who then sought to raise constitutional arguments. West Coast LEAF and CLAS argued that superior courts should retain jurisdiction to hear *Charter* claims even when those claims had not been advanced before the first administrative decision-maker with *Charter* jurisdiction.
- c. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 and *Vilardell v. Dunham*, 2013 BCCA 65: West Coast LEAF intervened in this case before this Court and at the Supreme Court of Canada. West Coast LEAF argued that court hearings fees disproportionately impact women's ability to access justice, and deprives them of their security of the person and equality rights.
- d. *Downtown Eastside Sex Workers United Against Violence v. Canada*, 2012 SCC 45 and 2010 BCCA 439: At both levels of court, West Coast LEAF argued for a broad and purposive approach to public interest standing to ensure that marginalized and disadvantaged communities are granted equal access to justice.
- e. From 2011 to the present, West Coast LEAF has regularly made budget submissions to the provincial and federal governments recommending increased investments in the legal system to ensure equal access to justice in the areas of family law, poverty law and immigration and refugee law.
- f. In November 2018, West Coast LEAF published a report titled, "We are Here: Women's Experiences of the Barriers to Reporting Sexual Assault" focused on the barriers that impede survivors of sexual assault from accessing the justice system.
- g. In September 2017, West Coast LEAF, in coalition with other legal advocacy organizations, prepared a report titled "Justice Reform for BC", calling on the provincial government to ensure meaningful access to justice by expanding funding for legal aid, counsel at legal aid clinics and in-house counsel at front-line service delivery organizations working to support marginalized and vulnerable communities.

- h. In May 2016, Rise Women's Legal Centre opened in Vancouver to provide legal services to women. Rise was developed by West Coast LEAF to respond to women's increasingly unmet family justice needs, after decades of advocacy for increased funding to family law legal aid. In partnership with the Peter A. Allard School of Law at UBC, Rise runs a student legal clinic where clients are represented by upper-year law students under close supervision by Rise staff.
- i. In April 2016, West Coast LEAF appeared before the House of Commons Standing Committee on Justice and Human Rights as part of the committee's study of Access to the Justice System. We spoke in favour of, among other things, a robust revived Court Challenges Program which would enhance access to justice by providing funding to individuals and public interest organizations to develop and engage in litigation and intervene in cases raising important constitutional issues.
- j. The formation of Rise was significantly informed by West Coast LEAF's research and reporting on disparities in accessing family justice in BC. In 2014, West Coast LEAF published a report, "Putting Justice Back on the Map", which charted a path forward to ensure access to justice in family law was both equitable and meaningful. West Coast LEAF also published reports jointly with the Canadian Centre for Policy Alternatives on the gendered impact of the erosion of access to justice in BC in 2010 ("Rights Based Legal Aid: Rebuilding BC's Broken System") and in 2004 ("Legal Aid Denied: Women and Cuts to Legal Services in BC").
- k. As mentioned earlier, West Coast LEAF is currently bringing litigation on behalf of an individual and an organizational plaintiff who challenging British Columbia's legal aid regime as it relates to certain family law, on the basis that the failure to provide adequate legal aid breaches ss. 7 and 15 of the Charter and s. 96 of the *Constitution Act, 1867*.

16. West Coast LEAF's interest and experience in advocating on issues of equal access to justice as described above will assist the Court in its consideration of the doctrine of public interest standing.

West Coast LEAF's Proposed Contribution on Appeal

17. If granted leave to intervene, West Coast LEAF will argue that the decision under appeal unduly narrowed the test for public interest standing by requiring that public interest litigants be paired with, and dependent on, individual litigants. West Coast LEAF submissions will involve the following three inter-related points:

- a. First, West Coast LEAF will argue that this decision will disproportionately and adversely impact women and other traditionally marginalized groups that frequently rely upon public interest organizations for assistance in vindicating their constitutionally protected rights and freedoms. West Coast LEAF will submit that courts should adopt a contextual approach that appreciates the essential role that public interest organizations play in advancing legal rights and access to justice for marginalized groups.¹⁰
- b. Second, West Coast LEAF will also argue that, in challenges to laws that are alleged to infringe the *Charter* rights of marginalized groups, tying public interest standing to the presence of private litigants is out of step with both the current state of *Charter* jurisprudence and the realities of modern *Charter* litigation.
- c. And finally, West Coast LEAF will argue that, on the basis of the points outlined above, this Court ought to find that public interest standing is available on an equal footing with private litigants where the nature of the claim and the relief sought involves systemic claims of oppression brought on behalf of marginalized and vulnerable populations.

18. A summary of West Coast LEAF's proposed submissions expanding on these three points is provided below.

(i) Public Interest Litigants Promote Meaningful Access to Justice

19. West Coast LEAF will argue that women are disproportionately economically disadvantaged. The feminization of poverty means that women and their children often lack adequate financial resources to conduct even relatively simple cases, let alone the complex and prolonged litigation involved in mounting a challenge to the constitutionality of laws. This is particularly so where sex and gender-based disadvantage intersects with, and is compounded by, disabling mental or physical impairments.

20. West Coast LEAF will argue that a contextual approach to public interest standing is required to ensure that women, especially women with disabling mental health impairments, are not disproportionately and adversely excluded from challenging laws that allegedly violate their constitutionally protected rights and freedoms.

¹⁰ See *SWUAV and Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 [*Manitoba Metis*] at paras 43-44.

(ii) Public Interest Litigants May Anchor Systemic Claims, as a Matter of Law and Practice

21. West Coast LEAF will argue the Supreme Court of Canada has consistently held that challenges to legislation are remedied under s. 52 of the *Constitution Act, 1982*¹¹ and that such challenges do not necessarily require that the impugned legislation contravenes the rights of the claimant directly.¹²
22. Further, West Coast LEAF will argue that recent cases involving challenges to laws alleged to cause systemic oppression in violation of the *Charter* demonstrate that the preponderance of evidence relevant to establishing and justifying rights infringements comes from sources other than named individual plaintiffs. In making that submission, West Coast LEAF will provide this Court with a review of those recent decisions, showing that it is the whole body of evidence – usually a very substantial body of evidence, much of it expert evidence – that supports the courts’ findings, and not the evidence of the individual litigants.
23. As a result, West Coast LEAF will submit that it is unnecessary for courts dealing with *Charter* challenges to laws under s. 52 to conceive of public interest standing as being dependent upon a factual matrix provided by privately interested individuals.

(iii) Public Interest Standing Must Be Available on an Equal Footing for Claims Alleging Systemic Breaches of the *Charter*

24. West Coast LEAF will argue that the logical conclusion of its earlier submissions is that public interest standing is available on an equal footing to private standing in respect of claims seeking relief for systemic violations of *Charter* rights, particularly where those violations disproportionately affect marginalized and historically vulnerable groups.¹³ In such cases, where the organizational litigant

¹¹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

¹² *R v Nur*, 2015 SCC 15 at para 51, citing *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 314; *R v Morgentaler*, [1988] 1 SCR 30; *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154; *R v Heywood*, [1994] 3 SCR 761 at 799; *R v Mills*, [1999] 3 SCR 668 at 704-5; *R v Ferguson*, 2008 SCC 6 at paras 58-66. See also the discussion of “imaginable circumstances” in *R v Goltz*, [1991] 3 SCR 485 at 515-16.

¹³ *Manitoba Metis* at paras 43-44 and 134.

shows some degree of reasonable, good faith engagement with the issues in the case, a presumption of public interest standing for an organizational litigant should effectively arise. Such a presumption should only be displaced by a clear demonstration that the litigation brought by the organization is not a reasonable and effective means of bringing the challenge to court. That standard might be met if it could be clearly shown, for instance, that a substantially similar challenge is underway and brought by a litigant who is clearly better positioned to mount the challenge.

25. A presumption of public interest standing in such cases would reflect the societal interest in allowing for judicial review of legislation and other government action where there are systemic breaches of *Charter* rights, and it would reflect the reality of modern *Charter* litigation.

West Coast LEAF's Intervention would be Useful and Distinct

26. The issues raised in this appeal have grave implications for the ability of marginalized and vulnerable populations to equally access the courts to vindicate infringements of their constitutional rights and freedoms. West Coast LEAF has significant experience and knowledge regarding the barriers that impede meaningful access to justice on the basis of sex, gender and intersecting markers of disadvantage, such as disability. This case falls squarely within West Coast LEAF's special expertise and ability to assist the court.¹⁴

27. West Coast LEAF will contribute to the issues on appeal by assisting the Court to consider the doctrine of public interest standing through an analysis attuned to intersectional substantive equality. Specifically, West Coast LEAF's proposed contribution (as outlined above) will aid the Court in appreciating what *meaningful* access to justice looks like for marginalized and historically disadvantaged groups, including for women and gender-diverse persons with disabling mental health impairments. In so doing, West Coast LEAF will focus the Court's attention on the ways in which inequality of access may inadvertently further entrench systemic discrimination. West Coast LEAF is uniquely positioned to provide insight and analysis on these issues.

¹⁴ Govender Affidavit at para 21.

28. West Coast LEAF will argue that the law and practice in relation to modern *Charter* litigation supports an approach to public interest standing that favours allowing organizations to bring claims without the need for privately impacted litigants. West Coast LEAF's review of that litigation in its factum will provide this Court with greater context.

D. CONCLUSION

29. This appeal concerns issues of broad public and common interest. It directly affects the ability of legal advocacy organizations, such as West Coast LEAF, to challenge the constitutionality of laws that limit the Charter rights of historically disadvantaged groups, including women and others impacted by gender-based discrimination.

30. West Coast LEAF has considerable experience in the area of access to justice and on what constitutes meaningful access to justice for historically marginalized and vulnerable populations.

31. West Coast LEAF also has significant experience as an intervenor before this court and others. If granted leave to intervene, West Coast LEAF will work in cooperation with the parties and any other intervenors to ensure that its submissions are neither duplicative nor expand the *lis* between the parties.

E. RELIEF SOUGHT

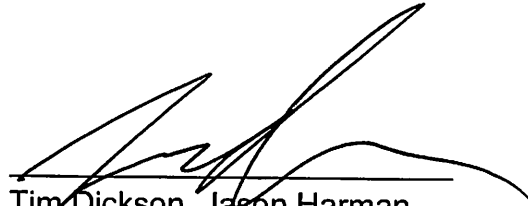
32. For the reasons set out above, West Coast LEAF respectfully requests that it be permitted leave to intervene in this appeal, and that the style of cause be amended accordingly, on the following terms:

- a. That West Coast LEAF be permitted to file a factum of not more than 10 pages on or before a date to be specified by this Honourable Court;
- b. That West Coast LEAF may apply to the division hearing the appeal for leave to make oral submissions at the hearing of the appeal;
- c. That West Coast LEAF be entitled to receive electronic copies of the appeal record, transcripts, appeal book, factums, replies, books of authorities and any other documents filed by the parties; and that:

d. No costs be awarded for or against West Coast LEAF in respect of this application or the appeal itself.

All of which is respectfully submitted.

Dated: March 13, 2019

A handwritten signature in black ink, consisting of several overlapping, fluid strokes that are difficult to decipher as individual names but appear to represent the three individuals listed below.

Tim Dickson, Jason Harman
and Rajwant Mangat

Counsel for the Applicant, West Coast LEAF

VANCOUVER

MAR 13 2019

Court of Appeal File No. CA45711

COURT OF APPEAL COURT OF APPEAL
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BETWEEN:

COUNCIL OF CANADIANS WITH DISABILITIES

APPELLANT
(Plaintiff)

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(Defendant)

AFFIDAVIT OF KASARI GOVENDER

I, KASARI GOVENDER, lawyer, of the City of Vancouver, in the Province of British Columbia, AFFIRM AS FOLLOWS:

1. I am the Executive Director of the West Coast Legal Education and Action Fund Association ("West Coast LEAF"), and as such have personal knowledge of the matters hereinafter deposed to, except where stated to be based on information and belief in which case I verily believe them to be true.
2. I was called to the bar in Ontario in 2006 and in British Columbia in 2007. I joined West Coast LEAF as 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 appeal.
3. This appeal concerns the application of the test for public interest standing. On appeal, this Court is asked to determine whether the chambers judge erred in finding that the Council of Canadians with Disabilities ("CCD") did not have public interest standing to challenge provisions of British Columbia's mental health regime depriving

people with mental disabilities of the right to make decisions about their own psychiatric treatment and the use of substitute or supportive decision-makers.

4. The underlying action was commenced with three plaintiffs: CCD and two individuals with diagnosed mental disabilities. The two individual plaintiffs later discontinued their involvement in the action. The defendant challenged CCD's standing to proceed with the litigation in a summary trial application. Following the summary trial application, the chambers judge found that CCD did not have public interesting standing and he dismissed the action. The appeal raises important access to justice concerns regarding the application of the test for public interest standing and the need for constitutional scrutiny of legislative regimes that impact particularly vulnerable and marginalized members of society.

5. West Coast LEAF has a demonstrable, ongoing interest in ensuring access to justice, as described in more detail below, including by advocating for a broad and purposive interpretation and application of the test for public interest standing. West Coast LEAF intervened before this Court and at the Supreme Court of Canada in *Downtown Eastside Sex Workers United Against Violence v. Canada (Attorney General)*, 2012 SCC 45, affirming 2010 BCCA 439.

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

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. 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 women substantive equality. Since 2009, West Coast LEAF has involved itself in litigation in its own name. As of 2014, West Coast LEAF is no longer an affiliate of LEAF.

9. During the last fiscal year, West Coast LEAF had approximately 370 members. As of February 3, 2019, West Coast LEAF employs six full-time staff and five 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 that the law recognizes that the myriad ways in which discrimination and disadvantage are experienced – in relation to gender, race, and disability, 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 this Court 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, leave to appeal to SCC refused (38157 (January 31, 2019) (jointly with Community Legal Assistance Society));
- (d) *Denton v. Workers Compensation Board*, 2017 BCCA 403, leave to appeal to SCC refused, 37923 (October 25, 2018) (jointly with 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 59;
- (i) *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 and *Villardell v. Dunham*, 2013 BCCA 65;
- (j) *British Columbia (Ministry of Education) v. Moore*, 2012 SCC 61;
- (k) *Friedmann v. MacGarvie*, 2012 BCCA 445;

(l) *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; and

(m) *Shewchuk v. Ricard*, [1986] B.C.J. No. 335, 28 D.L.R. (4th) 429 (BCCA) (jointly with the BC Association of Social Workers, BC Civil Liberties Association, Federated Anti-Poverty Groups of BC and Vancouver Status of Women).

13. Additionally, 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 cases:

(a) *Oger v. Whatcott* (BCHRT File No. 16408) (complaint heard December 11-14 and 17, 2018) (decision reserved);

(b) *British Columbia Civil Liberties Association and John Howard Society of Canada v. Canada (Attorney General)*, 2018 BCSC 62 (in coalition with the Native Women's Association of Canada);

(c) *National Inquiry into Missing and Murdered Indigenous Women and Girls* (Order dated August 17, 2017 granting participant status in Part II and Part III hearings) (final report 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 (in coalition with Community Legal Assistance Society);

(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 intervenor, West Coast LEAF is currently litigating a constitutional challenge to the family law legal aid regime in British Columbia before the BC Supreme Court on behalf of two plaintiffs: *Single Mothers' Alliance of BC and Nicolina Bell v. British Columbia*, File No. S1733843 (Notice of Civil Claim filed April 26, 2017) ("SMA legal aid challenge").

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 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.

16. Public legal education rounds out West Coast LEAF's major 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 support 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 principles of substantive equality to constitutional and legislative interpretation, the development of the law, and state action that impacts the lives of women and gender-diverse persons. This expertise is grounded in an understanding that sex and gender inequality are often compounded by and overlapping with other intersecting markers of stigma and disadvantage, such as race and disability.

B. West Coast LEAF's Expertise and Interest in the Appeal

18. This appeal concerns the application of the test for public interest standing refined by the Supreme Court of Canada in *Downtown Eastside Sex Workers United Against Violence v. Canada (Attorney General)*, 2012 SCC 45.

19. West Coast LEAF is a long-standing advocate for meaningful and effective access to justice, particularly in support of women and others who are disproportionately and differently impacted by the justice system on the basis of intersecting and compounding markers of disadvantage. Much of West Coast LEAF's access to justice work has arisen in the context of advocating for robust legal aid services in the areas of family and poverty law. We have also seen first-hand how such barriers to launching and sustaining complex public interest litigation impede the ability of individuals to seek access to the courts through our work on the SMA legal aid challenge.

20. West Coast LEAF's work on access to justice cuts across its litigation, law reform and educational programming. A selection of recent work in this area includes the following:

- a. SMA legal aid challenge – West Coast LEAF developed and filed a constitutional challenge to BC's family law legal aid scheme on behalf of the Single Mothers' Alliance of British Columbia and two individual plaintiffs. The case is a challenge under ss. 7 and 15(1) of the *Charter* and under s. 96 of the *Constitution Act, 1867* on the basis that the impugned scheme deprives women litigants of limited or moderate means whose family law proceeding

involve protection from violence, histories of family violence or the disruption of the parent-child bond of their security of the person and equality rights. The pleadings also allege that the impugned scheme undermines the jurisdiction of superior courts to resolve disputes and decide questions of law. The notice of civil claim was filed in the Supreme Court of British Columbia on April 26, 2017. Since then, one of the individual plaintiffs has discontinued her involvement as a plaintiff.

- b. *Denton v. Workers Compensation Board*, 2017 BCCA 403, leave to appeal to SCC refused, 37923 (October 25, 2018) – West Coast LEAF intervened before this Court jointly with the Community Legal Assistance Society (CLAS). This case concerned a judicial review of a decision denying workers' compensation to an individual who then sought to raise constitutional arguments about the legislation under which the decision was made at judicial review. West Coast LEAF and CLAS made arguments in support of superior courts retaining the jurisdiction to hear *Charter* claims even when those claims had not been advanced before the first administrative decision-maker with *Charter* jurisdiction.
- c. *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, 2018 BCCA 132, leave to appeal to SCC refused, 38157 (January 31, 2019) – West Coast LEAF intervened before this Court jointly with CLAS. This case concerned the evidentiary basis upon which a “connection or link” must be shown between the adverse treatment complained of and membership in a group protected under the BC *Human Rights Code*. West Coast LEAF and CLAS argued that there are no categorical limits on what type of connection will establish *prima facie* discrimination and that a flexible approach is necessary to prove such a connection.
- d. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 and *Vilardell v. Dunham*, 2013 BCCA 65 – West

Coast LEAF intervened in this case before this Court and at the Supreme Court of Canada. This case concerned the constitutionality of BC's court hearing fees. West Coast LEAF argued that court hearings fees disproportionately impact women's ability to access justice, and deprives them of their security of the person and equality rights.

- e. *Downtown Eastside Sex Workers United Against Violence v. Canada*, 2012 SCC 45 and 2010 BCCA 439. West Coast LEAF intervened before this Court and at the Supreme Court of Canada (jointly with Justice for Children and Youth and ARCH Disability Law Centre) in this case concerning the evolution of the doctrine of public interest standing. West Coast LEAF and its co-intervener groups argued for a broad and purposive approach in line with constitutional commitments to advance substantive equality. The arguments sought to shape the development of the doctrine of public interest standing to ensure that marginalized and disadvantaged communities are granted equal access to justice.
- f. From 2011 to the present, West Coast LEAF has regularly made budget submissions to the provincial and federal governments recommending increased investments in the legal system to ensure access to justice in family, poverty, and immigration and refugee law. For instance, in October 2017, West Coast LEAF made submissions to the provincial Select Standing Committee on Finance and Government Services in partnership with several other legal advocacy organizations, calling for, among other things, dedicated funding for legal aid through a mixed model of legal service delivery and funding to ensure that all patients detained under provincial mental health legislation are provided with independent legal advice. In October 2018, West Coast LEAF made submissions to the federal Standing Committee on Finance as part of a pre-budget consultation where we called for a federal investment in family law legal aid.

- g. In November 2018, West Coast LEAF published a report titled, “We are Here: Women’s Experiences of the Barriers to Reporting Sexual Assault” focused on the barriers that impede survivors of sexual assault from accessing the justice system.**
- h. In December 2017, West Coast LEAF called upon the federal Minister of Justice to sustainably fund immigration and refugee legal aid services to ensure that these services are not continuously at risk of being suspended. Our advocacy efforts focused on the need for principled and predictable funding to the provinces to enhance access to justice across institutions, but also to ensure that Canada meets its constitutional and international law obligations.**
- i. In September 2017, West Coast LEAF in coalition with other legal advocacy organizations prepared a report titled “Justice Reform for BC”, calling on the provincial government to ensure meaningful access to justice by expanding funding for legal aid, counsel at legal aid clinics and in-house counsel at front-line service delivery organizations working to support marginalized and vulnerable communities.**
- j. In May 2016, Rise Women’s Legal Centre opened in Vancouver to provide legal services to women. Rise was developed by West Coast LEAF to respond to women’s increasingly unmet family justice needs, after decades of advocacy for increased funding to family law legal aid. In partnership with the Peter A. Allard School of Law at UBC, Rise runs a student legal clinic where clients are represented by upper-year law students under close supervision by Rise staff.**
- k. In April 2016, West Coast LEAF appeared before the House of Commons Standing Committee on Justice and Human Rights as part of the committee’s study of Access to the Justice System. We spoke in favour of, among other things, a robust revived Court Challenges Program which would enhance access to justice by providing funding to individuals and public interest**

organizations to develop and engage in litigation and intervene in cases raising important constitutional issues.

- l. The formation of Rise was significantly informed by West Coast LEAF's research and reporting on disparities in accessing family justice in BC. In 2014, West Coast LEAF published a report, "Putting Justice Back on the Map", which charted a path forward to ensure access to justice in family law was both equitable and meaningful. West Coast LEAF also published reports jointly with the Canadian Centre for Policy Alternatives on the gendered impact of the erosion of access to justice in BC in 2010 ("Rights Based Legal Aid: Rebuilding BC's Broken System") and in 2004 ("Legal Aid Denied: Women and Cuts to Legal Services in BC").
- m. In January 2013, West Coast LEAF prepared a report on access to meaningful justice in the child protection system, titled: "Supporting Mothers or Shutting Them Out: Results of a Court Watch." The report summarizes the results of a court watch project that took place between March and April 2012 with volunteers observing child protection proceedings in Vancouver and Surrey.
- n. In March 2012, West Coast LEAF contributed to the government's justice system review by making submissions to the Legal Services Society through the Coalition for Public Legal Services. The Coalition was co-founded by West Coast LEAF in 2010, and consisted of organizations, legal advocates and lawyers from across the province working together to advocate for improved legal aid services.
- o. West Coast LEAF published two reports focused on "mapping the gap" in resources available to women seeking legal assistance in British Columbia. The first, *Mapping the Gap: A Summary of Legal Resources for Women in British Columbia*, was released in March 2010. The second, *Mapping the Gap: Linking Aboriginal Women with Legal Services and Resources*, was released in 2012.

- p. In 2009-2010, West Coast LEAF campaigned for a restoration of legal aid funding to that was in place before cuts were made to the system in 2002. In collaboration with other legal advocacy organizations, we disseminated a petition and presented it to the Attorney General and Leader of the Opposition.
- q. Since 2009, West Coast LEAF has published annual reports on, among other things, access to justice for women in BC assessed against the obligations outlined in the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). West Coast LEAF's most recent CEDAW Report Card, published in December 2018 emphasized delays in getting to a court hearing, lack of resources for migrant women and restrictive eligibility criteria to access legal aid in family law.
- r. In April 2007, West Coast LEAF released the results of a court watch project undertaken between October 2005 and April 2006. The report, *Court Watch Report: 2005-2006*, focused on access to justice barriers identified at family remand provincial court proceedings.
- s. West Coast LEAF also continues to offer a range of public legal education resources and workshops aimed at improving access to justice by informing BC residents about their legal rights across different contexts. For instance, West Coast LEAF offers a "Youth in the Workplace" workshop to educate young people aged 15-25 about their rights under employment and human rights legislation. West Coast LEAF also offers a workshop "Only Yes Means Yes" aimed at post-secondary students to understand the laws of consent and options for disclosing and reporting sexual assault. West Coast LEAF's "Trendshift" workshop is aimed at educating youth about their rights and responsibilities online. We also offer a companion resource "Is that Legal?" (available in English and five other languages) about safety online.

21. West Coast LEAF seeks leave to intervene in this appeal on the basis of its interest and experience in securing access to justice for marginalized and disadvantaged communities, some of which is described above.

C. West Coast LEAF's Proposed Submissions

22. If granted leave to intervene in this appeal, West Coast LEAF proposes to make the following submissions:

- a. The decision under appeal will disproportionately and adversely impact women and other traditionally marginalized groups that frequently rely upon public interest organizations for assistance in vindicating their constitutionally protected rights and freedoms. West Coast LEAF will submit that courts should adopt a contextual approach that appreciates the essential role that public interest organizations play in advancing legal rights and access to justice for marginalized groups.
- b. West Coast LEAF will also argue that, in challenges to laws that are alleged to infringe the *Charter* rights of marginalized groups, tying public interest standing to the presence of private litigants is out of step with both the current state of *Charter* jurisprudence and the prevailing practice of modern *Charter* litigation.
- c. West Coast LEAF will submit that, on the basis of the points outlined above, this Court ought to find that public interest standing is available on equal footing with private litigants where the nature of the claim and the relief sought involves systemic claims of oppression brought on behalf of marginalized and vulnerable populations.

23. I have reviewed the proposed submissions in the Memorandum of Argument included in this Application Record and confirm that they are an accurate reflection of West Coast LEAF's proposed submissions should leave to intervene in this appeal be granted.



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March 13, 2019

Delivered by hand

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VANCOUVER
MAR 13 2019
COURT OF APPEAL
REGISTRY

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File No. 1343-001

Re: Application for Intervenor Status in CCD v BC (Court Of Appeal File No. CA45711)

I write to you on behalf of the following proposed intervenors in the above-noted Court of Appeal file:

- West Coast Legal Education and Action Fund ("West Coast LEAF");
- Eco-Justice; and,
- BC Civil Liberties Association

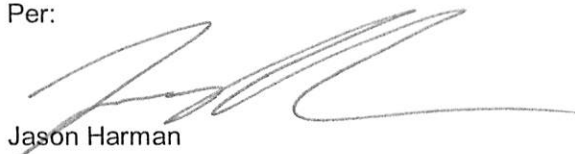
As solicitor for West Coast LEAF, I coordinated with the proposed intervenors and the parties in order to arrive at a suitable date to hear the proposed applications for leave to intervene: April 9, 2019.

We understand that in the interest of time some of the above-named intervenors may have already filed their notice and memorandum with the Court without including a hearing date. We respectfully request on behalf of those organizations that their applications also be scheduled for 9:30am on April 9, 2019.

Yours truly,

JFK Law Corporation

Per:



Jason Harman

JH/evp
Encl.9