

VANCOUVER

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**COURT OF APPEAL
REGISTRY**

Court of Appeal File No. CA42771
Supreme Court File No. S151065
Court of Appeal Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

TREVOR JAMES SCOTT

RESPONDENT
(PETITIONER)

AND:

COLLEGE OF MASSAGE THERAPISTS OF BRITISH COLUMBIA

APPELLANT
(RESPONDENT)

AND:

WEST COAST LEGAL EDUCATION ACTION FUND

PROPOSED INTERVENOR

MEMORANDUM OF ARGUMENT

(In support of an Application for Leave to Intervene by West Coast Legal
Education Action Fund)

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I. INTRODUCTION

1. The West Coast Legal Education and Action Fund (“West Coast LEAF”) applies under r. 36 of the *Court of Appeal Rules* for an order that:
 - (a) West Coast LEAF be granted leave to intervene in this appeal;
 - (b) West Coast LEAF be granted leave to file a factum of up to 20 pages in length;
 - (c) West Coast LEAF be granted permission to apply to the panel hearing the appeal for leave to present oral argument; and
 - (d) No costs be awarded for or against West Coast LEAF in respect of this application or of the appeal itself.
2. West Coast LEAF submits that this appeal raises significant issues of public law which engage its interest as an organization aimed at changing historic patterns of systemic discrimination against women. West Coast LEAF has expertise in applying a substantive equality lense to legal principles and processes relating to sexual assault and respectfully submits that it is able to make a unique and helpful contribution to the issues on appeal without taking the litigation away from the parties.

II. THE APPEAL

3. This appeal concerns the evidentiary threshold for decisions made under s. 35 of the *Health Professions Act*, RSBC 1996, c. 183 (the “HPA”). S. 35(1) of the *HPA* empowers the regulators of various health care professions to impose limits or conditions on a registrant’s practice or to suspend registration if it considers the action necessary to protect the public during the investigation or hearing of a complaint.
4. The College of Massage Therapists of British Columbia (the “College”) received a complaint from a woman alleging that, during a massage

therapy session, her massage therapist masturbated twice while massaging her and placed his penis on her wrist. The College retained an investigator to interview the complainant and subsequently determined that it ought to impose conditions on the registrant's practice pending a full investigation.

Decision and Order of the Inquiry Committee dated October 17, 2014, Appeal Book ("AB") at p. 65

5. The College determined that the complainant's allegations fell on the serious end of the sexual misconduct spectrum. It considered that while the complainant did not actually see the registrant's penis, she described motions and heard sounds consistent with him unzipping his pants, and then removing his penis and fondling it. The College noted that it would not be unusual for a complainant to never see the actual misconduct since many massage therapy techniques are performed while the patient is face down on the table. The College also considered the fact that, while the complainant did not confront the registrant at the time of the conduct, she immediately reported it to the RCMP and went to her doctor because she was upset by what had happened.

Decision and Order of the Inquiry Committee dated October 17, 2014, AB at pp. 69-70

6. The College decided to impose conditions on the registrant's practice, requiring that a chaperone be present for appointments with female clients. The registrant sought reconsideration of the College's decision.

Decision and Order of the Inquiry Committee dated October 17, 2014, AB at p. 72

7. The College provided the registrant with the opportunity to tender an unsworn statement and submissions in support of his application for reconsideration, but declined to remove the conditions imposed pending the completion of its investigation.

Decision and Order of the Inquiry Committee dated October 17, 2014, AB at p. 203 and 211

8. The registrant sought judicial review of both the College's initial and reconsideration decisions in the Supreme Court of British Columbia. On judicial review, the registrant sought to have the orders of the College set aside on the basis that the College's decisions, which relied on a single unproven complaint, were unreasonable.

Oral Reasons or Judgment, Appeal Record ("AR") p. 43 at para 1

9. The Chambers Judge determined the appropriate standard of review to be applied to the College's decisions was reasonableness. She found that the evidentiary requirements needed to support a decision pursuant to s. 35(1) of the *HPA* vary depending on the urgency of the situation. She affirmed that the standard of proof required for s. 35(1) will fall "somewhere between the assertion of one or more unsubstantiated allegations and the high standard which is required with respect to the evidence considered at the full hearing of the merits".

Oral Reasons or Judgment, AR p. 43 at paras 8 and 51

10. The Chambers Judge determined that the College did not apply this standard of proof to the complaint received. In particular, the Chambers Judge noted that the complaint was based on what the complainant "thought she heard and felt, not what she saw." She noted the session lasted approximately 50 minutes "during which time the complainant could easily have opened her eyes or looked to see whether her suspicions as to what the petitioner was doing were correct." She found there was insufficient evidence to establish that the registrant was masturbating, rather than the complainant simply imagining that he was doing so.

Oral Reasons or Judgment, AR p. 43 at paras 52 and 54

11. The Chambers Judge noted the absence of any other complaints against the petitioner and his lack of a criminal record. She concluded, "that the decision that the [registrant] posed a risk to the public and that it was necessary to impose the sanctions to protect the public on the basis of the complainant's unsubstantiated complaint does not fall within a range of

possible results which are defensible in respect of the facts and the law.” (para 56) She accordingly quashed both orders made by the College pursuant to s. 35(1).

Oral Reasons or Judgment, AR p. 43 at paras 56 and 61

12. The primary issue raised by this appeal is whether the complainant's allegations give rise to a *prima facie* case of risk to the public such that the College's power to impose conditions pursuant to s. 35(1) of the *HPA* is engaged. The question of whether and when a complainant's allegations may give rise to a *prima facie* case of risk to the public, in turn, engages myths and stereotypes about women, and the believability of sexual assault victims.
13. West Coast LEAF seeks leave to intervene in this appeal to address three points relevant to the Court's determination of whether and when a *prima facie* case of risk to the public may be made out so as to engage the power contained in s.35(1) of the *HPA*:
 - (a) Allegations of sexual misconduct similar to those in this case fall on the serious end of the misconduct spectrum to which s. 35(1) of the *HPA* might apply and are likely to require urgent action in order to protect the public;
 - (b) The evidentiary standard required to make out a *prima facie* case of risk to the public must take into account the inherent likelihood that the only evidence of sexual misconduct will often be a complainant's word against a registrant's; and
 - (c) The evidentiary standard required in order to make out a *prima facie* case of risk to the public must not result in the complainant's evidence being assessed on the basis of myths and stereotypes about women and sexual assault.

14. West Coast LEAF will not make submissions relating to the appropriate standard of review or the merits of the appeal.

III. LEGAL FRAMEWORK

15. This Court may grant leave to intervene in circumstances where:

- (a) A party has a direct interest in an appeal; or
- (b) The applicant can make a valuable contribution or bring a different perspective to the issues of public importance before the court on appeal.

Friedmann v. MacGarvie, 2012 BCCA 109 at paras. 12-19

BC Freedom of Information and Privacy Association v. British Columbia (Attorney General), 2014 BCCA 520 at paras. 4 and 5

16. In determining whether leave to intervene ought to be granted, this Court will consider the following criteria:

- (a) The nature of the group seeking intervenor status;
- (b) The directness of the group's interest in the matter; and
- (c) The suitability of the appeal to an intervention.

Guadagni v. British Columbia (Workers Compensation Board), (1988), 30 BCLR (2d) 259 (CA Chambers)

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

IV. ARGUMENT

West Coast LEAF and its Interest in the Appeal

18. West Coast LEAF is a non-profit society incorporated in British Columbia and registered federally as a charity. West Coast LEAF's mission is to further women's equality by changing historic patterns of systemic discrimination against women through three main BC-based program areas: equality rights litigation, law reform and public legal education.

Affidavit of Kendra Milne, sworn on October 21, 2015, at para 3

19. Prior to 2009, West Coast LEAF was a branch office of a national organization, Women's Legal Education and Action Fund ("LEAF"). Since 2009, West Coast LEAF has intervened in its own name while continuing to work closely with LEAF. Both LEAF and West Coast LEAF were created in 1985 and grew out of the efforts of a group of women who worked to ensure that ss. 15 and 28 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") would be effective in guaranteeing women's substantive equality.

Affidavit of Kendra Milne, at para 4

20. West Coast LEAF has approximately 330 members, including both individuals and organizations. It currently employs five full-time staff, three part-time staff and some 165 volunteers to carry out its work. This Court has recognized West Coast LEAF's "broad representative base".

Affidavit of Kendra Milne, at para 5

Friedmann v. MacGarvie, 2012 BCCA 109 (Chambers) at para 21

21. West Coast LEAF acts to promote the equality of all women in British Columbia, regardless of race, national origin, immigration status, sexual preference or identity, family or marital status, disability or ability, age, social economic status or any other personal characteristic.

Affidavit of Kendra Milne, at para 6

22. West Coast LEAF is committed to working in consultation and collaboration with other equality seeking groups to ensure that West Coast LEAF's legal arguments, education programs and law reform activities are informed by and inclusive of the diversity of women's experiences. West Coast LEAF also consults and collaborates with leading equality rights academics and practitioners to ensure the consistently high caliber of its work.

Affidavit of Kendra Milne, at para 7

23. Public legal education is the first of West Coast LEAF's three program areas. West Coast LEAF's public legal education program aims to help British Columbians learn about their legal equality rights, how to access those rights, and how to think critically about the law as it affects them. West Coast LEAF believes that, with such education, women will be able to take an active role in asserting their rights and shaping the laws that impact them.

Affidavit of Kendra Milne, at para 8

24. West Coast LEAF's No Means No program is one of the organization's longest running public legal education projects. No Means No is a workshop delivered to students aged 10-15 aimed at empowering youth to understand sexual assault and consent. The workshops, developed in response to the Supreme Court of Canada's decision in *R. v. Ewanchuk*, [1999] 1 SCR 330, delve into myths and stereotypes about gender and sexual assault, and explore issues pertaining to sexism, bullying and homophobia. The No Means No program has been delivered to approximately 5000 youth in British Columbia over the past 15 years.

Affidavit of Kendra Milne, at para 9

25. The second of West Coast LEAF's program areas is law reform. West Coast LEAF's law reform initiatives seek to ensure that all legislation in British Columbia complies with guarantees of equality for women pursuant to both s. 15 of the *Charter* and the United Nations *Convention on the*

Elimination of all Forms of Discrimination Against Women, to which Canada is a signatory.

Affidavit of Kendra Milne, at para 10

26. West Coast LEAF's law reform work consists of conducting comprehensive research projects, drafting best practices and recommendations on legal reform, and making submissions to government and key decision makers. West Coast LEAF has, on a number of occasions over the past 25 years, made submissions to government or key decision makers on issues relating to sexual assault, sexual harassment, sexual abuse, violence against women, sexual violence, sex inequality and legal processes relating thereto.

Affidavit of Kendra Milne, at para 11

27. West Coast LEAF's third program area is litigation. Through litigation work with LEAF and on its own, West Coast LEAF has contributed to the development of equality rights jurisprudence under both the *Charter* and human rights law, including jurisprudence relating to sexual assault.

Affidavit of Kendra Milne, at para 12

28. West Coast LEAF has intervened in its own name in twelve legal proceedings. These proceedings include several cases before this Court (*SWUAV v. Canada*, 2010 BCCA 439; *Friedmann v. MacGarvie*, 2012 BCCA 445; *Villardell v. Dunham*, 2013 BCCA 65; and *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, BCCA File No. CA042770 (in progress)) and many others before the Supreme Court of British Columbia and the Supreme Court of Canada.

Affidavit of Kendra Milne, at para 13

29. West Coast LEAF has also, together with LEAF, intervened in many additional cases, including cases before the British Columbia Court of Appeal, the Ontario Court of Appeal and the Supreme Court of Canada.

West Coast LEAF has provided information and support to LEAF in many of these cases and has taken the leading role in conducting interventions on behalf of LEAF in others.

Affidavit of Kendra Milne, at paras 14-16

30. West Coast LEAF, through its own case work and case work conducted by LEAF, has experience and expertise working to ensure that laws related to sexual assault and harassment, and the legal system's interpretation of those laws, provide meaningful protection to women and are consistent with women's substantive equality. Such experience and expertise has been developed through interventions, particularly in the following relevant cases:
- (a) *R. v. Seaboyer*, [1991] 2 S.C.R. 577. LEAF together with a coalition, argued that courts must remember that women are disproportionately victims of sexual assault so sexual assault cannot be treated legally as a "gender neutral" crime. As such, sexual assault trials must focus on the acts of the accused, rather than the behaviour of the women and children who have been sexually assaulted.
 - (b) *Norberg v. Wynrib*, [1992] 2 S.C.R. 226. LEAF argued that sexual assault is a form of sex discrimination and any assessment of consent in civil sexual assault cases must take into account instances of abuse of power arising from social inequities between the parties, which in this case involved a doctor and a female patient.
 - (c) *R. v. O'Connor*, 29 C.R. (4th) 40 (B.C.C.A.); *R. v. O'Connor*, [1995] 4 S.C.R. 41. LEAF, together with a coalition, argued that the scope of disclosure of sexual assault complainants' mental health records should be limited, and that disclosure of therapists' records fails to take into account women's equality rights.

- (d) *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. LEAF, in coalition, argued that sexual consent must be unequivocal and given freely without fear, and that the notion of “implied consent” in sexual assault cases undermines women’s equality.
- (e) *R. v. Shearing*, [2002] 3 S.C.R. 33. LEAF argued that the cross-examination of a sexual assault complainant on the contents of her diary reflected discriminatory myths about women that have no place in the criminal process.
- (f) *Friedmann v. MacGarvie*, 2012 BCCA 445. West Coast LEAF argued that sexual harassment is *per se* discrimination on the basis of sex.

Affidavit of Kendra Milne, at para 19

- 31. West Coast LEAF has an interest in this appeal because its outcome will have an impact on whether and when s. 35(1) of the *HPA* may be used by regulators to protect women where allegations of sexual misconduct are made against health care professionals; and whether the evidence required to establish a *prima facie* case of risk to the public flowing from complaints involving allegations of serious sexual misconduct incorporates discriminatory myths and stereotypes about women and sexual assault which have the effect of undermining women’s equality.

Affidavit of Kendra Milne, at para 20

West Coast LEAF’s Proposed Submissions

- 32. If granted leave to intervene, West Coast LEAF will focus its argument on three points.
- 33. First, West Coast LEAF will argue that allegations of sexual misconduct, like those in this case, fall on the serious end of the spectrum to which s. 35(1) of the *HPA* may apply and are likely to require urgent action in order

to protect the public. West Coast LEAF will submit that this is so both because all forms of sexual assault, have a significant negative impact on women's equality in Canada and because all health care professional-patient relationships are characterized by an inherent power imbalance. Determinations made by the College pursuant to s. 35(1) must take both the imbalance of power and the pursuit of women's substantive equality into account.

34. Second, West Coast LEAF will argue that the evidentiary standard applicable to determinations made under s. 35(1) must recognize the inherent likelihood that evidence will often be limited to a complainant's word against a registrant's. Services delivered by health care professionals are most often delivered in a closed door setting. Moreover, the overwhelmingly gendered nature of sexual assault is well established. Accordingly, an evidentiary standard applied to determinations made under s. 35(1) which requires corroboration stands to practically prevent health care regulators from using s. 35(1) to protect the public in almost all sexual misconduct cases and will have a disproportionately negative impact on women.
35. Third, West Coast LEAF will argue that the evidentiary standard applicable to determinations made under s. 35(1) must not import myths and stereotypes about women and sexual assault, including myths to the effect that female complainants are inherently less trustworthy than male respondents and or that active resistance or the pursuit of criminal justice are the only normal or appropriate responses to sexual assault. A focus on women's reactions to sexual assault in order to search for an "air of reality" to complaints erroneously leads to an analysis that is focused on the behavior of female victims rather than on the actions of perpetrators. Such an approach ignores a well established body of evidence about the diverse ways that women may respond to sexualized assault and trauma, including through disassociation.

The Value of West Coast LEAF's Proposed Contribution

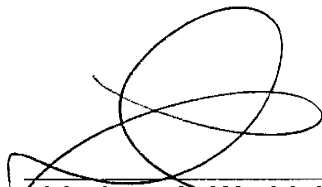
36. The outcome of this appeal will establish the conditions under which many self-governing health care professions can take interim action to protect the public, particularly women, pending the investigation of complaints of sexual misconduct. Ensuring that these conditions do not subtly import stereotypes and myths about women and sexual assault into the analysis will ensure that women's equality and human rights are not undermined.
37. West Coast LEAF's submissions will assist the Court by:
 - (a) Illuminating the discriminatory myths and stereotypes about women and sexual assault which permeate the decision under appeal;
 - (b) Revealing the broader impact of the Court's analysis on women;
 - (c) Working to ensure that the legal principles that develop around sexual assault are consistent with women's substantive equality; and by
 - (d) Providing the perspective of an equality-seeking group which works daily to eradicate systemic discrimination against women.
38. The complainant before the College is not a party to this proceeding and, in West Coast LEAF's respectful submission, neither the registrant nor the College are in a position to present West Coast LEAF's proposed arguments and unique perspective to the Court.
39. If granted leave to intervene, West Coast LEAF will ensure that its submissions do not duplicate those of the parties or expand the *lis* between them.

V. RELIEF SOUGHT

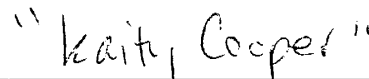
40. For the reasons set out above, West Coast LEAF respectfully request that it be granted leave to intervene in this appeal, that it be permitted to file a factum of not more than 20 pages in length, that it be granted permission to apply to the panel hearing the appeal for leave to present oral argument, and that it shall bear no costs of this application or costs of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: October 22, 2015



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