



No. S-150415  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and  
THE JOHN HOWARD SOCIETY OF CANADA

PLAINTIFFS

AND:

ATTORNEY GENERAL OF CANADA

DEFENDANTS

**NOTICE OF APPLICATION**

Name of applicant: West Coast Women's Legal Education and Action Fund  
(West Coast LEAF)

To: British Columbia Civil Liberties Association and John Howard Society of  
Canada

Joseph J. Arvay, Q.C. / Alison M. Latimer  
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And to: Attorney General of Canada

Mitchell R. Taylor, Q.C.  
Department of Justice  
900-840 Howe Street  
Vancouver, BC V6Z 2S9

TAKE NOTICE that an application will be made by the applicant before Justice Leask at the courthouse at 800 Smithe Street, Vancouver, British Columbia, on December 15, 2016 at 9:00 a.m. for the orders set out in Part 1 below.

**Part 1: ORDER(S) SOUGHT**

1. That West Coast LEAF be granted leave to intervene in this proceeding and to make oral and written submissions;
2. That there shall be no costs of this application or costs of the hearing or the proceeding for or against West Coast LEAF; and
3. Such further and other relief as this Honourable Court may deem just.

**Part 2: FACTUAL BASIS**

**A. The Case as Pleaded**

1. The *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (“*CCRA*”) makes provision for circumstances in which a federally incarcerated person may be subjected to segregation. Segregation of incarcerated persons means removal from the general penitentiary population. Segregated prisoners are held in isolation from other incarcerated persons.
2. The *CCRA* provides for two kinds of segregation: disciplinary and administrative. Incarcerated men and women may be placed in disciplinary segregation for a breach of disciplinary offences during the course of his or her term of imprisonment. Incarcerated persons placed in disciplinary segregation are afforded the following safeguards:
  - a. imposition of segregation only for the most serious disciplinary offences pursuant to s. 44(1)(f) of the *CCRA*;
  - b. temporal limits on the duration of the segregation pursuant to s. 40(2) of the *CCRA*;
  - c. adjudication by an independent chairperson pursuant to s. 24 of the *CCRA*;
  - d. a hearing at which the independent chairperson must be satisfied beyond a reasonable doubt based on the evidence presented that the inmate committed a disciplinary offence, pursuant to s. 43(3) of the *CCRA*; and

- e. a reasonable opportunity to retain and instruct counsel for the hearing pursuant to s. 31(2) of the *CCRA*.

3. Sections 31 through 37 of the *CCRA* authorize the use of administrative segregation, the purpose of which is described in section 31(1) as “maintain[ing] the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates.” Under section 31(3), the institutional head of a penitentiary may order confinement in administrative segregation if he or she is satisfied that there is “no reasonable alternative to administrative segregation” and he or she believes on reasonable grounds that one or more of the following circumstances arise: (a) that an incarcerated man or woman has acted, attempted to act or intends to act in a manner that “jeopardizes the security of the penitentiary or the safety of any person” and that allowing the prisoner to associate with other incarcerated persons would “jeopardize the security of the penitentiary or the safety of any person”; (b) that allowing an incarcerated man or woman to associate with other prisoners would interfere with an investigation that may lead to criminal or serious disciplinary charges; or (c) that allowing association with other prisoners would jeopardize the incarcerated person’s safety.

4. Decisions concerning initial placement into administrative segregation and continued segregation are made by the institutional head of the penitentiary upon recommendations made by designated persons. The *CCRA* and its regulations provide for ongoing internal administrative review process of an incarcerated person’s confinement in administrative segregation (s. 33). This process differs vastly from the process afforded to prisoners facing disciplinary segregation.

5. The administrative review in respect of administrative segregation is conducted by a person or persons designated by the institutional head of the penitentiary, not an independent adjudicator or judicial officer. Incarcerated men and women are not entitled to legal counsel at any administrative review in this process. The standard of proof applied to the hearing is not proof beyond a reasonable doubt. The *CCRA* provides only that the prisoner be released from administrative segregation “at the earliest appropriate

time” (s. 31(2)) but does not provide any objective criteria for the making of that determination.

6. Prolonged segregation is alleged by the Plaintiffs in this case to cause detriment to the physical, psychological, social and spiritual health of prisoners. The alleged significant adverse effects of prolonged segregation include: psychosis; major depression; hallucinations; paranoia; aggression; rage; loss of appetite; self-harm; suicidal behaviour; and disruption of sleep patterns. Prolonged segregation is alleged to frustrate the rehabilitative functions of incarceration as well as the sentencing court’s imposition of a fit sentence.

7. The Plaintiffs, the British Columbia Civil Liberties Association and the John Howard Society of Canada filed this challenge to the constitutional validity and administration of ss. 31, 32, and 33 of the *CCRA*. The claim alleges that ss. 31, 32 and 33 unjustifiably infringe ss. 7, 9, 10, 12 and 15 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

#### **B. History and Experience of the Proposed Intervener**

8. West Coast LEAF has been a non-profit society incorporated in British Columbia and registered as a federal charity since 1985. West Coast LEAF’s mission is to achieve substantive equality by changing historic patterns of systemic discrimination against women through BC-based equality rights litigation, law reform and public legal education.

9. West Coast LEAF acts to promote the equality interests 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, socio-economic status or any other personal characteristic. West Coast LEAF’s work is informed by its recognition that intersecting multiple and overlapping markers of historic disadvantage pose unique, complex challenges to seeking substantive equality for women in the law. West Coast LEAF has developed an expertise in approaching constitutional rights adjudication

through an intersectional lens such that its legal arguments, educational programming and law reform activities are informed by and inclusive of the diversity of women's experiences.

10. West Coast LEAF has extensive experience in bringing the experiences of women before courts and applying this expertise to arguments concerning constitutional law matters, with a particular focus on the equality guarantee under section 15 of the *Canadian Charter of Rights and Freedoms*. West Coast LEAF, through litigation work on its own and under the name of its sister organization, the Women's Legal Education and Action Fund (LEAF), has significantly contributed to the development of constitutional law and equality rights jurisprudence in Canada.

11. West Coast LEAF has intervened, or is intervening, in its own name in the following cases before the Court of Appeal for British Columbia and the Supreme Court of Canada: *Trinity Western University and Volkenant v. Law Society of British Columbia*, 2016 BCCA 423; *Scott v. College of Massage Therapists of British Columbia*, 2016 BCCA 180; *R. v. Lloyd*, 2016 SCC 13; *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, CA042770 (appeal ongoing); *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation*, 2014 SCC 59; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (and *Vilardell v. Dunham*, 2013 BCCA 65); *British Columbia (Ministry of Education) v. Moore*, 2012 SCC 61; *Friedmann v. MacGarvie*, 2012 BCCA 445; *SWUAV v. Canada*, 2012 SCC 45 (and 2010 BCCA 439); *Shewcuk v. Ricard*, [1986] B.C.J. No. 335, 28 D.L.R. (4th) 429 (BCCA).

12. West Coast LEAF has been granted leave to intervene or to participate as an interested person at the trial level before judges of this Court on four occasions: *Reference re Criminal Code of Canada (BC)*, 2011 BCSC 1588 (the *Polygamy Reference*); *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309; *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, 2015 BCSC 534; and *Trinity Western University and Volkenant, v. Law Society of British Columbia*, 2015 BCSC 2326.

13. West Coast LEAF also intervened as part of a coalition of six organizations in an inquiry before the Canadian Judicial Council: In the Matter of an Inquiry Pursuant to Section 63(1) of the *Judges Act* Regarding the Honourable Justice Robin Camp (Report and Recommendation of the Inquiry Committee to the Canadian Judicial Council, dated November 29, 2016).

14. Together with LEAF, West Coast LEAF has intervened in many more cases, including at the BC and Ontario Courts of Appeal and the Supreme Court of Canada.

15. West Coast LEAF took a leading role in the following interventions carried out in LEAF's name: *Rick v. Brandsema*, 2009 SCC 10; *R. v. Watson*, 2008 BCCA 340; *Smith (Guardian ad litem) v. Funk*, 2003 BCCA 449; *R. v. Demers*, 2003 BCCA 38; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44; and *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (Meiorin Grievance)*, [1999] 3 SCR 3.

16. In the following cases, West Coast LEAF provided general information and support to LEAF's intervention: *Blackwater v. Plint*, 2005 SCC 58; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66; *Canada (Attorney General) v. Lesiuk*, 2003 FCA 3; *Miller v. Canada (Attorney General)*, 2002 FCA 370; *R. v. Shearing*, 2002 SCC 58; *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*, [2002] O.J. No. 1771 (C.A.), 59 O.R. (3d) 481; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69; and *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219.

### **C. West Coast LEAF's Expertise and Interest in the Litigation**

17. West Coast LEAF has developed expertise on the concept of substantive gender equality and, in particular, on the use of *Charter* equality rights in the interpretation and assessment of legislation, common law, and state action from the perspective of promoting and protecting substantive equality.

18. This case concerns the rights of persons incarcerated in federal penitentiaries. West Coast LEAF's interest in the case relates to the equality interests of incarcerated

Indigenous women and incarcerated women with mental illness who are confined in administrative segregation. In contributing to the development of equality rights jurisprudence and the meaning of substantive equality in Canada, West Coast LEAF has developed considerable experience in the areas of corrections and sentencing, including how sex inequality and other intersecting forms of discrimination arise in the context of the criminal justice system.

19. West Coast LEAF's work in this area cuts across our litigation, law reform and education programming. West Coast LEAF has experience and expertise concerning the rights of incarcerated women, including the following:

- a) Since 2009, West Coast LEAF has published annual reports on, among other things, the treatment of provincially-incarcerated women in BC, assessed in light of international standards (in particular, the UN *Convention on the Elimination of all forms of Discrimination Against Women*). West Coast LEAF's 2016 CEDAW Report Card published in October 2016 emphasized governmental inaction on the over-representation of Indigenous women and girls in British Columbia's correctional facilities, and on how the conditions of incarceration of women and girls continue to fall short of minimum international standards;
- b) West Coast LEAF intervened at the Supreme Court of Canada in *R. v. Lloyd*, 2016 SCC 13 to argue that the imposition of the mandatory minimum sentence at issue in the case would have disproportionately negative consequences for women;
- c) In 2016, West Coast LEAF prepared an op-ed published in the Vancouver Sun highlighting the differential, adverse impacts of prolonged imprisonment on women;
- d) In 2014, West Coast LEAF wrote to British Columbia's Minister of Children and Family Development objecting to the closure of the Victoria Youth Custody Centre and recommending the use of the facility to house women being held on remand on Vancouver Island;
- e) In 2013, West Coast LEAF intervened in *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, which challenged the cancellation of the

mother-baby program at the Alouette Correctional Centre for Women to argue that the government's action engaged the equality and security of the person interests of incarcerated mothers and their babies;

- f) In 2012, West Coast LEAF wrote to British Columbia's Representative for Children and Youth (in coalition with two other organizations), sharing concerns regarding the centralization of the incarceration of girls in BC and calling on the Representative to intervene;
- g) In 2012, West Coast LEAF and LEAF jointly prepared submissions on Bill C-10: *The Safe Streets and Communities Act*, calling on the federal government to delay passage of the omnibus crime bill pending consideration of the impacts of the proposed legislation on women and Indigenous persons and with a view to its consistency with the government's obligations under the *Charter*;
- h) In 2007, West Coast LEAF wrote to British Columbia's Minister of Children and Family Development regarding reports of inappropriate, invasive medical procedures being undertaken on girls in correctional facilities. As a result of specific allegations made by a prisoner (on which our letter was based), the Ministry conducted an investigation into the reports; and
- i) From approximately 2003 to 2007, West Coast LEAF conducted "No Means No" workshops on the law of consent to sexual activity for at-risk youth held at the Burnaby Correctional Facility.

20. The claims advanced in this case require interpretation and application of constitutional rights to persons with multiple and intersecting disadvantaging characteristics, including Indigeneity, disability and gender. West Coast LEAF has particular interest and expertise in ensuring that constitutional rights are interpreted meaningfully for all women, particularly in circumstances where their multiple and intersecting personal characteristics may obscure the extent to which the law perpetuates disadvantage and harm.

21. West Coast LEAF seeks leave to intervene in this case because of the importance of the issues it raises to West Coast LEAF's constituents, and because its expertise in



substantive equality and intersectionality offers a unique and important perspective that would assist this Court in its deliberations.

### **Part 3: LEGAL BASIS**

22. This application is made pursuant to Part 8 of the *BC Supreme Court Civil Rules* and the inherent jurisdiction of this Court.

23. West Coast LEAF submits that its expertise in the interpretation and application of s. 15 of the *Charter* and in the interpretation of s. 7 of the *Charter* in a manner consistent with s. 15 will assist the Court in resolving the constitutional issues in this case.

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

- a) The Plaintiffs' claims regarding the constitutionality of administrative segregation must be viewed through an intersectional lens which addresses the "constellation of characteristics" related to the grounds of race, disability and sex as accepted by this Court in *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at paras 544-571. In the view of West Coast LEAF, arguments concerning the constitutional rights of prisoners cannot ignore the intersection of race, disability and gender (*Inglis*);
- b) Section 7 of the *Charter* must be approached through the interpretive lens of the *Charter's* equality guarantee such that the scope and content of section 7 recognizes the multiple and intersecting grounds of disadvantage at issue for segregated Indigenous and mentally ill female prisoners, and that the interpretation of the *Charter* responds to the needs and circumstances of disadvantaged members of society; and
- c) The Court's assessment of the constitutionality of administrative segregation under sections 7 and 15 of the *Charter* must be approached with regard to:

- i) The unique and manifold ways in which segregated prisoners who are Indigenous women and/or women with mental illness experience the effects of segregation arising not only from their experience as Indigenous or mentally ill persons, but from the intersection of their experiences as Indigenous *women* and/or mentally ill *women*, including, for example, the exacerbation of trauma arising from violence experienced outside the prison system and the greater incidence among these populations of self-harming behaviours that result in their placement into solitary confinement;
- ii) The disproportionate harms arising from the use of correctional security classification and risk assessment tools that fail to appropriately account for the race and mental health of female incarcerated persons and that influence the likelihood of placement into segregated confinement; and
- iii) The increased stigmatization and harm that the use of administrative segregation has on female populations who have suffered historical oppression arising from the intersection of race and mental health status.

25. West Coast LEAF does not seek to argue discrimination under s. 15 on the grounds of sex; rather, if granted leave to intervene, West Coast LEAF will assist the court in understanding how the alleged discrimination on the grounds of race and disability impact incarcerated women in unique ways.

26. West Coast LEAF does not intend to make arguments concerning ss. 9, 10 or 12 of the *Charter*. West Coast LEAF will work to ensure that its submissions do not duplicate those of the parties.

### **West Coast LEAF's Proposed Involvement in the Hearing**

27. West Coast LEAF's legal submissions will be based on evidence already before the Court in this proceeding and the proposed intervener does not seek to adduce fresh evidence.

**Part 4: MATERIAL TO BE RELIED ON**

Affidavit of A. Prince, affirmed December 5, 2016.

The applicant(s) estimate(s) that the application will take 30 minutes.

[Check the correct box]

[ ] This matter is within the jurisdiction of a master.

[ X ] 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: December 5, 2016

*Rajwant Mangat* .....

Signature of lawyers for applicant  
Rajwant Mangat and Kasari Govender

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