

**COURT OF APPEAL**

BETWEEN:

**DOWNTOWN EASTSIDE SEX WORKERS UNITED  
AGAINST VIOLENCE SOCIETY and SHERYL KISELBACH**

**APPELLANTS  
(PLAINTIFFS)**

AND:

**THE ATTORNEY GENERAL OF CANADA**

**RESPONDENT  
(DEFENDANT)**

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

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**DOWNTOWN EASTSIDE SEX  
WORKERS UNITED AGAINST  
VIOLENCE SOCIETY and  
SHERYL KISELBACH**

**THE ATTORNEY GENERAL OF  
CANADA**

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1. In this application, West Coast Women’s Legal Education and Action Fund (“West Coast LEAF”) requests that it be granted leave to intervene in the present appeal and that it be granted leave to make oral submissions at the hearing of the appeal.

2. West Coast LEAF respectfully submits that it should be granted leave to intervene because it has an indirect but substantial interest in the outcome of the appeal, it is able to make a unique contribution to the issues on appeal without taking the litigation away from the parties, and the case raises constitutional issues of public interest to which the applicant can bring a useful perspective.

**A. The Intervener and its Interest in this Appeal**

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

*Affidavit of Alison Brewin sworn May 11, 2009 at paras.6-7.*

4. In recent years, one of the primary focuses of West Coast LEAF’s program work has been on access to justice issues. West Coast LEAF is committed to ensuring that women have access to the courts and judicial remedies to ensure that their constitutionally guaranteed rights to equality are respected and fulfilled.

*Affidavit of Alison Brewin at para.21-34.*

5. West Coast LEAF has worked closely with the Women’s Legal Education and Action Fund (LEAF), its national affiliate, to intervene in 12 cases, including cases at the BC Court of Appeal, the Ontario Court of Appeal and the Supreme Court of Canada. In all of its interventions, LEAF’s arguments have focused on

the application of principles of substantive equality to the development and application of the law.

*Affidavit of Alison Brewin at paras.15 and 18.*

6. Although the case at bar is the first in which West Coast LEAF is applying for leave to intervene in its own name, it has been actively involved throughout its history in collaborating with LEAF on its interventions, up to and including managing entire interventions. Together, West Coast LEAF and LEAF have contributed to the development of the meaning of substantive equality and equality rights jurisprudence in Canada and in British Columbia.

*Affidavit of Alison Brewin at paras.17-18.*

7. West Coast provided general information and support to LEAF in its interventions in the following cases: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120; *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*, [2002] O.J. No. 1771 (C.A.); *Miller v. Canada (Attorney General)*, 2002 FCA 370; *R. v. Shearing*, [2002] 3 S.C.R. 33; *Canada (Attorney General) v. Lesiuk (C.A.)*, [2003] 2 F.C. 697 (C.A.); *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] 3 S.C.R. 381; and *Blackwater v. Plint*, [2005] 3 S.C.R. 3.

*Affidavit of Alison Brewin at para.16*

8. In the following cases, West Coast LEAF's involvement was substantial, and involved management of the intervention, including managing relations with coalition partners, covering costs in most cases, facilitating the subcommittee (which is the internal organizational body that instructs counsel) and providing administrative and staff support: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307; *Smith (Guardian ad*

*litem of) v. Funk*, 2003 BCCA 449; *R. v. Demers*, 2003 BCCA 28; and, most recently, *R. v. Watson*, 2008 BCCA 340 and *Rick v. Brandsema*, 2009 SCC 10.

*Affidavit of Alison Brewin at para.17*

9. West Coast LEAF has an historical interest in ensuring that public interest organizations have standing before the courts in constitutional challenges. West Coast LEAF also has a demonstrable interest in ensuring that principles of substantive equality are fulfilled in all aspects of public law.

10. In cooperation with direct service community organizations, West Coast LEAF has been searching for test case litigants to take forward litigation on two key issues for women's equality: the application of the provincial social assistance scheme to single mothers, and the impact on women of cuts to legal aid services for family law dating from 2002 to present.

*Affidavit of Alison Brewin at paras.29 and 32.*

11. West Coast LEAF has not yet been successful in finding willing and able test case litigants for either of these potential test cases. In the experience of West Coast LEAF, one of the primary obstacles to identifying willing test case litigants is that women who are already made vulnerable by discriminatory treatment are concerned about the time, financial resources and emotional drain of taking a constitutional case to court and following the case to its final conclusion. Women who are currently experiencing the impact of the laws and policies, and whose stories reflect the legal implications at issue, are the very individuals who, most often, do not have the resources, language capacity or safety to challenge the impact of the social assistance scheme on single mothers or the impact of the cuts to family law legal aid on women.

*Affidavit of Alison Brewin at paras.30, 32 and 33*

12. The difficulties in identifying potential test case litigants has strengthened West Coast LEAF's resolve to ensure that women have equal and adequate

access to justice, particularly on matters concerning the enforcement of their constitutional right to equality. West Coast LEAF has a clear interest in ensuring that the test for public interest standing promotes such fair and equal access, especially where other avenues for seeking judicial redress, such as legal aid, are increasingly unavailable.

*Affidavit of Alison Brewin at paras.25-26 and 34.*

13. West Coast LEAF's research reveals that recent cuts to legal aid funding, from 2002 to 2009, have had, and continue to have, a disproportionate impact on women and have consequently detrimentally impacted women's equality. In addition, cuts to legal aid reduce access to both civil and criminal courts, particularly for British Columbia's most marginalized citizens. In addition to searching for potential test case litigants, West Coast LEAF has engaged in extensive law reform initiatives working towards restoring pre-2002 levels of funding to legal aid for family law services, and calling for broad systemic reform to the provision of legal aid services in British Columbia.

*Affidavit of Alison Brewin at paras.24-26*

14. West Coast LEAF's work in the area of legal aid further demonstrates its commitment to ensuring access to justice for women. West Coast LEAF's extensive knowledge of the impact of the cuts to legal aid services between 2002 and 2009 also contributes to its commitment to ensuring that women have alternative means of accessing courts to assert their equality rights, such as through the auspices of organizations such as the Appellant Downtown Eastside Sex Workers United Against Violence (SWUAV).

*Affidavit of Alison Brewin at para.28.*

## **B. The Intervener's Position on the Appeal**

15. West Coast LEAF will respectfully submit that, in this case, the trial judge erred in dismissing the Plaintiffs' claim on the basis that the Plaintiffs' did not

have public interest standing. West Coast LEAF will submit that the Appellants SWUAV and Ms. Kiselbach should be granted public interest standing on the basis that there is no other reasonable and effective means for this constitutional challenge to come before the Courts.

16. West Coast LEAF will argue that the test for public interest standing should be applied in a manner that promotes systemic equality, pursuant to the equality guarantees in s.15(1) of the *Charter* and the rule of law.

17. West Coast LEAF takes no position on whether the Appellants should be granted private interest standing.

18. West Coast LEAF takes no position at this time on the constitutional issue in this case in chief, namely the constitutional validity of the criminal prohibitions on prostitution.

*Affidavit of Alison Brewin at para.5.*

### **C. Summary of the Intervener's Submissions on the Appeal**

19. The proposed intervener will argue, with respect, that the Court below erred by applying the test for public interest standing to the Appellants in a narrow, overly restrictive and unconstitutional manner. In particular, West Coast LEAF will argue that the trial Court's application of the public interest standing test is inconsistent with the right to equality enshrined in s.15(1) of the *Charter of Rights and Freedoms*, and the unwritten constitutional principle of the rule of law.

20. West Coast LEAF will argue that the Court's assessment of whether there are other reasonable and effective means to bring a constitutional challenge of this legislation before the Court must be based on principles of substantive equality.

21. West Coast LEAF will argue that equal access to justice is constitutionally mandated by s.15(1) of the *Charter*. Section 15(1) of the *Charter* reads: "Every individual is equal before and under the law and has the right to the equal

protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

*Canadian Charter of Rights and Freedoms*, s.15(1)

22. West Coast LEAF will submit that equal access to justice must be regarded as an integral aspect of equality. Without access to court to defend – or, just as importantly, to assert – rights, citizens cannot be said to be truly equal. A right cannot be considered ‘inviolable’ if it cannot be vindicated in court; a freedom is not ‘fundamental’ if it may not be protected at the instigation of its holder.

23. The proposed intervener will also submit that the explicit constitutional guarantees of equality in s.15(1) of the *Charter* are bolstered by the unwritten constitutional principle of rule of law.

24. Although not without limits, access to justice is an indispensable element of the unwritten constitutional principle of the rule of law:

The rights and freedoms are guaranteed by the *Charter* and the courts are directed to provide a remedy in the event of infringement. To paraphrase the European Court of Human Rights in *Golder v. United Kingdom* (1975), 1 E.H.R.R. 524, at p. 536, it would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the *Charter* and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. [...] Of what value are the rights and freedoms guaranteed by the *Charter* if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the *Charter* if court access is hindered, impeded or denied? The *Charter* protections would become merely illusory, the entire *Charter* undermined.

*British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at para.24.

*British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873 at paras.16-17.

25. As a result of a restrictive interpretation of public interest standing, the very persons intended to benefit from the *Charter* lack the means to enforce its guarantees, a lack which compounds and exacerbates the effects of their exclusion from the legislative process. To deny access to justice to persons who are the most fragile, most marginalized, most isolated and most frightened is a profound denial of the equality before the law which underlies all of the *Charter's* guarantees, and is an essential foundation of the rule of law in a democratic society.

26. West Coast LEAF will submit that the trial Court's restrictive interpretation of public interest standing in the case at bar has effectively resulted in the omission of any analysis in the third step of the test of reasonableness or effectiveness. In other words, it is as if the Court is requiring the plaintiffs to show that there is *no other means* for this matter to come before the Court, rather than what the test actually requires, which is for the plaintiffs to show that there are no other *reasonable and effective means*. West Coast LEAF will argue that the test must be applied in a purposive and fulsome manner that ensures that the words "reasonable" and "effective" are given substantial meaning.

27. West Coast LEAF will respectfully submit that consideration of whether an alternative claimant will reasonably be able to bring the claim before the Court must include a substantive equality analysis. That is, given an alternative claimant's vulnerabilities and actual position in society, is it reasonable to presume that claimant will be able to bring the case before the court? In this case, West Coast LEAF will argue that it is unreasonable to expect an individual woman involved in the survival sex trade to bring a constitutional challenge at the time that she is made most vulnerable by the alleged discrimination, especially considering that she is unlikely to have access to legal counsel for her related criminal charges due to cuts in legal aid since 2002.

#### **D. Applicable Principles of Law**

28. The applicant for intervener status must set out the reasons for believing that its submission will be useful to the court and different from those of other parties.

Form 18, Rule 36(2)(a)(ii)

29. Before an applicant will be allowed to intervene, the Court must consider the following factors:

- a. Does the applicant have a direct interest in the litigation? Or,
- b. Can the applicant make a valuable contribution or bring a perspective to a consideration of the issues that differs from those of the parties?

*R. v. Kapp*, 2005 BCCA 247 at para.11.

30. Where the applicant does not have a direct interest in the litigation, the court must consider the nature of the issue before it (particularly whether it raises public law issues); whether the case legitimately engages the interests of the potential intervener; the representativeness of the applicant of a particular point of view or perspective that may be of assistance to the court; whether that viewpoint will assist the court in the resolution of the issues and not take the litigation away from the parties; and whether the applicant will bring a fresh perspective to the case at bar.

*R. v. Watson*, 2006 BCCA 234 as cited in *Gehring v. Chevron Canada Ltd.*, 2007 BCCA 557 at para.7.

*Re Workers' Compensation Act, 1983 (NLFD)*, [1989] 2 S.C.R. 335 as cited in *Bosa Development Corp. v. British Columbia (Assessor of Area 12 – Coquitlam)*, [1996] B.C.J. No. 2060 (C.A.) at para.24.

31. Where the case raises issues of public interest or constitutional law, the court is more likely to grant intervener status, where that applicant can make a useful contribution to the case at bar.

*MacMillan Bloedel Ltd. V. Mullin* (1985), 66 B.C.L.R. 207 (C.A.) as cited in *R. v. Kapp* at para.11.

*Re Workers' Compensation Act, 1983 (NLFD)* as cited in *Bosa Development Corp. v. British Columbia (Assessor of Area 12 – Coquitlam)* at para.24.

## **E. Argument**

32. West Coast LEAF submits that its interest in the litigation is substantial, although not direct.

33. West Coast LEAF has worked on a number of different facets of access to justice. West Coast LEAF's difficulty in finding willing and able test case litigants to challenge the provincial social assistance scheme and the provincial legal aid system is illustrative of the obstacles obstructing the progress of women's equality litigation.

34. The process of obtaining public interest standing and using it to bring a constitutional equality challenge, as the Appellants are seeking to do, is an important element of access to justice. West Coast LEAF has extensive experience in the obstacles that women face in seeking to enforce their constitutional rights, and therefore has a clear interest in ensuring that the test for public interest standing is interpreted and applied in a manner that allows women equal and expansive access to courts to enforce their equality rights.

35. Through its affiliation with LEAF, West Coast LEAF has extensive experience intervening in cases before the courts, and making arguments about how substantive equality principles apply to a variety of different legal contexts. Also through its relationship with LEAF, West Coast LEAF has extensive experience assisting the court in understanding how a variety of laws and government actions impact upon women's equality. This proposed intervener will bring its expertise on substantive equality and women's access to justice to the case at bar.

36. While the Appellants in this case make some arguments about how the public interest standing test impacts their own access to the courts, the applicant will assist the Court in understanding how the application of the test for public interest standing in these circumstances may have broad implications for other public interest litigants and for constitutional litigation in general, especially in the current context of legal aid cuts and the abolition of the Court Challenges Program.

*Appellants' factum* at paras.67-68.

37. The proposed intervener will also illustrate how the Appellants' concern with their own access to the courts for this challenge can be characterized as an issue of substantive equality. West Coast LEAF will argue that the test for public interest standing must be applied in a contextualized manner, with due regard to the particular implications of the test on women's access to justice.

38. West Coast LEAF submits that the definition and application of the law concerning public interest standing is a matter of public interest and constitutional law, in respect of which West Coast LEAF can offer submissions of use and interest to the Court. West Coast LEAF has undertaken to work in cooperation with the parties and other possible interveners, and will not take the litigation away from those directly affected by it.

*Affidavit of Alison Brewin* at para.40

39. Rather, the experiences of West Coast LEAF in bringing an equality perspective to bear on rights litigation, and its experience working on issues related to access to justice, will enable it to provide a well-informed perspective on the issues in the appeal, and to provide a fresh perspective that is different than the parties.

40. West Coast LEAF is uniquely situated to make such a fresh contribution, with its long standing and close relationship with LEAF, an experienced and influential intervener before the courts.

**F. Order Requested**

41. West Coast LEAF respectfully requests that it be granted leave to intervene in this appeal on the following terms:

- a. that it file a factum of not more than 20 pages on or before a date to be specified by this Honourable Court;
  - b. that it may present oral argument at the hearing of the appeal not to exceed twenty minutes in length;
  - c. that it not be awarded costs nor have costs awarded against it.
42. West Coast LEAF asks that there be no costs of this application.

All of which is respectfully submitted,

Dated:

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Kasari Govender  
Counsel for the Intervener

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## **SCHEDULE A – CASES REFERRED TO**

*Bosa Development Corp. v. British Columbia (Assessor of Area 12 – Coquitlam)*, [1996] B.C.J. No. 2060 (C.A.).

*British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873.

*British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214.

*Gehring v. Chevron Canada Ltd.*, 2007 BCCA 557.

*R. v. Kapp*, 2005 BCCA 247.

## SCHEDULE B – STATUTES REFERRED TO

### ***Court of Appeal Rules, B.C. Reg. 297/2001***

- 36 (1) Any person interested in an appeal may apply to a justice for leave to intervene on any terms and conditions that the justice may determine.
- (2) A party seeking leave under subrule (1) to intervene in an appeal must, within 14 days after the filing of the appellant's factum,
- (a) prepare
    - (i) a notice of motion in Form 6, and
    - (ii) a memorandum of argument in Form 18,
  - (b) file 2 copies of that notice of motion and memorandum of argument for use by the court plus such additional copies of those documents as are required for the purposes of paragraph (c), and
  - (c) serve one filed copy of the notice of motion and memorandum of argument on each of the other parties.
- (3) In any order granting leave to intervene, the justice
- (a) is to specify the date by which the factum of the intervenor must be filed, and
  - (b) may make provisions as to additional disbursements incurred by the appellant or any respondent as a result of the intervention.
- (4) An intervenor must file a factum in Form 10 on or before the date referred to in subrule (3) (a).
- (5) Unless a justice otherwise orders, an intervenor
- (a) must not file a factum that exceeds 20 pages,
  - (b) must include in the factum only those submissions that pertain to the facts and issues included in the factums of the parties, and
  - (c) is not to present oral argument.

**Canadian Charter of Rights and Freedoms, Schedule B to the Canada Act 1982, (U.K.) 1982, c.11**

**15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.