

VANCOUVER  
APR 06 2022  
COURT OF APPEAL  
REGISTRY

Court of Appeal File No.: CA47971  
Court of Appeal Registry: Vancouver  
Provincial Court File No.: 41820-C  
Provincial Court Registry: Campbell River

**COURT OF APPEAL**

REGINA

APPELLANT

TANYA LEE ELLIS

RESPONDENT

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**NOTICE OF MOTION**

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**TO:** The Appellant, the Public Prosecution Service of Canada

**AND TO:** Its Solicitors

Ryan Carrier  
The Public Prosecution Service of Canada  
British Columbia Regional Office  
12<sup>th</sup> Floor, 800 Burrard Street  
Vancouver, B.C. V6Z 2G7

**TO:** The Respondent, Tanya Lee Ellis

**AND TO:** Her Solicitors:

Sarah J. Runyon

Marion and Runyon, Criminal Lawyers  
1250-A Cedar Street  
Campbell River, B.C. V9W 2W5

Caitlin Shane  
Pivot Legal Society  
121 Heatley Avenue  
Vancouver, B.C. V6A 3E9

TAKE NOTICE THAT AN APPLICATION will be made by the West Coast Legal Education and Action Fund ("West Coast LEAF") to the presiding justice at 400 - 800 Hornby Street, Vancouver, British Columbia, at a time and date to be determined, for an order pursuant to Rule 36 of the *Court of Appeal Rules* that:

- a. West Coast LEAF is granted leave to intervene in the appeal;
- b. West Coast LEAF is entitled to file a Statement of not more than 8 pages in length;
- c. West Coast LEAF may apply to the division hearing the appeal for leave to make oral submissions at the hearing of the appeal;
- d. West Coast LEAF is entitled to receive electronic copies of the appeal record, transcripts, appeal book, Statements, replies, books of authorities and any other documents filed by the parties; and
- e. No costs will be awarded for or against West Coast LEAF in respect of this application or the appeal itself.

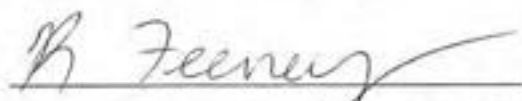
AND TAKE NOTICE THAT in support of the application will be read the affidavit of Rajwant Mangat affirmed on April 5, 2022.

The applicant anticipates that this application will be contested.

Dated: April 6, 2022

This application will take no more that 20 minutes to be heard.

This application is filed by:



Kasandra Cronin, Q.C. and Kate Feeney  
Counsel for the Proposed Intervenor

LaLiberté Cronin Criminal Lawyers  
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**AFFIDAVIT OF RAJWANT MANGAT**

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I, RAJWANT MANGAT, 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 2004 and to the Bar of British Columbia in 2011. I joined West Coast LEAF as the Director of Litigation in March 2016. I became the Executive Director on September 3, 2019.
3. I am authorized to provide this affidavit in support of West Coast LEAF's motion for leave to intervene in the within appeal.

4. This is an appeal of a one-year suspended sentence imposed on Tanya Ellis, who pleaded guilty in BC Provincial Court to one count of trafficking in fentanyl and one count of possession of cocaine/fentanyl for the purpose of trafficking. At the time of the offences, Ms. Ellis was a marginalized drug user who was selling small amounts of opioids at the street-level as a means of ensuring her own supply.

5. Under *R. v. Smith*, 2017 BCCA 112 ("*Smith*"), the sentencing range for Ms. Ellis, as a first-time, street-level trafficker of fentanyl, was eighteen to thirty-six months in jail. However, the sentencing judge agreed to revisit the *Smith* sentencing range, and ultimately imposed a one-year suspended sentence on Ms. Ellis, after considering social context evidence about the circumstances of drug users who sell drugs at the street level, the effectiveness, utility, and risks of incarcerating them and/or ordering their treatment, and the now ubiquity of fentanyl in BC's illicit drug supply.

6. As described in more detail below, West Coast LEAF has a demonstrable, ongoing interest in the rights and interests of criminalized women and people of marginalized genders, including by ensuring that courts are alive to and account for the criminal justice system's gendered impacts when making sentencing decisions.

7. West Coast LEAF seeks leave to intervene in this appeal based on this long-standing interest and expertise and its ability to provide a unique and useful perspective to aid the Court in its consideration of the issues on appeal.

#### **A. Background and Expertise of West Coast LEAF**

8. 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 seek systemic change. West Coast LEAF's areas of focus are access to healthcare, access to justice, economic security, freedom from gender-based violence, justice for those who are criminalized, and the right to parent.

9. West Coast LEAF was formed in April 1985 when the equality provisions of the Charter came into force. Before 2009, West Coast LEAF was a branch of a national organization, Women's Legal Education and Action Fund ("LEAF"). In 2009, West Coast LEAF became an affiliate of LEAF. Since then, 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, but the two organizations continue to collaborate from time to time.

10. During the last fiscal year, West Coast LEAF had approximately 460 members. As of April 5, 2022, West Coast LEAF employs 12 permanent staff members. It relies on the annual support of approximately 200 volunteers to carry out its work.

11. West Coast LEAF acts to promote the equality interests of all women and people of marginalized genders, including where gender intersects with other axes of marginalization such as Indigeneity, race, national origin, immigration status, sexual orientation, family status, disability, age, and class. It is committed to working in consultation and collaboration with other equality-seeking groups to ensure that West Coast LEAF's legal positions, law reform activities, and educational programming are informed by, and inclusive of, the diversity of human experience.

12. 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. It has provided its perspective on both specific challenges to discriminatory or unconstitutional laws and government actions and in matters where statutory interpretation compromises the realization of substantive equality through the adverse effects of such interpretation. West Coast LEAF works to ensure that the law incorporates an intersectional analysis of discrimination and disadvantage.

13. West Coast LEAF has intervened, or is intervening, in its own name in the following appeals before this Court and at the Supreme Court of Canada:

- (a) *Attorney General of British Columbia v. Council of Canadians with Disabilities*, SCC File No. 39430 (appeal heard in January 2022) and 2020 BCCA 241;

- (b) *Barendregt v. Grebliunas*, SCC File No. 39533 (appeal heard in December 2021);
- (c) *Ross McKenzie Kirkpatrick v. Her Majesty the Queen*, SCC File No. 39287 (appeal heard in November 2021);
- (d) *A.S. v. Her Majesty the Queen, et al.*, SCC File No. 39516 (jointly with Women Against Violence Against Women Rape Crisis Centre ("WAVAW")) (appeal heard in October 2021);
- (e) *Her Majesty the Queen v. J.J.*, SCC File No. 39133 (jointly with WAVAW) (appeal heard in October 2021);
- (f) *Colucci v. Colucci*, 2021 SCC 24 (jointly with LEAF);
- (g) *A.B. v. C.D.*, 2020 BCCA 11;
- (h) *Michel v. Graydon*, 2020 SCC 24;
- (i) *Bent v. Platnick*, 2020 SCC 23, and *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 (jointly with Atira Women's Resource Society, B.W.S.S. Battered Women's Support Services Association, and Women Against Violence Against Women Rape Crisis Centre);
- (j) *British Columbia Civil Liberties Association and John Howard Society of Canada v. Canada (Attorney General)*, 2018 BCCA 282;
- (k) *Law Society of British Columbia v. Trinity Western University and Volkenant*, 2018 SCC 32 and 2016 BCCA 423;
- (l) *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, 2018 BCCA 132, leave to appeal to SCC refused.

SCC File No. 38157 (January 31, 2019) (jointly with Community Legal Assistance Society);

(m) *Denton v. Workers Compensation Board*, 2017 BCCA 403, leave to appeal to SCC refused, SCC File No. 37923 (October 25, 2018) (jointly with Community Legal Assistance Society);

(n) *Schrenk v. British Columbia Human Rights Tribunal*, 2017 SCC 62;

(o) *Scott v. College of Massage Therapists of British Columbia*, 2016 BCCA 180;

(p) *R. v. Lloyd*, 2016 SCC 13;

(q) *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2014 SCC 59;

(r) *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 and *Vilardell v. Dunham*, 2013 BCCA 65;

(s) *British Columbia (Ministry of Education) v. Moore*, 2012 SCC 61;

(t) *Friedmann v. MacGarvie*, 2012 BCCA 445;

(u) *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

14. Interventions brought by LEAF, originating in British Columbia, in which West Coast LEAF was involved, include:

(a) *Rick v. Brandsema*, 2009 SCC 10 ("Rick");

(b) *Blackwater v. Plint*, 2005 SCC 58 (as part of a coalition with the Native Women's Association of Canada and the DisAbled Women's Network of Canada);

(c) *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 (co-intervening with the DisAbled Women's Network of Canada);

- (d) *R. v. Shearing*, 2002 SCC 58 (“*Shearing*”);
- (e) *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 (“*Little Sisters*”);
- (f) *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44;
- (g) *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees’ Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 (S.C.C.) (as part of a coalition with the DisAbled Women’s Network of Canada and the Canadian Labour Congress);
- (h) *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 (S.C.C.) (“*Eldridge*”) (co-intervening with the DisAbled Women’s Network of Canada);
- (i) *R. v. O’Connor*, [1995] 4 S.C.R. 411 (S.C.C.) (as part of a coalition with the Aboriginal Women’s Council, the Canadian Association of Sexual Assault Centres, and the DisAbled Women’s Network of Canada);
- (j) *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (S.C.C.);
- (k) *R. v. Sullivan*, [1991] 1 S.C.R. 489 (S.C.C.); and
- (l) *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 (S.C.C.).

15. 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) *R.R. v. Vancouver Aboriginal Child and Family Services Society*, BCHRT File No. 16765 (judgment under reserve);
- (b) *T.L. v. Attorney General of British Columbia and Jennifer Burns delegate of the Director under the Child, Family and Community Service Act*, 2021 BCSC 2203;
- (c) *Oger v. Whatcott*, 2019 BCHRT 58;



- (d) *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);
- (e) *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);
- (f) *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);
- (g) *Trinity Western University and Volkenant v. Law Society of British Columbia*, 2015 BCSC 2326;
- (h) *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, 2015 BCSC 534 (jointly with Community Legal Assistance Society);
- (i) *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309; and
- (j) *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (the *Polygamy Reference*).

16. Apart from its intervention work, West Coast LEAF is currently litigating a constitutional challenge to the family law legal aid regime in British Columbia before the BC Supreme Court: *Single Mothers' Alliance of BC Society v. British Columbia*, File No. S1733843 (Notice of Civil Claim filed April 26, 2017) ("SMA legal aid challenge").

17. 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 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 gender equality issues.

18. 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.

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

19. West Coast LEAF has long advocated to ensure that the criminal justice system is consistent with substantive equality for criminalized women and people of marginalized genders. Its work in this area includes the following activities:

- a. Since 2009, West Coast LEAF has published annual report cards which measure BC's progress in advancing gender equality for women and, since 2018, for other people of marginalized genders. These report cards have included sections on gender equality in the criminal justice system, including sentencing, prisons, and reintegration and rehabilitation. Among other concerns, the most recent 2019/2020 Gender Equality Report Card highlighted the specific experiences of trans and non-binary prisoners.
- b. In 2018, West Coast LEAF and the Native Women's Association of Canada intervened before this Court in *British Columbia Civil Liberties Association and John Howard Society of Canada v. Canada (Attorney General)*, 2019 BCCA 228, a constitutional challenge to Canada's administrative segregation regime in federal prisons. They made submissions about the unique and

- disproportionately harmful experiences of Indigenous women and women with mental health disabilities in administrative segregation. West Coast LEAF had previously intervened in *British Columbia Civil Liberties Association and John Howard Society of Canada v. Canada (Attorney General)*, 2018 BCSC 62.
- c. In 2017, West Coast LEAF made submissions before the House of Commons Standing Committee on the Status of Women concerning the Committee's study on Indigenous Women in the Federal Justice and Correctional Systems. West Coast LEAF's submissions included the need for applying a human rights framework to understand the challenges experienced by criminalized and imprisoned Indigenous women.
  - d. In 2016, West Coast LEAF intervened in *R. v. Lloyd*, 2016 SCC 13, a constitutional challenge to mandatory minimum jail sentences for drug trafficking. It made submissions about the importance of individualized criminal sentences under s. 15 of the *Charter* and the disproportionate impacts of mandatory minimum sentences on women, including because of the nature of their involvement in the drug trade, the effects of criminalization and incarceration on child custody and motherhood, and the likelihood that BC women will be incarcerated far from their home communities.
  - e. In 2016, West Coast LEAF authored an op-ed in the *Vancouver Sun* on the differential, adverse impacts of prolonged imprisonment on women.
  - f. 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. It argued that the government's action engaged the *Charter's* equality and security of the person rights of imprisoned mothers and their babies.
  - g. 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 imprisonment of girls in BC and calling on the Representative to intervene.

- h. In 2012, West Coast LEAF and the Women's Legal Education and Action Fund ("LEAF") 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 its impacts on women and Indigenous persons, and with a view to its consistency with the *Charter*.


**C. West Coast LEAF's Proposed Submissions**

20. If granted leave to intervene, West Coast LEAF will argue that a gendered and substantive equality-informed legal analysis supports a revisiting of the *Smith* sentencing range and the meaningful availability of non-carceral sentences for people who use and sell drugs. I have reviewed the Memorandum of Argument included in this Application Record, and I confirm that it is an accurate reflection of West Coast LEAF's proposed submissions should leave to intervene in this appeal be granted.

21. If granted leave to intervene, West Coast LEAF will work in cooperation with the parties and any other intervenors and ensure that we offer a perspective that is non-duplicative, unique, and useful to the Court's determination of this appeal.

22. I make this affidavit in support of West Coast LEAF's application for leave to intervene and for no other or improper purpose.

AFFIRMED BEFORE ME at the City of Vancouver, in the Province of British Columbia, this 5th day of April 2022. )  
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A Commissioner for taking Oaths  
in British Columbia

  
RAJWANT MANGAT

**Kate Feeney**  
*Barrister & Solicitor*  
**West Coast LEAF**  
800 - 409 Granville St.  
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Tel: 604.684.8772

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

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**Counsel for the Appellant**

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**Caitlin Shane**

Pivot Legal Society  
121 Heatley Avenue  
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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 this appeal, and that the style of cause be amended accordingly, on the following terms:
  - a. West Coast LEAF is entitled to file a Statement of not more than 8 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 is entitled to receive electronic copies of the appeal record, transcripts, appeal book, Statements, replies, books of authorities and any other documents filed by the parties; and
  - d. No costs will be awarded for or against West Coast LEAF in respect of this application or the appeal itself.
2. This appeal raises important concerns about the criminalization of people with substance use disorders. The Court will be called upon to revisit the sentencing range from *R. v. Smith*, 2017 BCCA 112 ("*Smith*"), considering evidence about the nature of BC's illicit drug supply and the implications of incarcerating people with substance use disorders who are selling drugs at the street-level as a means of ensuring their own drug supply.
3. West Coast LEAF has a demonstrable interest and expertise in in the rights and interests of criminalized women and people of marginalized genders, including by ensuring that courts are alive to and account for the criminal justice system's gendered impacts when making sentencing decisions. It will bring a unique and valuable perspective to the issues before the Court in this appeal.

## B. The Appeal

4. The sentencing decision under appeal is in relation to Tanya Ellis, a 43-year-old woman from Campbell River, BC, who pleaded guilty in BC Provincial Court to one count of trafficking in fentanyl and one count of possession of cocaine/fentanyl for the purpose of trafficking. Ms. Ellis is drug user who was selling small amounts of opioids to ensure her own supply.
5. Ms. Ellis has experienced difficult circumstances, including poverty, childhood exposure to intimate partner violence against her mother, a physically and sexually abusive relationship in her early twenties, and the overdose death of her partner and the father of her two children. She has been using opioids since childhood. Despite attending several residential treatment programs, Ms. Ellis testified that she has been unable to maintain sobriety while her life conditions stay the same.
6. Ms. Ellis has had long-term engagement with the criminal justice system for substance use-related offences. The Ministry of Children and Family Development has also been involved with her family and children (her children are Indigenous).
7. At Ms. Ellis's sentencing hearing, Judge Flewelling was asked to revisit *Smith*, in which this Court responded to concerns about the enhanced risks to the community of fentanyl trafficking by increasing the sentencing range for a first-time trafficker of fentanyl to eighteen to thirty-six months in jail.
8. Based on expert and other evidence about the circumstances of drug users who sell drugs at the street level, the effectiveness, utility, and risks of incarcerating them and/or ordering their treatment, and the now ubiquity of fentanyl in BC's illicit drug supply, Judge Flewelling determined that it was appropriate to revisit the *Smith* sentencing range and ultimately imposed a one-year suspended sentence.

### C. LEGAL FRAMEWORK – INTERVENOR APPLICATIONS

9. An order granting leave to intervene in an appeal is discretionary, and may be made on any terms and conditions the Court considers appropriate.<sup>1</sup> 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.<sup>2</sup>

10. 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.<sup>3</sup>

### D. ARGUMENT

11. 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 public interest issues raised in the appeal and the development of sentencing law which is alive to and reflects gendered social context; and

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

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

<sup>3</sup> *Freidmann, supra* at paras 21-28.



- b. West Coast LEAF will bring a unique perspective to this appeal, and it will make useful and different contributions to the issues before the Court without taking the litigation away from the parties.

12. 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's areas of focus are access to healthcare; access to justice; economic security; freedom from gender-based violence; justice for those who are criminalized; and the right to parent.<sup>4</sup>

13. West Coast LEAF acts to promote the equality interests of all women and people of marginalized genders, including where gender intersects with other axes of marginalization such as Indigeneity, race, national origin, immigration status, sexual orientation, family or marital status, disability, age, and class. It works 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.<sup>5</sup>

14. West Coast LEAF has intervened, or is intervening in its own name, in numerous cases, including cases before this Court, the British Columbia Supreme Court, and the Supreme Court of Canada. West Coast LEAF is also presently representing the plaintiff in a constitutional challenge to the provision of family law legal aid services.<sup>6</sup>

15. West Coast LEAF's legal submissions have been shaped by its significant expertise in applying principles of substantive equality to the development and application of law and state action affecting women and people of marginalized genders.

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<sup>4</sup> Affidavit of Rajwant Mangat affirmed April 5, 2022, at para. 8.

<sup>5</sup> *Ibid* at para. 11.

<sup>6</sup> *Ibid* at paras. 13-16.

16. In this case, the question of revisiting the *Smith* sentencing range takes place against the backdrop of Ms. Ellis's gendered circumstances as a woman being sentenced. West Coast LEAF has long advocated to ensure that the criminal justice system is consistent with substantive equality for criminalized women and people of marginalized genders. West Coast LEAF's work in this area includes the following:<sup>7</sup>

- a. Since 2009, West Coast LEAF has published annual report cards which measure BC's progress in advancing gender equality for women and, since 2018, for other people of marginalized genders. These report cards have included sections on gender equality in the criminal justice system, including sentencing, prisons, and reintegration and rehabilitation. Among other concerns, the most recent 2019/2020 Gender Equality Report Card highlighted the specific experiences of trans and non-binary prisoners.
- b. In 2018, West Coast LEAF and the Native Women's Association of Canada intervened before this Court in *British Columbia Civil Liberties Association and John Howard Society of Canada v. Canada (Attorney General)*, 2019 BCCA 228, a constitutional challenge to Canada's administrative segregation regime in federal prisons. They made submissions about the unique and disproportionately harmful experiences of Indigenous women and women with mental health disabilities in administrative segregation. West Coast LEAF had previously intervened in *British Columbia Civil Liberties Association and John Howard Society of Canada v. Canada (Attorney General)*, 2018 BCSC 62.
- c. In 2017, West Coast LEAF made submissions before the House of Commons Standing Committee on the Status of Women concerning the Committee's study on Indigenous Women in the Federal Justice and Correctional Systems. West Coast LEAF's submissions included the need for applying a human rights framework to understand the challenges experienced by criminalized and imprisoned Indigenous women.

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<sup>7</sup> *Ibid* at para. 19.

- d. In 2016, West Coast LEAF intervened in *R. v. Lloyd*, 2016 SCC 13, a constitutional challenge to mandatory minimum jail sentences for drug trafficking. It made submissions about the importance of individualized criminal sentences under s. 15 of the *Charter* and the disproportionate impacts of mandatory minimum sentences on women, including because of the nature of their involvement in the drug trade, the effects of criminalization and incarceration on child custody and motherhood, and the likelihood that BC women will be incarcerated far from their home communities.
- e. In 2016, West Coast LEAF authored an op-ed in the *Vancouver Sun* on the differential, adverse impacts of prolonged imprisonment on women.
- f. 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. It argued that the government's action engaged the *Charter's* equality and security of the person rights of imprisoned mothers and their babies.
- g. 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 imprisonment of girls in BC and calling on the Representative to intervene.
- h. In 2012, West Coast LEAF and the Women's Legal Education and Action Fund ("LEAF") 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 its impacts on women and Indigenous persons, and with a view to its consistency with the *Charter*.

### ***West Coast LEAF's Proposed Contribution on Appeal***

- 17. If granted leave to intervene, West Coast LEAF will argue that a gendered and substantive equality-informed legal analysis supports a revisiting of the *Smith* sentencing range and the meaningful availability of non-carceral sentences for

people who use and sell drugs. West Coast LEAF will make interrelated submissions to assist the Court in deciding the issues under appeal, as summarized below.

**a. Social Context Evidence and Substantive Equality**

18. A substantive equality-informed approach to sentencing law must readily incorporate and evolve with social context evidence, including social context evidence of a more general or systemic nature. The admission and use of such evidence in sentencing recognises the systemic realities of individuals before the court, which is in keeping with a growing body of case law from a variety of criminal law contexts.<sup>8</sup> Moreover, it promotes access to justice for people being sentenced by reducing barriers to the judicial consideration of their highly relevant social context, including where more individualized evidence is either not available or not accessible.

19. For women and people of marginalized genders, substantive equality under male-normed sentencing law will often require judicial consideration of systemic evidence about gendered pathways to crime and the gendered implications of criminalization. As illustrated by this case, such evidence can counteract male-normed models of the “drug dealer” and his criminality and moral culpability.

**b. The Gendered Social Context of Drug Trafficking**

20. Under the *Smith* sentencing range, women like Ms. Ellis who sell small quantities of drugs (virtually all of which contain fentanyl in the current context) to support their own use are subject to lengthy jail sentences unless they can establish that their circumstances are somehow exceptional. However, the circumstances that shape women’s pathways to drug use and trafficking, as well as the gendered implications

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<sup>8</sup> These contexts include the racialized experiences of arbitrary detention (see, e.g., *R v Le*, 2019 SCC 34), gendered experiences of self-defense (see, e.g., *R v Lavallee*, [1990] 1 SCR 852) and the relevance in sentencing of anti-Black racism (see, e.g., *R v. Morris*, 2021 ONCA 680) and the impacts of colonization and anti-Indigenous racism (see, e.g., *R. v. Gladue*, [1999] 1 SCR 688, and *R. v. Ipeelee*, 2012 SCC 13).

of their incarceration, are rarely exceptional. They are common to most women who sell drugs and yet the *Smith* range does not take them into account.

21. A substantive equality-informed approach to sentencing law in drug trafficking cases requires courts to consider the social context of women or people of marginalized genders *before* setting any sentencing range or sentence, including the ways in which gender interacts with other forms of marginalization.
22. First, such social context evidence can situate moral culpability within systems of gendered inequality. As illustrated by the record in this case, substance use disorders and street-level drug trafficking are strongly correlated to gendered experiences of poverty, colonialism, violence and abuse, state surveillance and control (such as by the child welfare system), and other forms of marginalization.
23. Second, such social context evidence can inform the weight given to individual mitigating and aggravating circumstances. For example, an aggravating circumstance in this case was the presence of Ms. Ellis's daughter during one transaction. However, such an aggravating circumstance should be understood in the gendered context of sole or primary caregivers of children, who may be less able to conduct criminal activity away from their children.
24. Finally, such social context evidence can inform an assessment of the effects and/or effectiveness of certain sentencing ranges or sentences. Women and people of marginalized genders have long been "correctional afterthoughts" as their numbers are eclipsed by the majority of incarcerated people who are men.<sup>9</sup> However, while those convicted of drug trafficking are more often men than women, the *proportion* of people serving sentences for drug trafficking is higher in women's prisons than in men's prisons.<sup>10</sup> Moreover, Indigenous women are the fastest growing prison

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<sup>9</sup> Debra Parkes, "Women in Prison: Liberty, Equality & Thinking Outside the Bars," (2016) 12 *Journal of Law & Equality* 127 ("*Parkes*").

<sup>10</sup> Rebecca King & Kathy AuCoin, "Female Offenders in Canada," Statistics Canada Catalogue No. 85-002-XIE (2009).

population in Canada, accounting for nearly 50% of federally sentenced women.<sup>11</sup>

25. Women and people of marginalized genders who are incarcerated in women's prisons are more likely than men to be incarcerated farther away from their home communities (and their children) and are often in more restrictive environments, despite being lower risk as a group.<sup>12</sup>
26. Trans and other people of marginalized genders may be incarcerated in a prison which does not match their gender.<sup>13</sup> Regardless of whether they are in a prison which matches their gender, they experience high levels of violence and discrimination, and are more likely than other incarcerated people to be segregated or isolated for their own protection.<sup>14</sup>
27. When the sole or primary caregivers of children, who are mostly women, are incarcerated, both they and their children experience disproportionate harms from physical separation, disruption of the parent-child bond, and high rates of child welfare involvement. These harms extend to the post-incarceration period where people with substance use disorders are at increased risk of overdose death or injury. Even where children would be in state care regardless of their caregiver's sentence, incarceration is a significant barrier to family reunification efforts.
28. Where, as in this case, the person being sentenced is a caregiver of Indigenous children, courts must also consider the disproportionately harmful impacts of family separation on Indigenous children in the context of colonialism, intergenerational trauma, and the overrepresentation of Indigenous children in foster care.

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<sup>11</sup> Office of the Correctional Investigator, "Proportion of Indigenous Women in Federal Custody Nears 50%" (17 December 2021).

<sup>12</sup> *Parkes*, *supra* note 10; Office of the Correctional Investigator, Annual Report 2018-2019 at 105-121 ("OCI Report").

<sup>13</sup> OCI Report, *ibid*, at 115-117.

<sup>14</sup> OCI Report, *ibid*, at 115.

***West Coast LEAF's Intervention would be Useful and Distinct***

29. West Coast LEAF will make useful and distinct contributions to the issues on appeal by assisting the Court to consider the gendered experiences of substance use disorders, the selling of drugs by those who use them, and criminalization, including as they intersect with other forms of marginalization, and the extent to which these experiences are not captured by the *Smith* sentencing range. This contribution will assist the Court in deciding whether the *Smith* sentencing range remains appropriate and ensuring that any new sentencing range or guidance accounts for its gendered implications. West Coast LEAF is uniquely positioned to provide such insight and analysis on these issues because of its specialized expertise as described above.

**E. CONCLUSION**

30. This appeal concerns issues of broad public and common interest. West Coast LEAF's interest in the litigation directly engages its mandate as a legal organization advocating for the equality rights of women and people of marginalized genders.

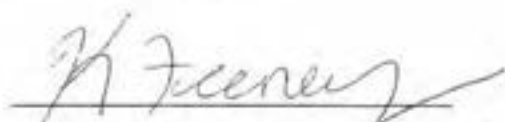
31. West Coast LEAF has considerable experience as an intervenor before this court and others, including in criminal law matters. If granted leave to intervene, it will work in cooperation with the parties and any other intervenors to ensure its submissions are neither duplicative nor expand the *lis*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

**F. RELIEF SOUGHT**

32. For the reasons set out above, West Coast LEAF respectfully requests that it be granted leave to intervene in this appeal on the terms described in paragraph 1.

All of which is respectfully submitted.

Dated: April 6, 2022



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