

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

FELICE COLUCCI

APPELLANT
(Respondent)

AND:

LINA COLUCCI

RESPONDENT
(Appellant)

MOTION RECORD FOR LEAVE TO INTERVENE
BY WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION and
THE WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.
(Pursuant to Rules 47(1)(a) and 55-59 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

TAB	DOCUMENT	PAGE
1.	Notice of Motice for Leave to Intervene	1
2.	Affidavit of Rajwant Mangat, West Coast Legal Education and Action Fund Association, sworn April 29, 2020	6
3.	Affidavit of Megan Stephens, Women’s Legal Education and Action Fund Inc., sworn April 29, 2020	20
4.	Memorandum of Argument of the Proposed Interveners, dated April 30, 2020	32
	Part I – Overview and Statement of Facts	32
	A. Overview	32
	B. The Proposed Interveners	33
	1. West Coast LEAF	33
	2. LEAF	33
	Part II – The Question in Issue	34
	Part III –Argument	34
	A. The Proposed Interveners’ Special Interest and Particular Expertise	34
	B. Overview of the Proposed Interveners’ Useful and Different Submissions	35
	1. Affirm Substantive Equality	35
	2. Eliminate Pernicious Payor Incentives	37
	3. Simplify the DBS Framework	39
	Part IV – Submission on Costs	41
	Part V – Order Sought	41
	Part VI – Table of Authorities	42

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**NOTICE OF MOTION FOR LEAVE TO INTERVENE
OF WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION and
THE WOMEN’S LEGAL EDUCATION AND ACTION FUND INC.
(Pursuant to Rules 47(1)(a) and 55-59 of the *Rules of the Supreme Court of Canada*)**

TAKE NOTICE that the Moving Parties, West Coast Legal Education and Action Fund Association (“West Coast LEAF”) and the Women’s Legal Education and Action Fund Inc. (“LEAF”), hereby apply to a Judge of this Court, pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, for an Order:

1. Granting West Coast LEAF and LEAF leave to intervene in this appeal;
2. Permitting West Coast LEAF and LEAF to file a joint factum of not more than ten (10) pages, or such other length as this Court deems appropriate;
3. Permitting West Coast LEAF and LEAF to present oral argument at the hearing of the appeal of not more than five (5) minutes, or such other duration as this Court deems appropriate;
4. Providing that no order of costs of this motion and this appeal may be made for or against West Coast LEAF and LEAF; and
5. Any such further or other Order that this Court deems appropriate.

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

1. As described in the affidavits of Rajwant Mangat and Megan Stephens, West Coast LEAF and LEAF are public interest organizations that have a genuine and substantial interest in this appeal;

2. West Coast LEAF is a non-profit society incorporated in British Columbia and is registered as a charity federally. It was founded as a branch of LEAF in 1985 when s. 15 of the *Charter* came into force. West Coast LEAF was a branch of LEAF until 2009, and has operated independently since 2014. Its 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. West Coast LEAF has approximately 370 members, employs 10 permanent staff members, and receives support from approximately 200 volunteers to carry out its work;

3. West Coast LEAF has appeared before the Supreme Court of Canada on multiple occasions (nine appeals under its own name and at least 19 appeals through its historic involvement with LEAF) addressing a wide variety of issues relating to women's substantive equality, including appeals on the issues of spousal and child support, the feminization of poverty and entrenchment of children's poverty, and statutory interpretation;

4. LEAF is a leading national, non-profit organization that was founded in 1985 when s. 15 of the *Charter* came into force to advance the equality rights of women and girls in Canada. To this end, LEAF intervenes in litigation, engages in law reform, and provides public education. LEAF has contributed significantly to the development of the meaning of substantive equality, and to Canadian equality rights jurisprudence;

5. LEAF has been involved in numerous appeals before the Supreme Court of Canada dealing with the gendered economic impacts of laws relating to child and spousal support, family law, and discrimination more broadly, as well as the resolution of statutory interpretation questions in a manner consistent with substantive equality;

6. Further, West Coast LEAF and LEAF have a different and useful perspective on the issues on appeal;

7. If granted leave to intervene, and drawing on their extensive knowledge and experience in substantive equality and family law, West Coast LEAF and LEAF will argue that the Court should:

- a. affirm substantive equality as an interpretive principle guiding the exercise of judicial discretion under the *Divorce Act*, which significantly implicates the interests of women and children;
- b. eliminate pernicious incentives for payors to conceal income or delay payments, and thus, maximize compliance with support obligations; and
- c. simplify *DBS* and establish a framework for retroactive support that provides distinct approaches depending on (a) whether the support obligation prescribed in the prior order corresponds with the payor's income, and (b) whether the application seeks a retroactive decrease or increase in that support obligation.

8. If granted leave to intervene, West Coast LEAF and LEAF will work collaboratively with the parties and any other interveners to avoid duplicative submissions;

9. Granting leave to intervene to West Coast LEAF and LEAF will not prejudice any of the parties, and West Coast LEAF, LEAF, and their constituents will suffer prejudice if leave to intervene in this appeal is denied;

10. West Coast LEAF and LEAF will take the record as they find it and will not seek to supplement it;

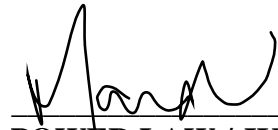
11. West Coast LEAF and LEAF will abide by the schedule set by the Registrar for the filing of materials;

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of such motion:

- 1. The affidavit of Rajwant Mangat affirmed April 29th, 2020;
 - 2. The affidavit of Megan Stephens affirmed April 29th, 2020;
 - 3. The Memorandum of Argument of West Coast LEAF and LEAF, dated April 30th, 2020;
- and

4. Such further and other material as counsel for West Coast LEAF and LEAF may advise and this Court may permit.

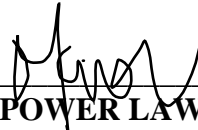
DATED at Ottawa, Ontario, this 30th day of April 2020.



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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

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AND:

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(Appellant)

AFFIDAVIT OF RAJWANT MANGAT

**(In support of the Joint Application for Leave to Intervene of
the West Coast Legal Education and Action Fund Association and
the Women's Education and Action Fund Inc.)**

(Pursuant to Rules 47(1)(b) and 57(1) of the *Rules of the Supreme Court of Canada*)

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 have indicated the source and verily believe them to be true.
2. I was called to the Bar of Ontario in 2004 and to the Bar of British Columbia in 2011. I joined West Coast LEAF as Director of Litigation in March 2016. I became the Executive Director on September 3, 2019. I am authorized to provide this affidavit in support of West Coast LEAF's application for leave to jointly intervene in this appeal with the Women's Education and Action Fund Inc. ("LEAF").

3. This appeal concerns access to child support and how the denial of child support owed has adverse effects on women and children, thereby contributing to the feminization of poverty and the entrenchment of child poverty. The appellant, Felice Colucci, is the former spouse of the respondent, Lina Colucci, and is appealing from the judgment below ordering no retroactive rescission of child support arrears owing under the *Divorce Act*, RSC, 1985, c 3 (2nd Supp).

4. As described in further detail herein, West Coast LEAF has a demonstrable, ongoing interest in eliminating gender discrimination in family law and in both access to justice and economic security, including by advocating for a child support regime that is accessible and promotes substantive equity.

5. West Coast LEAF seeks leave to intervene in this appeal jointly with LEAF based on this long-standing interest and expertise, and on its ability to provide a unique and useful perspective to aid this Court in its consideration of the issues on appeal. West Coast LEAF is committed to working on a consultative and collaborative basis to ensure that its arguments are informed by the diversity of women's experiences. West Coast LEAF and LEAF have created a case committee to develop legal arguments in collaboration with leading equality rights academics, practitioners, and community. The case committee is composed of Natasha Bakht (University of Ottawa); Vicky Law (Rise Women's Legal Centre); and Tamar Witelson and Deepa Mattoo (Barbra Schlifer Commemorative Clinic).

A. Background of West Coast LEAF

6. West Coast LEAF is a non-profit society incorporated in BC and is registered as a charity federally. Its mandate is to use the law to create an equal and just society for all women and people who experience gender-based discrimination in BC. While West Coast LEAF is focused on issues in BC, it also acts in matters of national significance that are important to the equality and human rights of people in BC. West Coast LEAF uses litigation, law reform, and public legal education to seek systemic change and its positions are informed by community engagement and outreach. West Coast LEAF aims to transform society by achieving access to healthcare, freedom from gender-based violence, access to justice, economic security, justice for those who are criminalized, and the right to parent.

7. West Coast LEAF was created in April 1985 when the equality provisions of the *Charter* came into force. Before 2009, West Coast LEAF operated as a branch of LEAF. In 2009, West Coast LEAF formally became an affiliate of LEAF. Beginning in 2009, West Coast LEAF has involved itself in litigation under its own name. As of 2014, West Coast LEAF is no longer an affiliate of LEAF.

8. During the last fiscal year, West Coast LEAF had approximately 370 members. As of April 22, 2020, West Coast LEAF employs 10 permanent staff members. It relies on the support of approximately 200 volunteers to carry out its work.

B. West Coast LEAF's Experience

9. West Coast LEAF acts to promote the equality interests of all women and gender diverse persons in BC, including where disadvantage is experienced along multiple and intersecting axes of marginalization on the basis of race, national origin, immigration status, sexual orientation, gender identity, gender expression, family or marital status, disability or ability, age, socio-economic status or any other personal characteristic. It is committed to working in consultation and collaboration with other equality-seeking groups to ensure that West Coast LEAF's legal positions, law reform activities, and educational programming are informed by, and inclusive of, the diversity of human experience.

10. 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, both in specific challenges to discriminatory or unconstitutional laws or government actions, as well as in matters where statutory interpretation compromises the realization of substantive equality through the adverse effects of such interpretations.

11. Specifically, West Coast LEAF has considerable advocacy experience in areas both directly and indirectly relevant to the instant appeal in interventions before the Supreme Court of Canada and interventions or participation before lower courts and tribunals. Additionally, West Coast LEAF does significant work in the areas of law reform and public education pertaining to gender equality.

1. West Coast LEAF's contributions before the Supreme Court of Canada

12. West Coast LEAF has considerable intervention experience before the Supreme Court of Canada. It has intervened in many appeals before this Court, either in its own name or through its participation in interventions brought by LEAF, while West Coast LEAF was operating as a branch of LEAF.

13. Interventions by West Coast LEAF, in its own name (nine appeals), include:

- a. *Danelle Michel v Sean Graydon*, Supreme Court of Canada Case No. 38498 (“*Michel*”) (appeal heard November 14, 2019) (judgment rendered with reasons to follow);
- b. *Maia Bent, et al v Howard Platnick, et al*, Supreme Court of Canada Case No. 38374 (as part of a coalition with Atira Women’s Resource Society, BWSS Battered Women Support Services Association, and Women Against Violence Against Women Rape Crisis Centre) (appeal heard November 12, 2019) (judgment reserved);
- c. *Law Society of British Columbia v Trinity Western University and Volkenant*, 2018 SCC 32 (“*TWU*”);
- d. *Schrenk v British Columbia Human Rights Tribunal*, 2017 SCC 62;
- e. *R. v Lloyd*, 2016 SCC 13;
- f. *British Columbia Teachers’ Federation v British Columbia Public School Employers’ Association*, 2014 SCC 70 (“*BCTF*”);
- g. *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59;
- h. *British Columbia (Ministry of Education) v Moore*, 2012 SCC 61; and
- i. *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence*, 2012 SCC 45 (as part of a coalition with Justice for Children and Youth and the ARCH Disability Law Centre).

14. Interventions brought by LEAF, originating in BC, in which West Coast LEAF was involved (12 appeals), 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 (BCGSEU)*, [1999] 3 SCR 3 (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 SCR 624 (“*Eldridge*”) (co-intervening with the DisAbled Women’s Network of Canada);
 - i. *R v O’Connor*, [1995] 4 SCR 411 (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 SCR 226 ;
 - k. *R v Sullivan*, [1991] 1 SCR 489 ; and
 - l. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.
15. West Coast LEAF provided background information and support to several LEAF interventions originating in other jurisdictions (3 appeals), these include:
- a. *Newfoundland (Treasury Board) v Newfoundland and Labrador Association of Public and Private Employees (NAPE)*, 2004 SCC 66;
 - b. *Thibaudeau v Canada*, [1995] 2 SCR 627 (“*Thibaudeau*”) (as part of a coalition with the Charter Committee on Poverty Issues, Federated Anti-Poverty Groups of British Columbia, and the National Action Committee on the Status of Women); and
 - c. *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219.
16. LEAF intervened in several other cases dealing with issues specific to the present appeal, notably family law and the evolving understanding of substantive equality. These include:

- a. *Dickie v Dickie*, 2007 SCC 8;
- b. *Moge v Moge*, [1992] 3 SCR 813;
- c. *M. v H.*, [1999] 2 SCR 3;
- d. *Boston v Boston*, 2001 SCC 43.

17. West Coast LEAF has been involved in appeals before this Court dealing with the gendered economic impacts of laws relating to child and spousal support and family law under its own name and through its historic connection to and work with LEAF.

18. Most recently, West Coast LEAF intervened in *Michel*, where this Court considered the jurisdiction to make retroactive increases to child support orders when the beneficiary is no longer a “child” under BC’s *Family Law Act*, SBC 2011, c 25 (the “FLA”). In *Michel*, West Coast LEAF submitted that enforcing retroactive support obligations provides a systemic incentive for payor parents to make timely disclosures and payment of current child support obligations. West Coast LEAF articulated the necessity of a gender lens to a child support analysis as in the overwhelming majority of cases, fathers are the payors and mothers are the payees, contributing to the feminization of poverty.

19. Additionally, LEAF has intervened in six cases in which child or spousal support were at issue. In *Thibaudeau*, the potential adverse effects of the income tax treatment of child support were impugned. In *Dickie*, the denial of a right of audience before a court for failure to pay owing child support and the contemptuous failure to secure the child support with an irrevocable letter of credit and to post security for costs was considered. In *Moge*, *M. v. H.*, *Boston*, and *Rick*, the law on substantive entitlements to spousal support were considered.

2. West Coast LEAF’s contributions before lower courts and tribunals

20. Additionally, West Coast LEAF has been granted leave to intervene or to participate as an interested party before the BC Court of Appeal, BC Supreme Court, an administrative decision-maker, or an inquiry, in the following cases relating to substantive equality:

- (a) *AB v CD and EF*, 2020 BCCA 11;

- (b) *Council of Canadians with Disabilities v British Columbia (Attorney General)*, BC Court of Appeal File No. CA45711 (“CCD”) (appeal heard May 31, 2019) (judgment reserved);
- (c) *British Columbia Civil Liberties Association and John Howard Society of Canada v Canada (Attorney General)*, 2019 BCCA 228 (“BCCLA”) (co-intervening with the Native Women’s Association of Canada);
- (d) *Law Society of British Columbia v Trinity Western University and Volkenant*, 2016 BCCA 423;
- (e) *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2018 BCCA 132, leave to appeal to the Supreme Court of Canada refused, Case No. 38157 (January 31, 2019) (co-intervening with Community Legal Assistance Society);
- (f) *Denton v Workers Compensation Board*, 2017 BCCA 403, leave to appeal to the Supreme Court of Canada refused, Case No. 37923 (October 25, 2018) (co-intervening with Community Legal Assistance Society);
- (g) *Scott v College of Massage Therapists of British Columbia*, 2016 BCCA 180;
- (h) *Vilardell v Dunham*, 2013 BCCA 65 (“Vilardell”);
- (i) *Friedmann v MacGarvie*, 2012 BCCA 445;
- (j) *Downtown Eastside Sex Workers United Against Violence v Canada*, 2010 BCCA 439;
- (k) *Shewchuk v Ricard*, [1986] BCJ No 335, 28 DLR (4th) 429 (CA) (“Shewchuk”) (as part of a coalition with the BC Association of Social Workers, BC Civil Liberties Association, Federated Anti-Poverty Groups of BC, and Vancouver Status of Women);
- (l) *British Columbia Civil Liberties Association and John Howard Society of Canada v Canada (Attorney General)*, 2018 BCSC 62 (“BCCLA BCSC”);
- (m) *Trinity Western University and Volkenant v Law Society of British Columbia*, 2015 BCSC 2326 (“TWU BCSC”);
- (n) *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2015 BCSC 534 (co-intervening with Community Legal Assistance Society);
- (o) *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 (“Inglis”);

- (p) *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (the “Polygamy Reference”);
- (q) *RR v Vancouver Aboriginal Child and Family Services Society*, BC Human Rights Tribunal Case No. 16765 (hearing ongoing);
- (r) *Oger v Whatcott*, 2019 BCHRT 58 (“Oger”);
- (s) *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 released June 2019) and the *BC Missing Women Commission of Inquiry* headed by Hon. Wally Oppal, Q.C. (report released November 2012); and
- (t) *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).

21. Many issues related to the present appeal have been considered in the cases listed above. For instance, *Shewchuk* dealt with the constitutionality of child support orders under the *Charter* for BC’s predecessor family law legislation, then the *Child Paternity and Support Act*, RSBC 1979, c 49. *AB* considered protections from family violence under the *FLA*. *Vilardell* considered the constitutionality of court hearing fees in BC Supreme Court trials in a family law dispute and the scope of an indigency exception to those fees.

22. In addition to its involvement in litigation as an intervener, West Coast LEAF is currently litigating a constitutional challenge to the family law legal aid regime in BC before the BC Supreme Court: *Single Mothers’ Alliance of BC and Nicolina Bell v British Columbia*, File No. S1733843 (“SMA Legal Aid Challenge”) (Notice of Civil Claim filed April 26, 2017). This case is a challenge under ss. 7 and 15(1) of the *Charter* and under s. 96 of the *Constitution Act, 1867*. In this challenge, West Coast LEAF submits that BC’s family law legal aid scheme deprives women litigants of limited or moderate means and their children of their security of the person where family violence is present. The effects of the regime are disproportionately experienced by women and their children, as women continue to have greater economic and parental responsibilities for children yet have lower or precarious income following relationship breakdown.

C. West Coast LEAF’s Expertise

23. The expertise that West Coast LEAF has developed through extensive advocacy, law reform, and public education efforts is directly relevant to the issues in this appeal.

24. West Coast LEAF has long-advocated for expansive access to child support under both the *Divorce Act* and the *FLA* (and its predecessor the *BC Family Relations Act*, RSBC 1996, c 128, as well as for the alleviation of procedural barriers that hinder individuals in recovering the child support owed to them. Much of West Coast LEAF's work on access to child support (and other maintenance in the form of spousal support) has arisen in the context of advocating for robust family law legal aid services to provide greater resources allowing child support beneficiaries to actually receive their entitlements. It is only with access to child support, to alleviate the deepening of child poverty due to parental separation and the feminization of poverty (when mothers are forced to compensate any deficits in child support access from their own funds that would otherwise promote their own personal welfare), that both women and children can adequately enjoy family law protections, and access to justice and economic security.

25. West Coast LEAF's work on child support is informed by its overall commitment to eliminating gender-based violence, discrimination, and poverty. For many decades, West Coast LEAF has advocated for a contextual and gendered interpretation of family law, which includes consideration of the role that interpersonal violence plays in limiting women's and children's ability to access the support to which they are entitled under the *Divorce Act* and the *FLA*. This work cuts across West Coast LEAF's litigation, law reform, and educational programming. West Coast LEAF's work on sex- and gender-based discrimination generally and with specific reference to Canada's divorce and family law regimes cuts across its litigation, law reform, and educational programming.

D. West Coast LEAF's Interest in this Appeal

26. West Coast LEAF seeks leave to intervene in this appeal on the basis of its interest and experience in advocating for substantive sex- and gender equality and ending women's and child poverty in BC and Canada.

27. This appeal concerns access to child support that is owing to children and their parents who are vulnerable and in need. West Coast LEAF has a considerable interest in the outcome of

this appeal, specifically its potential to have profound effects on the ability of women and children entitled to support to access adequate family law remedies, that promote their overall access to justice and economic security. Relatedly, West Coast LEAF believes that this appeal could also have a significant impact on the incentive structures confronting parents who are legally obligated to pay child support, yet fail to comply with that obligation.

28. The Superior Court of Justice below granted a reduction in child support arrears despite the payor father's longstanding delinquency and financial non-disclosure. The Ontario Court of Appeal overturned this decision by applying the principles articulated in *DBS v SRG*, 2006 SCC 37 ("*DBS*") as adapted by *Gray v Rizzi* 2016 ONCA 152. West Coast LEAF is concerned that an analysis by this Court which does not incentivize financial disclosure will undermine substantive equality by reinforcing the feminization of poverty and the entrenchment of child poverty post-parental separation.

29. West Coast LEAF has engaged in the following recent law reform activities related to the issues raised by this appeal:

- a. In March 2019, West Coast LEAF prepared submissions on the BC governments' Basic Income Consultation regarding the feasibility of implementing a basic income. The submissions sought consideration of how a basic income framework would interact with family law support entitlements. West Coast LEAF also advocated for expanding the mandate of the Family Maintenance Enforcement Program to promote wider recovery of women's entitlements to spousal and child support.
- b. In September 2018, West Coast LEAF prepared a briefing note on Bill C-78 concerning reforms to the *Divorce Act*. The briefing note highlighted how complex dual jurisdictional issues impact women facing separation. West Coast LEAF also opined on the utility of proposed amendments to the *Family Orders and Agreements Enforcement Assistance Act*, RSC 1985, c 4 (2nd Supp) to reduce poverty by ensuring that accurate financial information is available for the purpose of determining family support and by promoting compliance with family support obligations.
- c. In March 2018, West Coast LEAF prepared submissions for the Ministry of Social Development and Poverty Reduction on its BC Poverty Reduction Strategy. These

submissions highlighted the disproportionate impact of poverty on income security and access to justice for women. Among the concerns identified, the submissions included the connection between economic insecurity and abuse in relationships and the impact of underfunded legal aid on women's ability to launch claims for spousal or child support.

- d. In September 2017, West Coast LEAF, in coalition with other legal advocacy organizations, prepared a report titled "Justice Reform for BC", calling on the provincial government to ensure meaningful access to justice by expanding funding for legal aid, counsel at legal aid clinics and in-house counsel at front-line service delivery organizations working to support marginalized and vulnerable communities.
- e. In September 2016, West Coast LEAF provided feedback to Status of Women Canada concerning the development of a federal strategy on gender-based violence. Among other things, it recommended reforms to the *Divorce Act* to address family violence and to recognize that the funding of social service supports, including family law legal aid, enable women to leave violent spouses.

30. In May 2016, Rise Women's Legal Centre ("Rise") opened in Vancouver to provide legal services to self-identifying women of low or moderate means. Many of the clients served by Rise are impacted by family violence. West Coast LEAF developed Rise (which is now an independent non-profit, charitable society) to respond to women's increasingly unmet family justice needs. In partnership with the Peter A. Allard School of Law at the University of British Columbia, Rise runs a student legal clinic where clients are represented by upper-year law students under close supervision by Rise staff. Many Rise clients are seeking recovery of outstanding child and spousal support entitlements.

31. The following is a selection of West Coast LEAF's recent relevant public legal education reports, workshops, and initiatives pertaining to family law and gender equality:

- a. West Coast LEAF continues to offer a range of public legal education resources and workshops aimed at educating the public about sex- and gender-based discrimination within the broader family law context.

- b. West Coast LEAF's Family Law Project is an ongoing program area, which has consisted of multiple projects in the past on the impact of family law on women, including publishing the following reports:
 - i. "Separation Agreements: Your Rights and Options" (second version in 2019);
 - ii. "Putting Justice Back on the Map: The Route to Equal and Accessible Family Justice" (in 2014);
 - iii. "Supporting Mothers or shutting them out: Results of a court watch" (in 2013);
 - iv. "*Troubling Assessments*: Custody and Access Reports and their Equality Implications for BC Women" (in 2012);
 - v. "Separation Agreements: Your Right to Fairness" (in 2012) (provided in English, Punjabi, Tagalog, and Traditional Chinese);
 - vi. "Mapping the Gap: Linking Aboriginal Women with Legal Resources and Services" (in 2011);
 - vii. "Mapping the Gap: A Summary of Legal Resources for Women in British Columbia" (in 2010); and
 - viii. "Rights Based Legal Aid: Rebuilding BC's Broken System" (in 2010).

32. West Coast LEAF has also prepared multiple reports on women's and child poverty, as well as reports addressing the steps needed to alleviate barriers to substantive equality for women facing compounded discriminatory effects, including reports about social assistance in BC, the human rights impacts of child-care on women and children, and the intersection of parenting, disability, and the law.

E. West Coast LEAF's and LEAF's Proposed Submissions as Joint Interveners

33. If granted leave to intervene in this appeal, West Coast LEAF and LEAF will advance the arguments set out in the Memorandum of Argument in support of their Application for Leave to Intervene. These are briefly outlined below:

- a. First, the Court should affirm substantive equality as an interpretive principle informing the exercise of judicial discretion under the *Divorce Act* when varying child support orders. It is well documented that parents who receive child support—most often, mothers—are systemically disadvantaged in terms of information and resources. The reality is that many women and children face poverty following family separation. It is only with access to child support, to alleviate child poverty due to parental separation and the feminization of poverty, that both women and children can adequately enjoy family law protections, and access to justice and economic security, consistent with the remedial purpose of the *Divorce Act*.
- b. Second, the Court should eliminate pernicious payor incentives to conceal income or delay payments. Otherwise, the power imbalances described above will continue to result in the chronic underpayment of child support, and in turn, feminization of poverty and entrenchment of child poverty. Worse, payors have pernicious incentives to abuse or otherwise intimidate recipient parents in a context where women represent the vast majority of child support recipients and the vast majority of gender-based violence victims. *Colucci* is an opportunity for the Court to uphold timely income disclosure and support payments as clear overarching objectives of the child support regime.
- c. Third, in order to address the two preceding points, the proposed intervention will put forward a simplified *DBS* framework to govern retroactive support variations. This framework will provide distinct approaches to child support variations depending on the nature of the retroactive application, as well as respond to the objectives of certainty and flexibility identified in *DBS* in a manner closely tailored to the imbalances between the payor and recipient in child support arrangements.

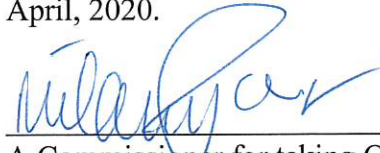
34. If granted leave to intervene, West Coast LEAF and LEAF will jointly offer an important gendered perspective and analysis of retroactive reductions in child support rooted in achieving substantive equality. This perspective is not otherwise before the Court.

35. I have reviewed the Memorandum of Argument included in this Motion Record, and confirm that it is an accurate reflection of West Coast LEAF's and LEAF's proposed submissions should leave to intervene in this appeal be granted.

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

37. I make this affidavit in support of the joint application for leave to intervene of West Coast LEAF and LEAF, and for no other or improper purpose.

AFFIRMED BEFORE ME at the City of)
Vancouver, in the Province of)
British Columbia, this 29th day of)
April, 2020.)



A Commissioner for taking Oaths



RAJWANT MANGAT

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LSBC 511544

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

FELICE COLUCCI

APPELLANT
(Respondent)

AND:

LINA COLUCCI

RESPONDENT
(Appellant)

AFFIDAVIT OF MEGAN STEPHENS

**(In support of the Joint Application for Leave to Intervene of
the West Coast Legal Education and Action Fund Association and
the Women's Education and Action Fund Inc.)**

(Pursuant to Rules 47(1)(b) and 57(1) of the *Rules of the Supreme Court of Canada*)

I, MEGAN STEPHENS, of the City of Toronto, in the Province of Ontario, AFFIRM AND SAY AS FOLLOWS:

1. I am the Executive Director and General Counsel of the Women's Legal Education and Action Fund Inc. ("LEAF") and as such have personal knowledge of the matters hereinafter deposed to, or where I have received the information from others, I believe it to be true.
2. I was called to the Bar of Ontario in 2003. I became the Executive Director and General Counsel at LEAF on June 1, 2019. I am authorized to provide this affidavit in support of LEAF's application for leave to jointly intervene in this appeal with the West Coast Legal Education and Action Fund Association ("West Coast LEAF"), in order to offer the Court a substantive equality analysis on retroactive variations of child support orders. Substantive equality in family law is a matter about which LEAF has extensive expertise and a genuine interest.
3. This appeal concerns the principles that should apply to retroactive support variations under section 17(1) of the *Divorce Act*, RSC 1985 c 3 (2nd Supp). In a context where, in the

overwhelming majority of cases, payor parents are men and recipient parents are women, the outcome of this appeal will have a direct impact on the economic disadvantages faced by women, particularly those raising children in lone-parent families, or what is called the “feminization of poverty”.

4. If granted leave to intervene, LEAF and West Coast LEAF will jointly offer an important gendered perspective and analysis of retroactive variations in child support rooted in the realities of the feminization of poverty. In particular, LEAF and West Coast LEAF will argue that this Court should affirm substantive equality as an interpretive principle guiding the exercise of judicial discretion under the *Divorce Act*. Further, LEAF and West Coast LEAF will argue that this Court should eliminate pernicious payor incentives to conceal income or delay payment of child support. Lastly, LEAF and West Coast LEAF will propose a simplified framework governing retroactive variations of child support that is informed by substantive equality principles.

5. LEAF seeks leave to intervene in this appeal based on its long-standing interest and expertise in eliminating gender discrimination in family law. The perspective of the proposed intervention is not otherwise before the Court.

A. LEAF’s Background

6. LEAF is a national, non-profit organization founded in April 1985 to advance the equality rights of women and girls in Canada as guaranteed by the *Charter of Rights and Freedoms*. To this end, LEAF intervenes in litigation, including human rights cases and criminal appeals, and engages in law reform and public education. LEAF is one of the only national organizations that exists to advance the equality rights of women and girls under the law.

7. LEAF’s work is made possible by individual private donors, unions, corporations, government grants, and foundations. The practitioners, academics, and researchers who sit on LEAF’s case committees contribute their significant expertise and time on a volunteer basis, as does LEAF’s outside litigation counsel. With branches across the country, LEAF’s membership is broad and includes women of all ages and backgrounds located across Canada.

8. LEAF litigates and educates to strengthen the substantive equality rights of women and girls, as guaranteed by the *Charter*. Substantive equality recognizes historically and socially-based differences, and challenges systemic and structural discrimination. Since 1985, LEAF has made significant gains for women in numerous important cases, advancing women's rights in areas such as family law, employment, pay equity, housing, reproductive justice, immigration, and sexual assault law.

9. LEAF also engages in extensive law reform initiatives to advocate for legislation and policies that promote women's equality rights. Of particular relevance to this appeal, LEAF regularly advocates for substantive equality interpretations of family law legislation. For example, in 2018 and 2019, LEAF made oral and written submissions to the House of Commons and the Senate regarding Bill C-78 (*An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019)), which introduced significant changes to the *Divorce Act*. In its testimony, LEAF provided input with a view to promoting women's substantive equality and safety as well as children's safety, security, and well-being.

B. LEAF's Experience as an Intervener

1. Contributions before the Supreme Court of Canada

10. Since its inception, LEAF has contributed to the development of the meaning of substantive equality and to Canadian equality rights jurisprudence. Substantive equality requires the recognition of historically and socially-based differences and challenges systemic and structural discrimination.

11. Early on in its history, LEAF intervened in the landmark case of *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, which set the groundwork for the subsequent interpretation of s. 15(1) of the *Charter*. Since *Andrews*, LEAF has helped to develop an intersectional approach to equality rights, which recognizes that prohibited grounds cannot be treated as discrete, isolated bases for discrimination but must be considered for their combined and cumulative effect. LEAF has also successfully advanced theories of adverse effect

discrimination, in which laws which appear neutral in fact impose disadvantages on members of protected groups.

12. LEAF regularly intervenes in appeals where the interpretation of the law promises to increase—or risks undermining—the substantive equality of women and girls. LEAF has intervened in more than 50 cases before the Supreme Court of Canada, including in the following significant cases addressing substantive equality rights:

- *Canadian Newspaper Co v Canada (Attorney General)*, [1988] 2 SCR 122;
- *Andrews v The Law Society of British Columbia*, [1989] 1 SCR 143;
- *Tremblay v Daigle*, [1989] 2 SCR 530;
- *Janzen and Govereau v Platy Enterprises Ltd.*, [1989] 1 SCR 1252;
- *Brooks v Canada Safeway Limited*, [1989] 1 SCR 1219;
- *Borowski v The Attorney General for Canada*, [1989] 1 SCR 342;
- *Taylor v Canadian Human Rights Commission and the Attorney General of Canada*, [1990] 3 SCR 892;
- *R v Keegstra*, [1990] 3 SCR 697;
- *R v Andrews and Smith*, [1990] 3 SCR 870;
- *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577;
- *R v Sullivan and Lemay*, [1991] 1 SCR 489;
- *Moge v Moge*, [1992] 3 SCR 813;
- *M (K) v M (H)*, [1992] 3 SCR 6;
- *Norberg v Wynrib*, [1992] 2 SCR 226;
- *Schachter v The Queen*, [1992] 2 SCR 679;
- *R v Butler*, [1992] 1 SCR 452;
- *Canadian Council of Churches v Her Majesty the Queen and the Minister of Employment and Immigration*, [1992] 1 SCR 236;
- *Weatherall v Canada*, [1993] 2 SCR 872;
- *R v M (ML)*, [1994] 2 SCR 3;
- *R v Whitley and Mowers*, [1994] 3 SCR 830;
- *Thibaudeau v Canada*, [1995] 2 SCR 627;

- *The Queen v O'Connor*, [1995] 4 SCR 411;
- *A(LL) v B(A)*, [1995] 4 SCR 536;
- *Goertz v Gordon*, [1996] 2 SCR 27;
- *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624;
- *Winnipeg Child and Family Services v G (DF)*, [1997] 3 SCR 925;
- *R v RDS*, [1997] 3 SCR 484;
- *Vriend v Alberta*, [1998] 1 SCR 493;
- *BCGSEU v British Columbia (Public Service Employee Relations Commission)*, [1999] 3 SCR 3;
- *R v Ewanchuk*, [1999] 1 SCR 330;
- *M v H*, [1999] 2 SCR 3;
- *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46;
- *R v Mills*, [1999] 3 SCR 668;
- *Little Sisters Book & Art Emporium v Minister of Justice*, [2000] 2 SCR 1120;
- *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307;
- *R v Darrach*, 2000 SCC 46;
- *Boston v Boston*, [2001] 2 SCR 413;
- *R v Shearing*, [2002] 3 SCR 33;
- *Newfoundland (Treasury Board) v NAPE*, [2004] 3 SCR 381;
- *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, [2004] 3 SCR 657;
- *Blackwater v Plint*, 2005 SCC 58;
- *Dickie v Dickie*, [2007] 1 SCR 346;
- *Honda Canada Inc v Keays*, [2008] 2 SCR 362;
- *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, [2011] 2 SCR 670;
- *R v NS*, [2012] 3 SCR 726;
- *Quebec (Attorney General) v A*, [2013] 1 SCR 61;
- *LMP v LS*, [2011] 3 SCR 775;
- *R v JA*, [2011] 2 SCR 440;
- *Caron v Alberta*, [2015] 3 SCR 511;

- *Withler v Canada (Attorney General)*, [2011] 1 SCR 396;
- *R v DAI*, [2012] 1 SCR 149;
- *Saskatchewan (Human Rights Commission) v Whatcott*, [2013] 1 SCR 467;
- *R v Kokopenace*, 2015 SCC 28;
- *R v Borowiec*, 2016 SCC 11;
- *Canadian Human Rights Commission v Attorney General of Canada*, 2018 SCC 31;
- *R v Jarvis*, 2019 SCC 10;
- *R v Barton*, 2019 SCC 33; and
- *Fraser v AG Canada*, Supreme Court of Canada Case No. 38505 (argued in December 2019, under reserve).

13. As a result of its breadth of experience with litigation, law reform, and public education, LEAF has considerable expertise in articulating how laws and policies advance or undermine substantive equality for women and girls, especially for those who experience discrimination on multiple and intersecting grounds like sex, gender, marital or family status, race, sexual orientation, disability, Indigenous ancestry, and socio-economic status.

14. Areas of the law involving the rights and obligations of spouses and ex-spouses as they relate to both child and spousal support are among those with the greatest potential to improve women's equality or deepen their inequality. For this reason, LEAF has intervened before the Supreme Court of Canada in numerous cases involving the development of family law, including:

- *Moge v Moge*, [1992] 3 SCR 813 (concerning the principles to be applied when considering applications to terminate spousal support);
- *Thibaudeau v Canada*, [1995] 2 SCR 627 (challenging the constitutionality of s. 56(1)(b) of the *Income Tax Act*, SC 1970-71-72, c 63, which required individuals who received child support payments to report them as taxable income);
- *Goertz v Gordon*, [1996] 2 SCR 27 (concerning the ability of custodial mothers to relocate with their children, and the meaning of the best interests of the child);
- *M v H*, [1999] 2 SCR 3 (concerning the meaning of "spouse" under the Ontario *Family Law Act*, RSO 1990, c F3, and whether it extended to same-sex couples);

- *Boston v Boston*, [2001] 2 SCR 413 (concerning the availability of spousal support for senior women under the Ontario *Family Law Act*);
- *Dickie v Dickie*, [2007] 1 SCR 346 (concerning the remedies available when parties do not follow family court orders);
- *Rick v Brandsema*, [2009] 1 SCR 295 (concerning the enforceability of settlement agreements following a couple's separation where a spouse has exploited the known vulnerabilities of their spouse to obtain an unfair bargain);
- *LMP v LS*, [2011] 3 SCR 775 (concerning the proper approach to applications for variations of spousal support orders under s. 17(4.1) of the *Divorce Act*); and
- *Quebec (Attorney General) v A*, [2013] 1 SCR 61 (concerning the exclusion of unmarried spouses from the protections existing for married couples under Québec's family law regime).

15. LEAF has also developed unique expertise in the economic disadvantages faced by women perpetuated by structural and systemic discrimination, or the “feminization of poverty”. LEAF has often advanced frameworks for statutory interpretation that take into account the reality of the feminization of poverty in Canada. In particular, LEAF's most recent intervention in *Fraser* underscored how the *Royal Canadian Mounted Police Superannuation Act*, RSC, 1986, c R-11, and its Regulations had the significant adverse impact of denying the Appellants (female RCMP officers) the opportunity to “buy-back” pension credits for the period in which they were in temporary “job-share” positions due to family caregiving responsibilities. LEAF argued that the adverse effects were not the result of a “choice” made by the Appellants but were inextricably linked to their gender and family caregiving responsibilities.

2. Contributions before other Appellate Courts

16. LEAF has also appeared in appellate courts across Canada to offer equality rights-respecting interpretations of family law legislation. In particular:

- LEAF highlighted, in *Sparks v Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82, the discriminatory economic consequences experienced by women and children when their income assistance is automatically suspended due to a spouse's disqualification under Nova Scotia's *Employment Support and Income Assistance Regulations*.

- LEAF raised the gendered impact of family status discrimination in *Johnstone v Canada Border Services Agency*, 2014 FCA 110, including by challenging the rhetoric of, and assumptions around, the matter of ‘choice’ for women regarding employment and caregiving.
- LEAF addressed the discriminatory impacts of the “spouse in the house” regulations in the Ontario social assistance legislation in *Falkiner v Ontario (Minister of Community and Social Services)*, (2002) 59 OR (3d) 481 (ONCA).

C. LEAF’s Expertise

17. LEAF will provide this Court with a unique perspective and particular expertise on the issues raised in this appeal because LEAF:

- a) represents a diversity of women across Canada;
- b) has considerable expertise in the substantive equality rights of women under s. 15 of the *Charter*;
- c) has expertise in the interpretation and application of legislation in accordance with equality rights and values; and
- d) has expertise in the systemic discrimination experienced by women within the family law context.

18. Further, LEAF has a unique contribution to make to this case in light of its knowledge of the range and history of inequality experienced by mothers following the breakdown of relationships, its expertise in the area of substantive equality rights litigation, and its concern for the continued development of equality-related jurisprudence.

19. LEAF proposes to bring its expertise in women and girls’ equality rights to this appeal, particularly in the areas of socioeconomic rights and the feminization of poverty, to ensure that both women’s and children’s substantive equality are properly considered when interpreting and applying the relevant principles to retroactive child support variation orders.

D. LEAF’s Interest in this Appeal

20. LEAF has considerable interest in the outcome of this appeal, specifically its potential to have profound effects on access to adequate family law remedies and incentive structures for

parents who are legally obligated to pay child support. LEAF is concerned to ensure that the reality of the feminization of poverty following relationship breakdown informs a framework for fair child support arrangements.

21. The Superior Court of Justice below granted a reduction in child support arrears despite the payor father's longstanding delinquency and financial non-disclosure. The Court of Appeal for Ontario overturned this decision for failing to apply *DBS v SRG*, 2006 SCC 37, as modified by *Gray v Rizzi*, 2016 ONCA 152, to applications for retroactive decreases of child support obligations. The principles governing retroactive variations in child support orders as set out in *DBS* and adapted in *Gray* are at risk of evolving without appropriate consideration of women's substantive equality. In particular, without clarification on this appeal, these principles risk undermining substantive equality by incentivizing delinquent child support payors to allow their payments to fall into arrears and therefore reinforcing the feminization of poverty.

22. LEAF has a considerable interest in seeing judicial discretion under s. 17(1) of the *Divorce Act* exercised in accordance with the *Charter* value of substantive equality. Approaching s. 17(1) through the lens of substantive equality means recognizing the fundamental imbalance of knowledge and resources between payor and recipient parents. This imbalance systematically disadvantages recipients of child support, namely, children and women.

23. In addition, LEAF is very concerned that the current child support regime incentivizes payors to conceal income or delay payments and places undue responsibility on recipient parents to press payor parents for information as to whether there has been a material change in their income. These concerns are only aggravated in the context of intimate partner violence, where every interaction between ex-spouses can precipitate further violence.

24. LEAF's work and perspective on its proposed intervention is informed by statistical data showing that women's socioeconomic equality is bound up with child support obligations. For example, according to a 2013 Statistics Canada report, across Canada, women continue to be the primary caregivers post relationship breakdown, and in the overwhelming majority of cases, the

reality is that non-resident fathers pay child support to mothers who live with and care for the children of the marriage.¹

25. Ensuring that substantive equality principles inform the framework for retroactive child support variations is particularly pressing for LEAF, as every unpaid instalment contributes to women's socioeconomic inequality and deepens child poverty.

E. LEAF and West Coast LEAF's Proposed Submissions as Joint Interveners

26. If granted leave to intervene, LEAF and West Coast LEAF will not introduce new facts or evidence or expand the issues beyond those identified by the parties. LEAF and West Coast LEAF will take no position on the outcome of this appeal.

27. If granted leave to intervene in this appeal, West Coast LEAF and LEAF will advance the arguments set out in the Memorandum of Argument in support of their Application for Leave to Intervene. These arguments are briefly outlined below:

- a) First, the Court should affirm substantive equality as an interpretive principle informing the exercise of judicial discretion under the *Divorce Act* when varying child support orders. It is well documented that parents who receive child support—most often, mothers—are systemically disadvantaged in terms of information and resources. The reality is that many women and children face poverty following family separation. It is only with access to child support, to alleviate child poverty due to parental separation and the feminization of poverty, that both women and children can adequately enjoy family law protections, and access to justice and economic security, consistent with the remedial purpose of the *Divorce Act*.
- b) Second, the Court should eliminate pernicious payor incentives to conceal income or delay payments. Otherwise, the power imbalances described above will continue to result in the chronic underpayment of child support, and in turn, feminization of poverty and entrenchment of child poverty. Worse, payors have pernicious incentives

¹ Canada, Statistics Canada, Juristat, *Payment patterns of child and spousal support* (April 24, 2013) at 9, 18, online: Statistics Canada <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2013001/article/11780-eng.pdf?st=eRcodICf>>.

to abuse or otherwise intimidate recipient parents in a context where women represent the vast majority of child support recipients and the vast majority of gender-based violence victims. *Colucci* is an opportunity for the Court to uphold timely income disclosure and support payments as clear overarching objectives of the child support regime.

- c) Third, in order to address the two preceding points, the proposed intervention will put forward a simplified *DBS* framework to govern retroactive support variations. This framework will provide distinct approaches to child support variations depending on the nature of the retroactive application, as well as respond to the objectives of certainty and flexibility identified in *DBS* in a manner closely tailored to the imbalances between the payor and recipient in child support arrangements.

28. Central to LEAF's mandate and legitimacy as a national equality rights organization is its commitment to work on a consultative and collaborative basis to ensure that its arguments are informed by the diversity of women's experiences. The consultative process ensures that LEAF's advocacy is as inclusive and accountable as possible.

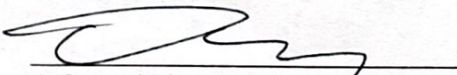
29. If granted leave to intervene jointly with West Coast LEAF, LEAF will follow its usual practice of developing its legal arguments in consultation and collaboration with leading equality rights academics, practitioners, and community members to ensure that its arguments are of the highest caliber possible. LEAF's interventions are guided, informed and supported by a case committee composed of academics and practitioners with expertise in the relevant issues. LEAF and West Coast LEAF's joint application for leave to intervene in this case was guided by contributions from the following case committee members: Natasha Bakht (University of Ottawa); Vicky Law (Rise Women's Legal Centre); and Deepa Mattoo and Tamar Witelson (Barbra Schlifer Commemorative Clinic).

30. In prior interventions, LEAF has also consulted with parties and interveners to avoid duplication of submissions. LEAF undertakes to do the same in this appeal.

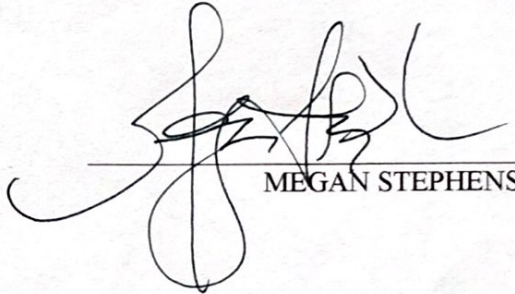
31. If granted leave to intervene, LEAF is prepared to file its factum in accordance with any timetable set by this Court.

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

AFFIRMED BEFORE ME at the City of)
Toronto, in the Province of)
Ontario, this 29th day of)
April, 2020.)
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)
)


A Commissioner for taking Oaths

Daniel J. [unclear]
LSO 48535F


MEGAN STEPHENS

PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The West Coast Legal Education and Action Fund Association (“West Coast LEAF”) and the Women’s Legal Education and Action Fund Inc. (“LEAF”) seek leave to jointly intervene in this appeal to make submissions on the gendered dynamics of child support. They propose to address the need for a simplified framework that promotes women and children’s substantive equality to guide discretionary child support variation orders under the *Divorce Act*.¹

2. This appeal concerns a father who—over 16 years—chronically underpaid child support to a mother, resulting in a debt of over \$170,000. During that time, the father failed to disclose his income, rarely made voluntary support payments, and absconded twice without notice to his family or the Family Responsibility Office overseeing his support—first to the United States, and then to Italy.² Despite this, after his children ceased to qualify for ongoing support because they grew up, the father successfully applied to substantially rescind his debt.³

3. This Court last opined on child support over a decade ago in *DBS v SRG*⁴ (“*DBS*”). If granted leave to intervene, West Coast LEAF and LEAF will seek to simplify the framework governing retroactive child support variations to better reflect the intent of the *Divorce Act* and reality of child support. They propose to argue that the Court should: (1) affirm substantive equality as an interpretive principle guiding the exercise of judicial discretion under the *Divorce Act*, which significantly implicates the interests of women and children; (2) eliminate pernicious incentives for payors to conceal income or delay payments, and thus, maximize compliance with support obligations;⁵ and (3) simplify *DBS* and establish a framework for retroactive support that provides distinct approaches depending on (a) whether the support obligation prescribed in the prior order corresponds with the payor’s income, and (b) whether the application seeks a retroactive decrease or increase in that support obligation.

4. The Court’s decision in this appeal will have far-reaching impacts on the substantive equality of women and children who rely on child support for the income security and standard

¹ *Divorce Act*, RSC 1985, c 3 (2nd Supp) [*Divorce Act*].

² *Colucci v Colucci*, 2019 ONCA 561 at paras 8, 31 [*Colucci*].

³ *Ibid* at paras 9-12.

⁴ *DBS v SRG*, 2006 SCC 37 [*DBS*].

⁵ As directed in *DBS*, *supra* note 4 at para 4.

of living to which they are statutorily and constitutionally entitled. The issues on appeal fall squarely in the public interest mandates of West Coast LEAF and LEAF, who have longstanding track records of promoting substantive equality for women and children in family law. Their submissions will be informed by this experience, and will be useful and distinct.

B. The Proposed Interveners

5. West Coast LEAF and LEAF are sister non-profit organizations. Both were founded in 1985 when s. 15 of the *Charter* came into force. LEAF is a national organization with branches in different provinces. West Coast LEAF operates independently out of British Columbia.

6. If granted leave to intervene, West Coast LEAF and LEAF will co-operate with the parties and other interveners to ensure that their submissions are not duplicative. They do not seek leave to file any evidence and would rely entirely on the record presented by the parties.

1. West Coast LEAF

7. West Coast LEAF's mandate is to use the law to create an equal and just society for all women and people who experience gender-based discrimination in British Columbia. Working in collaboration with the community, West Coast LEAF uses litigation, law reform, and public legal education to make change. West Coast LEAF has extensive knowledge and experience in advocating for women and children's substantive equality.⁶ West Coast LEAF has been granted leave to intervene in this Court and other courts and tribunals many times. It has provided submissions before legislative committees and for government consultation processes on law reform.⁷ It has also prepared multiple reports and workshops on substantive access to family law legal aid to facilitate enforcement of child support.⁸ Further, West Coast LEAF was the sole intervener in *Michel v Graydon*,⁹ this Court's most recent consideration of child support.

2. LEAF

8. LEAF is a leading national organization that exists to advance the equality rights of women and girls in Canada under the *Charter*. To this end, LEAF intervenes in litigation, engages in law reform, and provides public education. LEAF is one of the only national

⁶ Affidavit of Rajwant Mangat, affirmed April 29, 2020 at paras 10, 20 [Mangat Affidavit].

⁷ *Ibid* at para 11.

⁸ *Ibid* at para 30.

⁹ *Ibid* at para 18. Reasons yet to be released (*Michel v Graydon*, 2019 CanLII 109252 (SCC)).

organizations advancing women and girls' legal equality. LEAF has played a significant role in developing substantive equality principles in Canadian equality rights jurisprudence.¹⁰ A key element of LEAF's work in this area includes intervening in cases where the interpretation of the law promises to increase—or risks to decrease—women and girls' substantive equality.¹¹ LEAF has intervened before this Court in major family law cases, produced high quality research, created and delivered workshops through education programs, and provided submissions to provincial, federal, and international bodies on various topics related to gender equality.¹²

PART II - QUESTION IN ISSUE

9. The sole issue is whether West Coast LEAF and LEAF should be granted leave to jointly intervene in this appeal.

PART III - ARGUMENT

10. Applicants seeking leave to intervene before this Court must establish: (1) that they have a special interest or particular expertise in the subject matter of the appeal; and (2) that their submissions will be useful to the Court and different from those of the parties.¹³

A. The Proposed Intervenors' Special Interest and Particular Expertise

11. West Coast LEAF and LEAF's interest in this appeal flows directly from their respective mandates to promote gender equality across Canada. Central to these mandates is advocacy on public interest issues that impact women, including with respect to how family law doctrine can adversely affect their access to justice and income security. The issues in this appeal will directly impact members of West Coast LEAF and LEAF's constituencies, including the women and children who are most significantly impacted by the proper operation of Canada's child support regimes.¹⁴ Further, this appeal's outcome will affect West Coast LEAF and LEAF's longstanding efforts to promote substantive equality for women and children. Given the direct relation between the issues in this appeal and the mandates of West Coast LEAF and LEAF, they have a

¹⁰ Affidavit of Megan Stephens, affirmed April 29, 2020 at paras 8, 9 [Stephens Affidavit].

¹¹ *Ibid* at paras 10-12.

¹² *Ibid* at paras 9, 12, 13.

¹³ *Rules of the Supreme Court of Canada*, SOR/2002-156, ss 55 and 57(2); *R v Barton*, 2019 SCC 33 at para 52; *Reference re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 SCR 335 at 339 [*Workers' Compensation*]; *R v Finta*, [1993] 1 SCR 1138 at 1142-1143.

¹⁴ Mangat Affidavit, *supra* note 6 at paras 6, 9; Stephens Affidavit, *supra* note 10 at para 3.

special interest in this appeal, as well as particular expertise in the issues it raises.¹⁵

B. Overview of the Proposed Interveners' Useful and Different Submissions

12. The “useful and different submission” criterion is satisfied by applicants who have a history of involvement with the issue giving them expertise that can shed fresh light or provide new information on the matter.¹⁶ West Coast LEAF and LEAF’s history of promoting gender-conscious approaches to family law, set out above, establish that they have such expertise.

13. Further, West Coast LEAF and LEAF’s proposed submissions will be useful and different. They propose to argue that: (1) substantive equality should inform discretionary child support variation orders; (2) pernicious incentives for payors to be delinquent should be eliminated; and (3) the *DBS* framework should be simplified. These submissions are useful because they reconcile the constitutional and statutory interests implicated by child support and enhance its governing framework. They are different because they bring a unique perspective to the appeal. The parties approach the appeal from the standpoint of their private interests. In contrast, West Coast LEAF and LEAF approach the appeal from the standpoint of the public interest, and more specifically, the substantive equality interests of women and children across Canada who may be disadvantaged by interpretations of the *Divorce Act* that fail to account for the relative information, resources, and responsibilities of recipient and payor parents.

1. Affirm Substantive Equality

14. First, West Coast LEAF and LEAF intend to argue that judges’ exercise of discretion under s. 17 of the *Divorce Act* with respect to “varying, rescinding or suspending” child support must comply with *Charter* values,¹⁷ and specifically, the value of women and children’s equality reflected in ss. 15 and 28 of the *Charter*.

¹⁵ Mangat Affidavit, *supra* note 6 at para 29; Stephens Affidavit, *supra* note 10 at 17.

¹⁶ *Workers’ Compensation*, *supra* note 13 at 340.

¹⁷ *R v Williams*, [1998] 1 SCR 1128 at para 44; *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 875; *Hills v Canada (AG)*, [1988] 1 SCR 513 at 558; *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 592-593 and 603; *Bell Express Vu Limited Partnership v R*, 2002 SCC 42 at para 62; *Hincks v Gallardo*, 2014 ONCA 494 at para 32; Ruth Sullivan, *Construction of Statutes*, 6th ed (Lexis Nexis, September 2014) at 22-24 and 528-531.

15. Child support engages substantive equality because it is, essentially, an issue of gender justice. The *Divorce Act*—and other statutory regimes that govern family law¹⁸—are remedial legislation.¹⁹ As such, their interpretation “shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”²⁰ Recognition of the *Divorce Act*’s remedial character requires that the “institutionalized gender bias”²¹ which persists in the operation of Canadian child support must be taken into account to appreciate the relationship between child support and gender inequality.²² This inequality is demonstrably feminized: with 96% of cases registered in enforcement schemes involving men paying women, “[t]he problem of unpaid support contributes to the feminization of poverty.”²³ Further, this inequality is substantial: “[t]here are billions of dollars of unpaid child support payments in Canada.”²⁴

16. A substantive equality analysis illuminates the gendered reality of child support and underpins the need to treat payor and recipient parents distinctly “to achieve equality of results.”²⁵ The different knowledge and resources of payor and recipient parents turn child support regimes against mothers and children, counter to their remedial objectives and the *Charter* value of equality. Because the amount of support owed is based on the payor’s income,²⁶ payors have more knowledge than recipients about whether payors are meeting their support

¹⁸ For example, *Federal Child Support Guidelines*, SOR/97-175 [*Guidelines*]; *Family Law Act*, RSO 1990, c F.3.

¹⁹ See *Beliveau v Lanyon*, [1993] AJ No. 359 (*Divorce Act*); *Gervais v Tongue*, [2000] OJ No. 529 at para 26 (*Guidelines*); *Bradbury v Mundell*, [1993] OJ No. 896 (Ontario *Family Law Act*).

²⁰ *Interpretation Act*, RSC, 1985, c I-21, s 12.

²¹ Marie L. Gordon, “‘What, Me Biased?’ Women and Gender Bias in Family Law” (2001) 19 CFLQ 53 at 6.

²² Natasha Bakht et al, “D.B.S. v. S.G.R.: Promoting Women’s Equality through the Automatic Recalculation of Child Support” (2006) 18:2 CJWL 535 at 537, 545-546 and 557.

²³ *Ibid.* See also Statistics Canada, Juristat, *Payment patterns of child and spousal support* (24 April 2013) at 6-9, online: Statistics Canada <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2013001/article/11780-eng.pdf?st=eRcodICf>> [Payment patterns]; Statistics Canada, Juristat, *Spotlight on Canadians: Results from the General Social Survey, Parenting and Child Support After Separation or Divorce* (February 2014) at 9, online: Statistics Canada <<https://www150.statcan.gc.ca/n1/pub/89-652-x/89-652-x2014001-eng.pdf>> [Spotlight on Canadians].

²⁴ Parliament, House of Commons Debates, 42nd Parl, 1st Sess, Vol 148, No 326 (26 September 2018) [Wilson-Raybould].

²⁵ Jonnette Watson Hamilton & Jennifer Koshan, “Adverse Impact: The Supreme Court’s Approach to Adverse Effects Discrimination under Section 15 of the Charter” (2015) 19:2 Review of Constitutional Studies 191 at 195.

²⁶ *Guidelines*, *supra* note 18 s 3(1)(a).

obligations. Further, recipients typically have fewer resources than payors,²⁷ a fact exacerbated by the exclusion of child support applications from many provincial legal aid schemes.²⁸

17. Because there is a “fundamental power imbalance”²⁹ between recipient and payor parents, an interpretation of the child support regime that fails to take the above differences into account will systematically disadvantage recipient parents. The remedial objectives of the *Divorce Act* cannot be realized unless these power imbalances are taken into account.³⁰

2. Eliminate Pernicious Payor Incentives

18. Second, West Coast LEAF and LEAF intend to argue that substantive equality requires the elimination of pernicious payor incentives to conceal income and delay support payments. Otherwise, the power imbalances described above will continue to lead to what we already see now: the chronic underpayment of child support.³¹ In turn, this chronic underpayment contributes to the feminization of poverty,³² exacerbating women’s demonstrated economic disadvantage.³³ Further, because children living in lone-parent families are far more likely to live in a low-income household, and the “vast majority” of such children live with their mother,³⁴ underpaid child support invariably fuels the entrenchment of child poverty. Viewed in this way, women and children’s economic destinies are linked, and are jointly compromised by persisting payor

²⁷ Hugh Neilson, “Tax Implications of Marriage Breakdown” (2004) 29:1 Law Now at 4.

²⁸ House of Commons, Standing Committee on Justice and Human Rights, *Access to Justice Part 2: Legal Aid*, 42nd Parl, 1st Sess (October 2017) at 32-40, online: <<https://www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP9186121/justrp06/justrp06-e.pdf>>.

²⁹ *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 56.

³⁰ *Moge v Moge*, [1992] 3 SCR 813 at 857, 874 [*Moge*].

³¹ See Statistics Canada, *Cases of child and spousal support by age group of the child beneficiaries* (23 June 2014) at 7, 8, online: Statistics Canada <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2014001/article/14031-eng.pdf?st=P2-CaFIb>>; See also Payment patterns, *supra* note 23.

³² Wilson-Raybould, *supra* note 24. Payment Patterns, *supra* note 23. Spotlight on Canadians, *supra* note 23; *Moge*, *supra* note 30 at 853-858; *Marzetti v Marzetti*, [1994] 2 SCR 765 at 801; *Willick v Willick*, [1994] 3 SCR 670 at 704-707, 713-716 and 722-724 per L’Heureux-Dubé J., concurring.

³³ Statistics Canada, *The Economic Well-Being of Women in Canada*, by Dan Fox & Melissa Moyser (16 May 2018) at 13, 14, online: Statistics Canada <<https://www150.statcan.gc.ca/n1/en/pub/89-503-x/2015001/article/54930-eng.pdf?st=ngRFL16x>>.

³⁴ Statistics Canada, *Census in Brief: Children living in low-income households* (13 September 2017), online: Statistics Canada <<https://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016012/98-200-x2016012-eng.cfm>>.

incentives to leave child support obligations unfulfilled.

19. Timely income disclosure and support payments are overarching objectives of the child support regime.³⁵ The jurisprudential framework governing retroactive child support must not create incentives that frustrate these objectives. For example, in this appeal, Mr. Colucci made few voluntary support payments and, after absconding internationally, failed to disclose his income, as required.³⁶ He was nevertheless rewarded on retroactive application with a substantial rescission of child support arrears after 16 years of delinquency³⁷—undoubtedly, a “perverse incentive”³⁸ in the context of a remedial child support scheme. *DBS* categorically affirmed that: “Any incentives for payor parents to be deficient in meeting their obligations should be eliminated.”³⁹ That directive remains unsatisfied: over a decade after *DBS*, the British Columbia Court of Appeal described payors’ concealment of income changes as a persisting “cancer” in family law disputes.⁴⁰

20. Worse, payors have pernicious incentives to abuse or otherwise intimidate recipient parents. Women not only represent the vast majority of child support recipients, but further, the vast majority of gender-based violence victims.⁴¹ Financial, physical, and emotional abuse intersect.⁴² Because an application-based system requires adversarial court processes for the vindication of legal rights, payors—overwhelmingly, fathers—can use threats and intimidation to add an additional, often insurmountable, hurdle to obtaining financial support. Indeed, *DBS* alluded to this fact when referring to payors “react[ing] vindictively” to child support applications.⁴³ Further, not only may requests for support be met with physical abuse, but the

³⁵ *DBS*, *supra* note 4 at para 4.

³⁶ *Colucci*, *supra* note 2 at para 8.

³⁷ *Colucci*, *supra* note 2 at paras 8-12.

³⁸ *Colucci v Colucci*, 2017 ONCA 892 at para 26.

³⁹ *DBS*, *supra* note 4 at para 4 [emphasis added].

⁴⁰ *Smith v Smith*, 2017 BCCA 319 at para 24 [Smith].

⁴¹ See Statistics Canada, *Family violence in Canada: A statistical profile, 2018* (12 December 2018) at 24 and Table 2.1, online: Statistics Canada <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00018-eng.pdf?st=ALMckvED>>.

⁴² Sarah Romans et al, “Who Is Most at Risk for Intimate Partner Violence? A Canadian Population-Based Study” (2007) 22:12 *Journal of Interpersonal Violence* at 1502, 1504.

⁴³ *DBS*, *supra* note 4 at para 101.

deliberate withholding of support is itself a form of “economic abuse.”⁴⁴ Such abuse has cascading harms on children, who are then “at increased risk for a wide range of psychological, emotional, behavioural, social, and academic problems.”⁴⁵ Of course, it is for Parliament to design Canada’s federal child support regime.⁴⁶ But courts’ interpretations, while working within Parliament’s chosen enforcement system, must advance women and children’s substantive equality in a manner consistent with that system’s remedial purpose.

3. Simplify the *DBS* Framework

21. Third, given the need to affirm substantive equality and eliminate pernicious payor incentives, West Coast LEAF and LEAF intend to argue that this appeal presents an ideal opportunity for this Court to simplify *DBS* using a framework that harmonizes *DBS* with the Ontario Court of Appeal’s decision in *Gray v Rizzi*.⁴⁷ *DBS* affirmed that “fairness” is an overarching consideration for retroactive support awards,⁴⁸ which “implicate the delicate balance between certainty and flexibility.”⁴⁹ In other words, sometimes fairness favours certainty (opposing retroactive variation), and sometimes fairness favours flexibility (supporting retroactive variation). With this in mind, West Coast LEAF and LEAF intend to propose a framework with different presumptions in three distinct contexts of retroactive variation to consistently promote a fair child support regime.

22. **Context 1: Where Order and Income Correspond.** If the prior support order corresponds with the payor’s income, the only realistic retroactive application is one by the payor to rescind valid arrears. In such a case, the payor should be permitted to rescind his arrears only if he can prove that, even with a flexible payment plan,⁵⁰ “he cannot and will not ever be able to pay the arrears.”⁵¹ When the extant order corresponds to the payor’s income, fairness

⁴⁴ Heather Douglas & Rachna Nagesh, “Domestic and family violence, child support and ‘the exemption’” (2019) *Journal of Family Studies* at 2 [Douglas & Nagesh].

⁴⁵ Andrea Gonzalez et al, “Subtypes of exposure to intimate partner violence within a Canadian child welfare sample: Associated risks and child maladjustment” (2014) 38 *Child Abuse & Neglect* at 1935.

⁴⁶ *DBS*, *supra* note 4 at paras 57-58.

⁴⁷ *Gray v Rizzi*, 2016 ONCA 152 [*Gray*].

⁴⁸ *DBS*, *supra* note 4 at para 96.

⁴⁹ *Ibid* at para 2.

⁵⁰ *Ibid* at para 116.

⁵¹ *Gray*, *supra* note 47 at para 58.

favours the certainty of that order being enforced⁵²—the arrears accumulated simply because the payor ignored his support obligations, despite the recipient’s reasonable expectation to be paid.

23. Context 2: Retroactive Decrease Sought where Order and Income Do Not

Correspond. If (1) there is reliable evidence that the prior support order mandated support contributions that exceeded the payor’s income-based obligations and (2) a retroactive decrease in support is therefore sought, then there should be a presumption that the support obligation is retroactively decreased. However, that presumed decrease should only date back as far as three years before the payor’s effective notice,⁵³ which, to be effective, must include full financial disclosure.⁵⁴ When the extant order overstates the support obligation, fairness favours certainty for recipients who have relied on the prior order, but also favours flexibility so that payors can get a reasonable reduction of support if they have diligently reported and substantiated their income changes. If, as in this case, the payor never provided reliable income information⁵⁵ and thus failed to provide effective notice, he should not benefit from the above presumption.

24. Context 3: Retroactive Increase Sought where Order and Income Do Not

Correspond. If (1) the prior support order mandated support contributions that fell below the payor’s income-based obligations and (2) a retroactive increase in that support is therefore sought, then there should be a presumption that the support obligation is retroactively increased dating back to the material change that made support inadequate.⁵⁶ When the extant order understates the support obligation, fairness principally favours flexibility. The payor parent, who knows best about their own income changes, bears “the major responsibility for ensuring that a child benefits from the change as soon as reasonably possible.”⁵⁷ Indeed, retroactive increases typically arise in the context of a payor’s concealed income,⁵⁸ which *DBS* held warrants an increase dating back to the material change.⁵⁹ Further, this approach to retroactive increases is responsive to how a recipient’s delay in seeking increased support is often explained by intimate

⁵² *DBS*, *supra* note 4 at para 98.

⁵³ *Ibid* at para 123; *Gray*, *supra* note 47 at para 45.

⁵⁴ *Gray*, *supra* note 47 at para 62; See also *Corcios v Burgos*, 2011 ONSC 3326 at para 55(7).

⁵⁵ *Colucci*, *supra* note 2 at para 31.

⁵⁶ *DBS*, *supra* note 4 at para 124.

⁵⁷ *Ibid* at para 161 (per Abella J, concurring).

⁵⁸ *Smith*, *supra* note 40 at para 24.

⁵⁹ *DBS*, *supra* note 4 at para 124.

partner violence, and in particular, the payor's deliberate use of intimidation as a means of shirking child support obligations.⁶⁰ Such a presumption, in addition to supporting the remedial purpose of the *Divorce Act*, promotes women and children's substantive equality by counteracting the feminization of poverty and entrenchment of child poverty.

PART IV - SUBMISSION ON COSTS

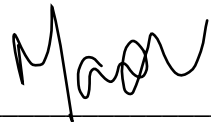
25. In this motion and in their intervention if granted leave to intervene, West Coast LEAF and LEAF do not seek costs and ask that costs not be awarded against them.

PART V - ORDER SOUGHT

26. West Coast LEAF and LEAF respectfully request an Order from this Court:

- a. Granting West Coast LEAF and LEAF leave to intervene in this appeal;
- b. Permitting West Coast LEAF and LEAF to file a factum of not more than ten (10) pages, or such other length as this Court deems appropriate;
- c. Permitting West Coast LEAF and LEAF to present oral argument at the hearing of the appeal of not more than five (5) minutes, or such other duration as this Court deems appropriate;
- d. Providing that no order of costs of this motion and this appeal may be made for or against West Coast LEAF and LEAF; and
- e. Any such further or other Order that this Court deems appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of April, 2020.



Jennifer Klinck
Joshua Sealy-Harrington
Counsel for the Proposed Interveners

⁶⁰ Douglas & Nagesh, *supra* note 44 at 10, 13.

PART VI - TABLE OF AUTHORITIES

JURISPRUDENCE	PARA(S)
<i>Bell Express Vu Limited Partnership v R</i> , 2002 SCC 42	14
<i>Beliveau v Lanyon</i> , [1993] AJ No. 359	15
<i>Bradbury v Mundell</i> , [1993] OJ No. 896, 13 O.R. (3d) 269	15
<i>Colucci v Colucci</i> , 2019 ONCA 561	2, 19, 23
<i>Colucci v Colucci</i> , 2017 ONCA 892	19
<i>Corcios v Burgos</i> , 2011 ONSC 3326	23
<i>Dagenais v Canadian Broadcasting Corp.</i> , [1994] 3 SCR 835	14
<i>DBS v SRG</i> , 2006 SCC 37	<i>passim</i>
<i>Gervais v Tongue</i> , [2000] OJ No. 529	15
<i>Gray v Rizzi</i> , 2016 ONCA 152	21-23
<i>Hills v Canada (AG)</i> , [1988] 1 SCR 513	14
<i>Hincks v Gallardo</i> , 2014 ONCA 494	14
<i>Marzetti v Marzetti</i> , [1994] 2 SCR 765	18
<i>Michel v Graydon</i> , 2019 CanLII 109252 (SCC)	7
<i>Moge v Moge</i> , [1992] 3 SCR 813	17, 18
<i>R v Barton</i> , 2019 SCC 33	10
<i>R v Finta</i> , [1993] 1 SCR 1138	10
<i>R v Williams</i> , [1998] 1 SCR 1128	14
<i>Reference re Workers' Compensation Act 1983 (Nfld.)</i> , [1989] 2 SCR 335	10, 12
<i>RWDSU v Dolphin Delivery Ltd.</i> , [1986] 2 SCR 573	14
<i>Saskatchewan Federation of Labour v Saskatchewan</i> , 2015 SCC 4	17
<i>Smith v. Smith</i> , 2017 BCCA 319	19
<i>Willick v Willick</i> , [1994] 3 SCR 670	18
SECONDARY SOURCES	PARA(S)
Andrea Gonzalez et al, "Subtypes of exposure to intimate partner violence within a Canadian child welfare sample: Associated risks and child maladjustment" (2014) 38 Child Abuse & Neglect	20
Heather Douglas & Rachna Nagesh, "Domestic and family violence, child support and 'the exemption'" (2019) Journal of Family Studies	20, 24
House of Commons, Standing Committee on Justice and Human Rights, <i>Access to Justice Part 2: Legal Aid</i> , 42 nd Parl, 1 st Sess (October 2017), online:	16

https://www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP9186121/justrp06/justrp06-e.pdf	
Hugh Neilson, “Tax Implications of Marriage Breakdown” (2004) 29:1 Law Now	16
Jonnette Watson Hamilton and Jennifer Koshan, “Adverse Impact: The Supreme Court’s Approach to Adverse Effects Discrimination under Section 15 of the Charter” (2015) 19:2 Review of Constitutional Studies 191	16
Marie L. Gordon, “What, Me Biased?” Women and Gender Bias in Family Law” (2001) 19 CFLQ 53	15
Natasha Bakht et al, “D.B.S. v. S.G.R.: Promoting Women's Equality through the Automatic Recalculation of Child Support” (2006) 18:2 CJWL 535	15
Ruth Sullivan, Construction of Statutes, 6th edition (Lexis Nexis, September 2014)	14
Sarah Romans et al, “Who Is Most at Risk for Intimate Partner Violence? A Canadian Population-Based Study” (2007) 22:12 Journal of Interpersonal Violence	20
Statistics Canada, <i>Cases of child and spousal support by age group of the child beneficiaries</i> (23 June 2014), online: Statistics Canada < https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2014001/article/14031-eng.pdf?st=P2-CaFlb >	18
Statistics Canada, <i>Census in Brief: Children living in low-income households</i> (13 September 2017), online: Statistics Canada < https://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016012/98-200-x2016012-eng.cfm >	18
Statistics Canada, <i>Family violence in Canada: A statistical profile, 2018</i> (12 December 2018), online: Statistics Canada: < https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00018-eng.pdf?st=ALMckvED >	20
Statistics Canada, Juristat, <i>Payment patterns of child and spousal support</i> (24 April 2013), online: Statistics Canada < https://www150.statcan.gc.ca/n1/pub/85-002-x/2013001/article/11780-eng.pdf >	15, 18
Statistics Canada, Juristat, <i>Spotlight on Canadians: Results from the General Social Survey, Parenting and Child Support After Separation or Divorce</i> (February 2014), online: Statistics Canada < https://www150.statcan.gc.ca/n1/pub/89-652-x/89-652-x2014001-eng.pdf >	15, 18
Statistics Canada, <i>The Economic Well-Being of Women in Canada</i> , by Dan Fox & Melissa Moyser (16 May 2018), online: Statistics Canada < https://www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/54930-eng.htm >	18
LEGISLATION, PARLIAMENTARY DEBATE, AND OTHER LEGAL INSTRUMENTS	PARA(S)
<i>Canadian Charter of Rights and Freedoms</i> , Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 , ss 15, 28	<i>passim</i>
<i>Divorce Act</i> , R.S.C. 1985, c. 3 (2nd Supp.) , s 17	<i>passim</i>
<i>Family Law Act</i> , RSO 1990, c F.3	15, 16
<i>Federal Child Support Guidelines</i> , SOR/97-175 , s 3(1)(a)	15
<i>Interpretation Act</i> , RSC, 1985, c I-21 , s 12	15

Parliament, House of Commons Debates, 42nd Parl., 1st Sess., Vol. 148, No. 326 (26 September 2018)	15, 18
<i>Rules of the Supreme Court of Canada</i> , S.O.R./2002-156 , ss 55 and 57(2)	10