

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA)

BETWEEN:

**HER MAJESTY THE QUEEN**

APPELLANT  
(Respondent)

AND:

**J.J.**

RESPONDENT  
(Applicant/ Defendant)

AND:

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ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF MANITOBA,  
ATTORNEY GENERAL OF SASKATCHEWAN, and  
ATTORNEY GENERAL OF ALBERTA**

INTERVENERS

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**MOTION RECORD FOR LEAVE TO INTERVENE**  
**BY WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION and**  
**WOMAN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS CENTRE**  
(Pursuant to Rules 47(1)(a) and 55-59 of the *Rules of the Supreme Court of Canada*)

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**J.J.**

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AND:

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ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF MANITOBA,  
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INTERVENERS

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**NOTICE OF MOTION FOR LEAVE TO INTERVENE  
OF WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION and  
WOMAN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS CENTRE  
(Pursuant to Rules 47(1)(a) and 55-59 of the *Rules of the Supreme Court of Canada*)**

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**TAKE NOTICE THAT** the Moving Parties, West Coast Legal Education and Action Fund Association (“West Coast LEAF”) and Women Against Violence Against Women Rape Crisis Centre (“WAVAW”), hereby apply to a Judge of this Honourable 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 WAVAW leave to intervene in this appeal;
2. Permitting West Coast LEAF and WAVAW to file a factum of not more than ten (10) pages, or such other length as this Court deems appropriate;
3. Permitting West Coast LEAF and WAVAW 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 WAVAW; 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 Dalya Israel, West Coast LEAF and WAVAW are non-profit organizations that have a genuine and substantial interest in this appeal;
2. West Coast LEAF was created as a branch of the Women's Legal Education and Action Fund ("LEAF") in 1985, when s.15 of the *Canadian Charter of Rights and Freedoms* ("the Charter") came into force. It became an affiliate of LEAF in 2009 and has operated independently of LEAF since 2014. Its mandate is to use the law to create a just and equal society for all women and people who experience gender-based discrimination. It carries out its mandate through litigation, law reform, and public legal education activities;
3. West Coast LEAF has appeared before the Supreme Court of Canada, the British Columbia Court of Appeal, and the Supreme Court of British Columbia on multiple occasions to address a wide variety of issues affecting women and gender-diverse people, including issues related to gender-based violence and the rights and interests of survivors of gender-based violence;
4. WAVAW is British Columbia's largest rape crisis centre. Founded in 1982, its mandate is to work towards a future free from sexualized violence. It carries out its mandate by providing direct support services to survivors of sexualized violence, as well as by engaging in educational outreach and systemic advocacy;
5. West Coast LEAF and WAVAW have a history of collaborating on issues related to gender-based and sexual violence. Recently, they were part of a coalition of organizations from British Columbia which intervened in *Bent v. Platnick*, 2020 SCC 23, and *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22. The coalition argued for an interpretation of anti-SLAPP legislation which would reduce barriers to survivors reporting, disclosing, and seeking support for sexual and gender-based violence;

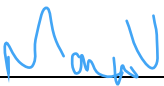
6. West Coast LEAF and WAVAW have a different and useful perspective on the issues on appeal;
7. If granted leave to intervene, and drawing on their expertise and experience with respect to the rights and interests of survivors of sexual violence, West Coast LEAF and WAVAW will take a complainant-centred and intersectional perspective to argue that:
  - a. Despite the evolution of the rules of evidence, myths and stereotypes about sexual assault continue to infuse criminal sexual assault trials, particularly in relation to complainants who experience multiple and intersecting indicia of inequality.
  - b. Meaningful complainant participation in applications under the accused in possession regime is key to refuting discredited myths and stereotypes about sexual assault which may nevertheless underlie these applications, especially in cases involving complainants who experience multiple and intersecting indicia of inequality; and
  - c. Factors including (a) the scope of the complainant's participation; (b) the complainant's access to independent legal representation; and (c) the timing of these applications during the course of criminal proceedings is essential to a consideration of the constitutionality of the regime and whether it affords meaningful participatory rights to complainants, as intended by Parliament.
8. If granted leave to intervene, West Coast LEAF and WAVAW will work collaboratively with the other parties and other interveners to avoid duplicative submissions;
9. Granting leave to intervene to West Coast LEAF and WAVAW will not prejudice any of the parties, but West Coast LEAF, WAVAW, and their constituents will suffer prejudice if leave to intervene in this appeal is denied;
10. West Coast LEAF and WAVAW will take the record as they find it and will not seek to supplement it; and
11. West Coast LEAF and WAVAW will abide by the schedule set by the Registrar for filing 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 February 2, 2021;
2. The affidavit of Dalya Israel, affirmed February 3, 2021;
3. The Memorandum of Argument of West Coast LEAF and WAVAW, dated February 4, 2021; and
4. Such further and other material as counsel for West Coast LEAF and WAVAW may advise and this Honourable Court may permit.

DATED at Ottawa, Ontario, this 5th day of February, 2021.


*for*   
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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.

SCC File No: 39133

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ATTORNEY GENERAL OF ALBERTA**

INTERVENERS

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**AFFIDAVIT OF RAJWANT MANGAT**  
**(In support of a Motion for Leave to Intervene)**  
**(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 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 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 jointly with the Women Against Violence Against Women Rape Crisis Centre ("WAVAW") in the within appeal.

4. This appeal concerns the constitutionality of ss. 278.92 to 278.94 of the *Criminal Code*, which uniquely apply to the prosecution of sexual offences and govern the admissibility of records that are in the accused's possession and in which the complainant has a privacy interest (the "accused in possession" regime). The regime aims to balance the rights of the accused with the privacy interests of the complainant, while ensuring the truth-seeking function of the courts by preventing the admission of irrelevant and prejudicial evidence.

5. As described in further detail herein, West Coast LEAF has a demonstrable and ongoing interest in ending gender-based violence, including sexual assault, against all women and gender diverse people. West Coast LEAF's work on gender-based violence includes advocating for the elimination of myths and stereotypes about sexual violence from the criminal justice system, other non-criminal legal and quasi-legal processes, and wider society.

6. West Coast LEAF seeks leave to intervene in this appeal on the basis of 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 of West Coast LEAF**

7. 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 freedom from gender-based violence, access to healthcare, access to justice, economic security, justice for those who are criminalized, and the right to parent.

8. West Coast LEAF was created 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 continues to collaborate with it from time to time.

9. During the last fiscal year, West Coast LEAF had approximately 460 members. As of February 3, 2021, West Coast LEAF employs 10 permanent staff members. It relies on the annual support of approximately 200 volunteers to carry out its work.

## **B. West Coast LEAF's Experience**

10. West Coast LEAF acts to promote the equality interests of all women and gender diverse people in British Columbia, including where gender intersects with other indicia of inequality such as race, national origin, immigration status, Indigeneity, sexual orientation, gender identity, gender expression, family or marital status, disability or ability, age, and class. West Coast LEAF 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.

11. 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 and government actions, as well as 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.

### **i. Experience before the Supreme Court of Canada**

12. West Coast LEAF has considerable intervention experience before the Supreme Court of Canada, both in its own name and, in earlier years, through its participation in interventions brought by LEAF while West Coast LEAF was operating under LEAF's auspices.

13. West Coast LEAF has intervened in its own name in the following cases:



- a. *Colucci v Colucci*, SCC File No. 38498 (jointly with LEAF) (appeal heard November 4, 2020; judgment reserved);
  - b. *Michel v Graydon*, 2020 SCC 24;
  - c. *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);
  - d. *Law Society of British Columbia v. Trinity Western University and Volkenant*, 2018 SCC 32;
  - e. *Schrenk v British Columbia Human Rights Tribunal*, 2017 SCC 62;
  - f. *R v Lloyd*, 2016 SCC 13;
  - g. *British Columbia Teachers’ Federation v British Columbia Public School Employers’ Association*, 2014 SCC 70;
  - h. *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59;
  - i. *British Columbia (Ministry of Education) v Moore*, 2012 SCC 61; and
  - j. *Downtown Eastside Sex Workers United Against Violence v Canada*, 2012 SCC 45 (jointly with *Justice for Children and Youth* and *ARCH Disability Law Centre*).
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 provided background information and support to several LEAF interventions originating in other jurisdictions, including:
- a. *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (N.A.P.E.)*, 2004 SCC 66;
  - b. *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627 (S.C.C.) (“*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 S.C.R. 1219 (S.C.C.).

**ii. Experience before lower courts, administrative decision-makers, and inquiries**

16. West Coast LEAF has intervened before the British Columbia Court of Appeal and the Supreme Court of British Columbia in the following cases:

- a. *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241;
- b. *A.B. v. C.D.*, 2020 BCCA 11;
- c. *British Columbia Civil Liberties Association and John Howard Society of Canada v. Canada (Attorney General)*, 2019 BCCA 228 (jointly with the Native Women's Association of Canada);
- d. *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2018 BCCA 132 (jointly with the Community Legal Assistance Society) (leave to appeal to the SCC refused, SCC File No. 38157);
- e. *British Columbia Civil Liberties Association and John Howard Society of Canada v. Canada (Attorney General)*, 2018 BCSC 62;
- f. *Denton v Workers Compensation Board*, 2017 BCCA 403 (jointly with the Community Legal Assistance Society);
- g. *Law Society of British Columbia v. Trinity Western University and Volkenant*, 2016 BCCA 423;
- h. *Scott v College of Massage Therapists of British Columbia*, 2016 BCCA 180;
- i. *Trinity Western University and Volkenant v. Law Society of British Columbia*, 2015 BCSC 2326;

- j. *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2015 BCSC 534 (jointly with the Community Legal Assistance Society);
  - k. *Vilardell v Dunham*, 2013 BCCA 65;
  - l. *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309;
  - m. *Friedmann v MacGarvie*, 2012 BCCA 445;
  - n. *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (the *Polygamy Reference*); and
  - o. *Downtown Eastside Sex Workers United Against Violence v Canada*, 2010 BCCA 439.
17. Additionally, West Coast LEAF has intervened or had interested party status before an administrative decision-maker or a commission of inquiry in the following cases:
- a. *RR v. Vancouver Aboriginal Child and Family Services Society*, BCHRT File No. 16765 (hearing ongoing);
  - b. *Oger v Whatcott*, 2019 BCHRT 58;
  - c. *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
  - d. *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).
18. Apart from its intervention work, West Coast LEAF is currently litigating a constitutional challenge to British Columbia's family law legal aid regime before the Supreme Court of

British Columbia: *Single Mothers' Alliance of BC and Nicolina Bell v. British Columbia*, (File No. S-1733843) (Notice of Civil Claim filed April 26, 2017).

### iii. Law reform and public legal education activities

19. 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 sex and 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 issues impacting equality-seeking groups.
20. 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.

### C. West Coast LEAF's Interest in this Appeal

21. West Coast LEAF's work on gender-based violence, including sexual violence, forms a significant part of its litigation, law reform, and public legal education programs. A selection of relevant work includes the following:
  - a. Commencing in 2016, West Coast LEAF has been engaged in a law reform project, *Dismantling the Barriers to Reporting Sexual Assault*, which is aimed at identifying strategies to reduce barriers in the justice system for sexual assault survivors through dialogue among key stakeholders, including front-line anti-violence activists and service providers, law enforcement, former Crown prosecutors, retired judges, defence counsel and academics. In November 2018, as part of this project, West

Coast LEAF published a report titled, “We are Here: Women’s Experiences of the Barriers to Reporting Sexual Assault”. This report centred the voices of 18 female survivors of sexual assault who shared with us their experiences of navigating the criminal justice system. Following this report, in March 2020, West Coast LEAF published a toolkit for complainant’s counsel in criminal proceedings who are dealing with applications under sections 276 and 278 of the *Criminal Code*.

- b. In November 2019, West Coast LEAF was part of a coalition of anti-violence organizations from British Columbia which intervened in two appeals heard together by the Supreme Court of Canada: *Bent v. Platnick*, 2020 SCC 23, and 1704604 *Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22. The coalition made submissions on the barriers to the reporting and disclosure of gender-based violence, including the use and threat of SLAPP suits. It argued for an interpretation of Ontario’s *Protection of Public Participation Act* (upon which BC’s *PPPA* is modelled) which would empower survivors to report, disclose, and/or seek basic supports related to gender-based violence without the fear of being sued.
- c. In June 2019, West Coast LEAF wrote to the government of British Columbia to urge the province to invest in a rights-based framework for survivors of sexual assault by committing to providing dedicated, sustained funding for community-based sexual assault crisis response teams and integrated sexual assault clinics across British Columbia. We were joined in this request by several BC-based umbrella and direct-service provider organizations who work to support survivors of sexual assault.
- d. In July 2017, West Coast LEAF was granted standing to participate in Part II (institutional hearings) and Part III (expert hearings) of the *National Inquiry into Missing and Murdered Indigenous Women and Girls* (final report released June 2019). West Coast LEAF participated at several of the National Inquiry’s hearings held over the course of 2018 and prepared final oral and written submissions in late 2018. West Coast LEAF’s participation in the National Inquiry focused on how governments could be held accountable for action in resolving the root causes of violence against Indigenous women, girls and Two Spirit persons, including violence

- of a sexual nature. Earlier, West Coast LEAF had also been granted leave to participate in the provincial Missing Women Commission of Inquiry headed by Hon. Wally Oppal, Q.C., which completed its work in November 2012. After withdrawing from the provincial inquiry, West Coast LEAF joined, and continues to participate in, a coalition of Indigenous, women's and grassroots anti-poverty organizations in the Downtown Eastside of Vancouver pushing for action in addressing violence against Indigenous women, girls and Two Spirit people.
- e. In April 2017, West Coast LEAF filed a notice of civil claim in the Supreme Court of British Columbia representing the Single Mothers' Alliance of British Columbia and two individual plaintiffs (once of whom has since discontinued her involvement in the litigation.) The case, *Single Mothers Alliance of British Columbia et al v. British Columbia*, Vancouver Registry, File No. S1733843, is a challenge under ss. 7 and 15(1) of the *Charter* and under s. 96 of the *Constitution Act, 1867* on the basis that BC's family law legal aid scheme deprives women litigants of limited or moderate means whose family law proceeding involves protection from violence (including sexual violence), histories of family violence, or the disruption of the parent-child bond of their security of the person and equality rights. The pleadings also allege that the impugned scheme undermines the jurisdiction of superior courts to resolve disputes and decide questions of law.
- f. In June 2016, West Coast LEAF was granted intervener status (as part of a coalition of six women's organizations from across Canada) in proceedings concerning a judge's conduct of a sexual assault trial: In the matter of an Inquiry Pursuant to s. 63(1) of the *Judges Act* regarding the Honourable Justice Robin Camp. The Coalition made submissions on, among other things, low reporting rates of sexual assault, the lack of confidence among survivors of sexual assault in the criminal justice system, and the chilling effect that the perpetuation of rape myths and stereotypes has on reporting.
- g. In May 2016, Rise Women's Legal Centre opened in Vancouver to provide legal services to self-identified women of low or moderate means. Many of the clients

served by Rise are impacted by family violence, including sexual assault and other violence of a sexual nature. Rise was developed by West Coast LEAF to respond to women's increasingly unmet family justice needs, after decades of advocacy for increased funding to family law legal aid. In partnership with the Peter A. Allard School of Law at UBC, Rise runs a student legal clinic where clients are represented by upper-year law students under close supervision by Rise staff.

- h. In November 2015, West Coast LEAF intervened at the Court of Appeal for British Columbia in *Scott v. College of Massage Therapists of British Columbia*, 2016 BCCA 180. This case concerned the ability of the College to place interim conditions on the registrant's practice to protect the public while investigating a complaint of sexual misconduct. West Coast LEAF intervened to make submissions that the evidence required to establish a risk to the public must not result in the complainant's evidence being assessed on the basis of gendered myths and stereotypes about sexual violence.
- i. Since 2009, West Coast LEAF has reported annually on British Columbia's overall action to remedy gender-based discrimination by issuing a report card assessing the province's performance against the United Nations' *Convention on the Elimination of Discrimination against Women* in a number of areas. As in past years, West Coast LEAF's Gender Equality Report Card 2019/2020 gives low grades to BC's overall action to remedy gender-based discrimination. In the area of addressing gender-based violence, the report card identifies the lack of a provincial policy on addressing sexual assault.
- j. West Coast LEAF offers a range of public legal education resources and workshops aimed at educating the public about gender-based discrimination and forms of gender-based violence. In 2017, in part as a response to the requirement that all post-secondary institutions in British Columbia have in place sexual misconduct policies, West Coast LEAF developed a legal education project called "Only Yes Means Yes" about sexual assault and consent designed by and for post-secondary students. Along with the workshop, through which we have reached approximately 800 students,



faculty and staff, West Coast LEAF produced a social media-friendly video called “The Unfinished Story of Yes” about the development of sexual assault and consent law in Canada.

- k. Since 1999, West Coast LEAF has delivered its “No Means No” workshop to thousands of BC students aged 10-15 to empower youth to understand sexual assault and consent law. The workshop, developed in response to the Supreme Court of Canada’s decision in *R. v. Ewanchuk*, [1999] 1 SCR 330, delves into gendered myths and stereotypes about sexual assault.

#### **D. West Coast LEAF’s and WAVAW’S Proposed Submissions**

22. 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. Despite the evolution of the rules of evidence, myths and stereotypes about sexual assault continue to infuse criminal sexual assault trials, particularly in relation to complainants who experience multiple and intersecting indicia of inequality.
- b. Meaningful complainant participation in applications under the accused in possession regime is key to refuting discredited myths and stereotypes about sexual assault which may nevertheless underlie these applications, especially in cases involving complainants who experience multiple and intersecting indicia of inequality; and
- c. Factors including (a) the scope of the complainant’s participation; (b) the complainant’s access to independent legal representation; and (c) the timing of these applications during the course of criminal proceedings is essential to a consideration of the constitutionality of the regime and whether it affords meaningful participatory rights to complainants, as intended by Parliament.

23. If granted leave to intervene, West Coast LEAF and WAVAW will jointly offer a gendered and intersectional perspective, from the standpoint of sexual assault survivors and complainants. Further, they offer an analytical approach which, by reconciling complainant

participation with the truth-seeking function of the criminal justice system, shows that the rights of the accused and those of the complainant are not mutually exclusive. This perspective is not otherwise before the Court.

24. 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 WAVAW's proposed submissions should leave to intervene in this appeal be granted.

25. If granted leave to intervene, West Coast LEAF and WAVAW 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.

26. 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 2<sup>nd</sup> day of February, 2021.



Commissioner for Taking Affidavits  
in British Columbia

Kate Feeney

**Kate Feeney**  
Barrister & Solicitor  
West Coast LEAF  
800 - 409 Granville  
Vancouver, BC V6C  
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}



RAJWANT MANGAT

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA)

BETWEEN:

**HER MAJESTY THE QUEEN**

APPELLANT  
(Respondent)

AND:

**J.J.**

RESPONDENT  
(Applicant/ Defendant)

AND:

**ATTORNEY GENERAL OF CANADA,  
ATTORNEY GENERAL OF ONTARIO,  
ATTORNEY GENERAL OF NOVA SCOTIA,  
ATTORNEY GENERAL OF MANITOBA,  
ATTORNEY GENERAL OF SASKATCHEWAN, and  
ATTORNEY GENERAL OF ALBERTA**

INTERVENERS

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**AFFIDAVIT OF DALYA ISRAEL**  
(In support of a Motion for Leave to Intervene)  
(Pursuant to Rules 47(1)(b) and 57(1) of the *Rules of the Supreme Court of Canada*)

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I, DALYA ISRAEL, executive director, of the City of Vancouver, in the Province of British Columbia, AFFIRM AS FOLLOWS:

1. I am the Executive Director of Women Against Violence Against Women Rape Crisis Centre (“WAVAW”) 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 have worked at WAVAW since 2005 and I became its Executive Director in February 2019.

3. I am authorized to provide this affidavit in support of WAVAW's motion for leave to intervene jointly with the West Coast Legal Education and Action Fund Association ("West Coast LEAF") in the within appeal.

4. This appeal concerns the constitutionality of ss. 278.92 to 278.94 of the *Criminal Code*, which uniquely apply to the prosecution of sexual offences and govern the admissibility of records that are in the accused's possession and in which the complainant has a privacy interest (the "accused in possession" regime). The regime aims to balance the rights of the accused with the privacy interests of the complainant, while ensuring the truth-seeking function of the courts by preventing the admission of irrelevant and prejudicial evidence.

5. As described in further detail herein, WAVAW has a demonstrable and ongoing interest in ending sexualized violence, including sexual assault, against all people of marginalized genders, including women, transgender people who are not women, gender-diverse, and Two-Spirit people. WAVAW's work includes advocating for the elimination of myths and stereotypes about sexualized violence from the criminal justice system, other non-criminal legal and quasi-legal processes, and wider society.

6. WAVAW seeks leave to intervene in this appeal on the basis of 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 of WAVAW**

7. WAVAW is a non-profit organization incorporated in British Columbia and registered federally as a charity. WAVAW's mandate is to work toward a future free from sexualized violence. In order to do so, WAVAW provides direct support services to survivors of sexualized violence, as well as engages in educational outreach and systemic advocacy. It works from a feminist, anti-oppressive, and decolonizing framework.

8. WAVAW was established in 1982 in response to the increasing recognition that sexual assault offences were dramatically under-reported, the criminal justice system was not responding appropriately to sexual assault offences, and sexual assault survivors were lacking in support services. Nearly forty years later, WAVAW is British Columbia's largest rape crisis centre.

Throughout its existence, it has observed the pernicious effects of myths and stereotypes about sexualized violence on survivors' pursuits of justice and healing.

9. WAVAW initially worked with and on behalf of survivors who were ciswomen. Since the early 1990s, WAVAW has provided services to all women (both cis- and trans- women). In 2018, WAVAW changed its mandate to expressly include survivors of all marginalized genders. This change was groundbreaking and has influenced other anti-violence organizations in Canada and abroad to consider the ways in which they are inclusive of transgender, gender-diverse and Two-Spirit people.

### **B. WAVAW's Experience and Interest in the Appeal**

10. WAVAW's direct support services include immediate support after an experience of sexualized violence (in the form of a 24-hour crisis-line and accompaniment to the hospital), as well as longer term support over the course of a survivor's pursuit of justice and healing. WAVAW is committed to ensuring survivors' autonomy in responding to sexualized violence. Depending on the survivor's chosen path, WAVAW's support services include communicating with the perpetrator, assisting the survivor to make a police report, assisting the survivor to share their story with the media, and supporting the survivor in the criminal justice system and/or other non-criminal legal processes.

11. WAVAW also provides free individual and group counselling services to survivors. WAVAW's counselling services include specialized services to meet the needs of survivors who are disproportionately affected by sexualized violence and other forms of marginalization, such as Indigenous survivors and transgender, gender-diverse, and Two-Spirit survivors. WAVAW also provides counselling services to the families of missing and murdered Indigenous women, Two-Spirit people, and girls.

12. In addition to its direct support services, WAVAW engages in educational outreach and systemic advocacy. WAVAW's educational outreach programs work with high schools, post-secondary institutions, workplaces, courts, and other organizations to teach people about the root causes of sexualized violence, as well as how to challenge rape culture and support survivors.

13. WAVAW's systemic advocacy has resulted in numerous changes to the criminal justice system and other institutions to make them more responsive to the needs of survivors. Briefly, some relevant examples of WAVAW's systemic advocacy include:

- (a) In 1982, WAVAW collaborated with healthcare providers and the Vancouver Police Department's Sex Crimes Unit to establish the Sexual Assault Service ("SAS"). The SAS gives survivors the option to have forensic evidence collected by trained and sensitive medical practitioners.
- (b) In 1983, WAVAW's advocacy contributed to the enactment of Bill C-127, which made fundamental amendments to the *Criminal Code* with respect to the substantive, procedural and evidentiary aspects of Canada's sexual assault laws.
- (c) In 1989, WAVAW's lobbying assisted to bring about increased legal protections for sexual assault survivors under British Columbia's *Victims of Crime Act*.
- (d) In 1992, WAVAW's advocacy contributed to the enactment of the *Criminal Code*'s "rape shield" provisions (R.S.C., 1985, c. C-46, ss. 276 and 277).
- (e) In 1995-2010, WAVAW supported Kimberley Nixon, a trans woman who brought a human rights complaint against Vancouver Rape Relief for discrimination on the basis of her gender identity.
- (f) In 2008 and after years of advocacy by WAVAW, British Columbia adopted a Third Party Reporting Protocol for sexual offences, which allows adult survivors to access support and report details of a sexual offence to police anonymously, through a Community Based Victim Services Program.
- (g) In 2012, WAVAW published *Challenges of Women's Equality In the Courts*, a research project which examined the impacts of rape culture myths on criminal justice proceedings.
- (h) In 2016, WAVAW was granted intervenor status in the Canadian Judicial Council's inquiry into the conduct of Judge Robin Camp. WAVAW submitted documentation

to the inquiry which highlighted the negative impacts of Judge Camp's prejudicial reasoning on survivors' confidence in the criminal justice system.

- (i) In 2017, WAVAW started a three-year project called the Justice Project that supports justice system personnel to learn from survivors' lived experiences with the criminal justice system. The project aimed at answering the question, "How can we increase confidence in the criminal justice system for survivors of sexual assault?" Twenty-one survivors and ten justice system personnel were interviewed. A report from the Justice Project will be available in Spring 2021.
- (j) In November 2019, WAVAW was part of a coalition of anti-violence organizations from British Columbia which intervened in two appeals heard together by the Supreme Court of Canada: *Bent v. Platnick*, 2020 SCC 23, and *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22. The coalition made submissions on the barriers to the reporting and disclosure of gender-based violence, including the use and threat of SLAPP suits. It argued for an interpretation of Ontario's *Protection of Public Participation Act* (upon which BC's *PPPA* is modelled) which would empower survivors to report, disclose, and/or seek basic supports related to gender-based violence without the fear of being sued.

#### **14. West Coast LEAF's and WAVAW'S Proposed Submissions**

15. 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. Despite the evolution of the rules of evidence, myths and stereotypes about sexual assault continue to infuse criminal sexual assault trials, particularly in relation to complainants who experience multiple and intersecting indicia of inequality.
- b. Meaningful complainant participation in applications under the accused in possession regime is key to refuting discredited myths and stereotypes about sexual assault which may nevertheless underlie these applications, especially in cases involving complainants who experience multiple and intersecting indicia of inequality; and

- c. Factors including (a) the scope of the complainant's participation; (b) the complainant's access to independent legal representation; and (c) the timing of these applications during the course of criminal proceedings is essential to a consideration of the constitutionality of the regime and whether it affords meaningful participatory rights to complainants, as intended by Parliament.

16. If granted leave to intervene, West Coast LEAF and WAVAW will jointly offer a gendered and intersectional perspective, from the standpoint of sexual assault survivors and complainants. Further, they offer an analytical approach which, by reconciling complainant participation with the truth-seeking function of the criminal justice system, shows that the rights of the accused and those of the complainant are not mutually exclusive. This perspective is not otherwise before the Court.

17. 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 WAVAW's proposed submissions should leave to intervene in this appeal be granted.

18. If granted leave to intervene, West Coast LEAF and WAVAW 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.

19. I make this affidavit in support of WAVAW'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 3<sup>rd</sup> day of February, 2021.

  
\_\_\_\_\_  
*Commissioner for Taking Affidavits  
in British Columbia*

  
\_\_\_\_\_  
DALYA ISRAEL

**Kate Feeney**  
*Barrister & Solicitor*  
**West Coast LEAF**  
800 - 409 Granville St.  
Vancouver, BC V6C 1T2  
Tel: 604.684.8772



## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. West Coast Legal Education and Action Fund Association (“West Coast LEAF”) and the Women Against Violence Against Women Rape Crisis Centre (“WAVAW”) (“the Proposed Interveners”) seek leave to jointly intervene in this appeal to make submissions on the participatory rights of complainants in applications under ss. 278.92 to 278.94 of the *Criminal Code*, R.S.C. 1985, c. C-46 (“the *Code*”). They propose to discuss the role of meaningful complainant participation in refuting myths and stereotypes about sexual assault which may underlie these applications, particularly in cases involving complainants from marginalized groups.
2. This appeal concerns the constitutionality of ss. 278.92 to 278.94 of the *Code*, which uniquely apply to the prosecution of sexual offences and govern the admissibility of records that are in the accused’s possession and in which the complainant has a reasonable expectation of privacy (the “accused in possession” regime). Enacted as part of Bill C-51 in December 2018, the purpose of the regime is to balance the rights of the accused with the privacy interests of the complainant, and to facilitate the truth-seeking function of the courts by preventing the admission of irrelevant and prejudicial evidence.<sup>1</sup>
3. The accused in possession regime requires that, where the defence wishes to tender or use private records related to the complainant and in the hands of the accused, they must make an admissibility application. The application must be made on seven days’ notice to the Crown, unless the trial judge permits a shorter notice period (s. 278.93(4)). If the application meets certain threshold requirements, the trial judge must hold an admissibility hearing (s. 278.93(4)). While the admissibility hearing is *in camera* (s. 278.94(1)), the complainant is permitted to attend the hearing, make submissions, and be represented by counsel (ss. 278.94(2) to 278.94(3)).

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<sup>1</sup> Official Report of Debates of the House of Commons (Hansard), 42<sup>nd</sup> Parl., 1<sup>st</sup> Sess., Vol. 148, No. 249 (December 11, 2017), at pp. 16242-16243.

4. This appeal arises from a criminal sexual assault case before the Supreme Court of British Columbia. In a pre-trial application, the accused, J.J., challenged the constitutionality of the accused in possession regime as a whole, arguing that it violated his rights under ss. 7, 11(c) and 11(d) of the *Charter*. The trial judge dismissed the majority of J.J.'s constitutional arguments but agreed that the seven-day notice requirement in s. 278.94 infringed s. 7 of the *Charter* and could not be saved under s. 1. The trial judge's efforts to correct this constitutional infirmity was to read s. 278.94 down and require applications to be made after the conclusion of the complainant's examination-in-chief.
5. On July 23, 2020, this Court granted the Crown leave to appeal the trial judge's interlocutory ruling. On December 23, 2020, this Court granted J.J. leave to cross appeal. On cross appeal, J.J. argues again that the accused in possession regime as a whole is unconstitutional.
6. If granted leave to intervene, the Proposed Interveners will focus their submissions on the relevance and significance of complainants' participatory rights to realizing the purposes of the accused in possession regime. They propose to submit that:
  - a. Despite the evolution of the rules of evidence, myths and stereotypes about sexual assault continue to infuse criminal sexual assault trials, particularly in relation to complainants who experience multiple and intersecting indicia of inequality;
  - b. Meaningful complainant participation in applications under the accused in possession regime is key to refuting discredited myths and stereotypes about sexual assault which may nevertheless underlie these applications, especially in cases involving complainants who experience multiple and intersecting indicia of inequality; and
  - c. Factors including (a) the scope of the complainant's participation; (b) the complainant's access to independent legal representation; and (c) the timing of admissibility applications during the course of criminal proceedings is essential to a consideration of the constitutionality of the regime and whether it affords meaningful participatory rights to complainants, as intended by Parliament.
7. Allowing complainants to have a meaningful voice in admissibility applications is not at odds with the accused's rights to a fair trial. As discussed herein, complainant participation

serves the ultimate goal of a fact-finding process that is free of all forms of bias and prejudicial reasoning.

8. The Court's decision in this appeal will have a significant impact on the permeability of evidentiary rules which were designed to protect complainants from irrelevant and unfair attacks on their character and credibility. Stripping complainants of their participatory rights, or allowing those rights to be hollowed out, will only serve to perpetuate the disadvantage of complainants inside and outside of the courtroom. It will also add to the barriers that discourage sexual assault survivors from reporting their experiences and seeking redress through the criminal justice system.

### **B. The Proposed Interveners**

9. The Proposed Interveners are non-profit organizations from British Columbia ("BC") with demonstrated expertise and longstanding experience promoting the interests of women and gender-diverse people, including those who are subject to sexual violence. They also have a history of collaborating on issues related to sexual violence. Recently, they intervened jointly (with two other organizations) in two appeals which were heard together by this Court.<sup>2</sup>
10. If granted leave to intervene, the Proposed Interveners 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**

11. 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.<sup>3</sup> Working in collaboration with community, West Coast LEAF uses litigation, law reform, and public legal education to make change.<sup>4</sup>

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<sup>2</sup> *Bent v. Platnick*, 2020 SCC 23 and *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22.

<sup>3</sup> Affidavit of Raji Mangat, affirmed February 2, 2021 ("Mangat Affidavit"), at para. 7.

<sup>4</sup> *Ibid*

12. West Coast LEAF has extensive knowledge and experience from its work with and on behalf of survivors of gender-based violence, including sexual violence. West Coast LEAF has intervened, or is intervening, in numerous proceedings before this Court, the BC Court of Appeal, and the BC Supreme Court, including on issues related to gender-based violence and the rights and interests of survivors.<sup>5</sup> West Coast LEAF has also written reports, prepared workshops, and made submissions to government with the goal of improving legal and societal responses to gender-based violence.<sup>6</sup> Since 2016, West Coast LEAF has been engaged in a law reform project entitled *Dismantling the Barriers to Reporting Sexual Assault*, which aims to improve the treatment of complainants in the criminal justice system.<sup>7</sup>

## 2. WAVAW

13. WAVAW is BC's largest rape crisis centre and its mandate is to work toward a future free from sexualized violence.<sup>8</sup> It carries out its mandate by providing direct support services to survivors of sexualized violence, including by supporting them in criminal sexual assault cases. It also engages in educational outreach and systemic advocacy, including about the treatment and experiences of complainants in criminal sexual assault trials.<sup>9</sup> Most recently, since 2017, WAVAW has been engaged in the *Justice Project*, which supports justice system personnel to learn from survivors' lived experiences.<sup>10</sup> With respect WAVAW's systemic advocacy, it has contributed to the enactment of rape shield provisions and protections for sexual assault survivors under BC's *Victims of Crime Act*.<sup>11</sup>

## PART II – STATEMENT OF QUESTIONS IN ISSUE

14. The sole issue is whether the Proposed Interveners should be granted leave to jointly intervene in this appeal.

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<sup>5</sup> Mangat Affidavit, at paras. 13-16 and 21.

<sup>6</sup> Mangat Affidavit, at paras. 19-21.

<sup>7</sup> Mangat Affidavit, at para. 21.

<sup>8</sup> Affidavit of Dalya Israel, affirmed February 3, 2021 (“Israel Affidavit”), at paras. 5 and 8.

<sup>9</sup> Israel Affidavit, at paras. 7 and 12-13.

<sup>10</sup> Israel Affidavit, at para. 13.

<sup>11</sup> Israel Affidavit, at para. 13.

### **PART III - ARGUMENT**

15. The *Rules of the Supreme Court of Canada* provide this Court with broad discretion to decide whether to permit a person to intervene. Applicants seeking leave to intervene must establish that: (1) they have an interest or particular expertise in the subject matter of the appeal; and (2) their submissions will be useful to the Court and different from those of the parties.<sup>12</sup>

#### **A. The Proposed Interveners have particular interest and expertise**

16. The Proposed Interveners have a common, particular interest in this appeal because of their decades-long work with, and on behalf of, survivors of sexual violence. The issues in this appeal will directly affect members of the Proposed Interveners' constituencies, many of whom have lived experience of sexual violence or are at heightened risk of sexual violence. Further, this appeal's outcome will affect the Proposed Interveners' long-standing goals of improving societal and legal responses to sexual violence. Myths and stereotypes about sexual violence not only undermine the integrity of the criminal justice system, but also have downstream impacts on non-criminal legal and quasi-legal processes, as well as on societal attitudes toward sexual violence.

#### **B. The Proposed Interveners' submissions will be useful and distinct**

17. The "useful and different submission" criterion is satisfied by applicants who have a history of involvement with the issue, giving them expertise that can illuminate and provide new perspective on the matters under consideration. Where the applicant will provide the Court with a fresh perspective on an important constitutional or public issue, leave to intervene may be warranted.<sup>13</sup> As set out herein, the Proposed Interveners have significant experience supporting survivors of sexual violence and advocating on their behalf, including before this Court.

18. Further, the Proposed Interveners' submissions will be useful to the Court's determination of this appeal and different from those of other parties. They propose to submit that: (1) despite

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<sup>12</sup> *Rules of the Supreme Court of Canada*, SOR/2002-156, ss 55 and 57(2); *R. v. Barton*, 2019 SCC 33 at para 52 ("*Barton*"); *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.

<sup>13</sup> *Workers' Compensation*, *supra* note 11 at 340.

efforts at reform, the rules of evidence in criminal sexual assault cases continue to permit myths and stereotypes about sexual assault to obscure the fact-finding process; (2) complainant participation in applications under the accused in possession regime is critical to the proper enforcement of that regime; and (3) in order to realize the purpose of the accused in possession regime, complainant participation must be meaningful. Further, the Proposed Interveners will approach their submissions through an appreciation of the particular experiences and needs of complainants who experience multiple and intersecting indicia of inequality. These submissions are useful to the appeal because they highlight the potential of complainant participation to aid in the fact-finding process by refuting myths and stereotypes about sexual assault. These submissions are likewise distinct because West Coast LEAF and WAVAW offer an analytical approach which, by reconciling complainant participation with the truth-seeking function of the criminal justice system, shows that the rights of the accused and those of the complainant are not mutually exclusive.

### **1. Myths and stereotypes in the criminal justice system**

19. Sexual assault is an overwhelmingly gendered crime which serves to perpetuate the disadvantage of women and gender-diverse people.<sup>14</sup> It has a disproportionate impact on women and gender-diverse people who experience multiple and intersecting inequalities, including on the basis of Indigeneity, race, age, gender-identity, immigration status, sexual orientation, class, and sex worker status.<sup>15</sup>
20. Despite the evolution of Canadian sexual assault law, myths and stereotypes about sexual assault continue to plague the criminal justice system and undermine its truth-seeking function.<sup>16</sup> As a reflection of social conditions outside of the courtroom, myths and stereotypes are most common in relation to complainants who experience multiple and intersecting inequalities.<sup>17</sup> A notorious example is *R v. Barton*, in which prejudicial attitudes

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<sup>14</sup> Jennifer Koshan, “Disclosure and Production in Sexual Violence Cases: Situating Stinchcombe,” (2002) 40-3 *Alberta Law Review* 6559 (“Koshan”), at 657; Caroline White, Joshua Goldberg, “Expanding our Understanding of Gendered Violence: Violence against Trans People and their Loved Ones” (2006) 25.1-2 *Canadian Women’s Studies* at 125.

<sup>15</sup> *Koshan*, *supra* note 13, at 657.

<sup>16</sup> *R. v. Goldfinch*, 2019 SCC 38 (“*Goldfinch*”) at para. 2; *Barton*, *supra* note 11, at para. 1

<sup>17</sup> *Barton*, *supra* note 11, at para. 1.

toward the victim, Cindy Gladue, who was an Indigenous woman and a sex worker, permeated the trial process.<sup>18</sup>

21. The rules of evidence in criminal sexual assault cases, which have arisen through extensive dialogue between Parliament and the courts over the past three decades, aim to eliminate myths and stereotypes from the trial process through restrictions on the use of sexual history evidence and private records. However, there is a well-documented gap between their aims and their substantive results.<sup>19</sup> This gap can be partially explained by the pernicious influence of myths and stereotypes on the very interpretation and application of these provisions.<sup>20</sup>
22. The ongoing permeability of the rules of evidence allows myths and stereotypes to seep into criminal sexual assault cases, along with their resulting impacts on the integrity of the trial process and the equality, privacy and security rights of complainants. It poses the greatest risk to complainants who experience multiple and intersecting inequalities, who are not only more vulnerable to myths and stereotypes, but also more likely to have had records made about them.<sup>21</sup>

## **2. The relevance and significance of complainants' participatory rights**

23. In providing complainants with participatory rights in applications under the accused in possession regime, Parliament has recognized the extremely relevant perspective of the complainant.<sup>22</sup> In particular, complainants can help close the gap between the regime's aims and its substantive results by vigorously refuting myths and stereotypes about sexual assault in these applications.

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<sup>18</sup> *Barton*, *supra* note 11, at paras. 5, 205, and 223.

<sup>19</sup> Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions," (2016) 94 Canadian Bar Review 1 ("*Craig*"); Lise Gotell, "Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1–278.9 of the Criminal Code," (2008) Canadian Journal of Women and the Law, vol. 20 no. 1 ("*Gotell*").

<sup>20</sup> *Craig*, *supra* note 18, at 46; *Gotell*, *supra* note 18, at 114.

<sup>21</sup> *Gotell*, *supra* note 18, at 123.

<sup>22</sup> Proceeding of the Standing Senate Committee on Legal and Constitutional Affairs, 42<sup>nd</sup> Parl., 1<sup>st</sup> Sess., Issue No. 47 (June 20, 2018), at p. 2/15; *R. v. A.C.*, 2019 ONSC 4270, at 64.

24. The respective roles of Crown counsel and trial judges in the trial process mean that complainants cannot count on them to refute myths and stereotypes about sexual assault. First, the Crown does not represent the complainant—rather, the Crown’s role is to act independently in the public interest. In trying to do so, Crown counsel may subordinate the complainant’s rights and interests to other duties or concerns. Second, while trial judges may intervene to protect complainants, their ultimate duty is to be impartial decision-makers in the context of an adversarial system of justice.
25. Moreover, Crown counsel and trial judges are not immune from the influence of myths and stereotypes about sexual assault, as well as other forms of bias.<sup>23</sup> They may find it particularly difficult to protect complainants who experience multiple and intersecting inequalities, who face stark power imbalances and complex discrimination in the criminal justice system. In the example of *Barton*, the prosecutor allowed in sexual history evidence which should have been subject to a s. 276 application, while the trial judge did not give the jury any limiting instruction identifying the purposes for which sexual history evidence could and could not be used.<sup>24</sup> The prosecutor also participated in the use of prejudicial and dehumanizing language to describe Ms. Barton.<sup>25</sup>

### 3. What constitutes meaningful complainant participation

26. In assessing the constitutionality of the accused in possession regime, this Court will be called upon to provide guidance on what constitutes meaningful complainant participation. If granted leave to intervene, the Proposed Interveners will focus their submissions on three distinct aspects of meaningful complainant participation: (a) the scope of such participation; (b) the complainant’s access to independent legal representation; and (c) the impact of the timing of the admissibility application.
27. With respect to the scope of participation, the Proposed Interveners will argue that the complainant’s rights to attend and make submissions at an admissibility hearing must be

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<sup>23</sup> *R. v. Seaboyer; R. v. Gayme*, 1991 CanLII 76 (SCC), [1991] 2 SCR 577 (“*Seaboyer*”).

<sup>24</sup> *Barton*, *supra* note 11, at para. 5. See also *Goldfinch*, *supra* note 15, in which this Court held that the trial judge erred in allowing evidence of an ongoing sexual relationship (para. 45).

<sup>25</sup> *Barton*, *supra* note 11, at para. 205.



interpreted to include the rights to review the application materials, lead evidence, and cross-examine the accused on the affidavit sworn in support of the application. Without the ability to completely respond to the respondent's application and evidence, the complainant's submissions will often be of limited use to the trial judge.<sup>26</sup> The complainant's participatory rights must also extend to any application which affects their rights and interests under the accused in possession regime. The widespread use of pre-screening applications, which take place outside of the two-stage process prescribed by the accused in possession regime and thus often exclude the complainant, risk violating the spirit and intent of the regime. In particular, pre-screening applications which seek to determine if a complainant has a privacy interest in a record<sup>27</sup> strike at the heart of complainants' privacy interests.

28. It will not be the rare case where a complainant requires legal representation to give effect to their participatory rights.<sup>28</sup> Evidentiary questions are particularly challenging in criminal sexual assault cases, and complainants are uniquely disadvantaged within the trial process. Moreover, complainants who experience multiple and intersecting indicia of inequality may have additional barriers to making meaningful submissions on a self-represented basis. Conversely, where complainants do have access to legal representation, this allows complainants (and the court) to benefit from counsel's specialized knowledge and expertise in dealing with evidentiary questions from the perspective of the complainant.<sup>29</sup>
29. The timing of an application under the accused in possession regime likewise has significant implications for the complainant's participatory rights. An application which takes place during trial will often result in a trial adjournment, including so that the complainant can retain and instruct counsel. There is the risk that some complainants will forego their

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<sup>26</sup> *R. v. Boyle*, 2019 ONCJ 253, at para. 6.

<sup>27</sup> See, for example, *R. v. A.M.*, 2020 ONSC 1846; *R. v. Boyle*, 2019 ONCJ 11; and *R. v. E.A.*, 2020 ONSC 6657.

<sup>28</sup> *R. v. T.P.S.*, 2019 NSSC 48 ("*T.P.S.*"), at para. 25.

<sup>29</sup> *T.P.S.*, *supra* note 28, at 25; *Gottell*, *supra* note 18, at 2008. See also *R. v. T.A.H.*, 2019 BCSC 1614, in which Justice Blok noted: "I found it particularly helpful that there was counsel representing the complainant. It is not the Crown's role to advocate on behalf of a complainant and the additional perspective added much to the Court's understanding of the issues" (para. 67).

participatory rights to minimize the adverse impacts on them of trial interruption and delay. In particular, where an application takes place during the complainant's cross examination, the complainant risks weeks or months of being restricted in their ability to talk about their trial experiences with support people, including mental health professionals. In any event, an application which takes place during the complainant's cross examination hollows out the complainant's right to counsel. Even with leave of the court to speak to the complainant, counsel will be constrained in their candour and ability to give fulsome legal advice.

#### **PART IV – SUBMISSIONS**

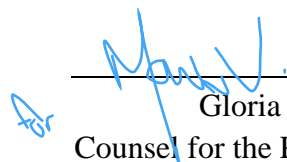
30. In this motion and in their intervention if granted leave to intervene, West Coast LEAF and WAVAW do not seek costs and ask that costs not be awarded against them.

#### **PART V – ORDER SOUGHT**

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

- a. Granting West Coast LEAF and WAVAW leave to intervene in this appeal;
- b. Permitting West Coast LEAF and WAVAW 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 WAVAW to present oral argument at 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 WAVAW; and
- e. Any further or other Order that this Court deems appropriate

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of February, 2021

  
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Gloria Ng and Kate Feeney  
Counsel for the Proposed Interveners

## PART VI – TABLE OF AUTHORITIES

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SECONDARY SOURCES	PARA(S)
Lise Gotell, "Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1–278.9 of the Criminal Code," <a href="#">(2008) Canadian Journal of Women and the Law, vol. 20 no. 1.</a>	21, 22, 28
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