

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

BETWEEN:

DANELLE MICHEL

APPELLANT
(Appellant)

AND:

SEAN GRAYDON

RESPONDENT
(Respondent)

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

TAKE NOTICE THAT the Moving Party, West Coast Legal Education and Action Fund Association (“West Coast LEAF”), hereby applies 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 leave to intervene in this appeal;
2. Permitting West Coast LEAF to file a factum of not more than ten (10) pages, or such other length as this Honourable Court deems appropriate;
3. Permitting West Coast LEAF to present oral argument at the hearing of the appeals of not more than five (5) minutes, or such other duration as this Honourable 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
5. Any such further or other Order that this Honourable Court deems appropriate.

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

1. As described in the affidavit of Rajwant Mangat, West Coast LEAF is a public interest organization that has 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. 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 was created in April 1985 when the equality provisions of the *Charter* came into force (then an affiliate of Women’s Legal Education and Action Fund (“LEAF”) until 2014). 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 direct experience and interest as well as a different and useful perspective with respect to the issues in this appeal, and can offer this perspective to this Court on issues critical to the determination of this appeal;
4. West Coast LEAF has appeared before the Supreme Court of Canada on multiple occasions (seven appeals under its own name and at least 23 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;
5. Given the above experience, West Coast LEAF has special knowledge of and experience on issues raised in this appeal, namely how child support payments are, fundamentally, a gender justice issue implicating the feminization of poverty and the entrenchment of child poverty;
6. If granted leave to intervene, West Coast LEAF will ensure that its submissions are relevant to this appeal, useful to the Court, and distinct from those to be made by the parties and any other intervener(s) in this appeal, focusing on the need for a gender-conscious and remedial lens that respects substantive equality in the statutory interpretation of the provisions related to child support variation orders, namely s. 152 of the British Columbia *Family Law Act*, and s. 17 of the federal *Divorce Act*;

7. Granting leave to intervene to West Coast LEAF will not prejudice any of the parties and West Coast LEAF and its members would suffer prejudice if leave to intervene in this appeal is denied;
8. West Coast LEAF will take the record as it finds it and will not seek to supplement the record;
9. West Coast LEAF will abide by the schedule set by the Registrar for the filing of materials;
10. These submissions are made under Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*; and
11. Such further and other grounds as counsel for West Coast LEAF may request and this Honourable Court may permit.

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

1. The affidavit of Rajwant Mangat, affirmed September 8, 2019;
2. The Memorandum of Argument of West Coast LEAF, dated September 9, 2019; and

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

DATED at Ottawa, Ontario, this 9th day of September, 2019.

POWER LAW / JURISTES POWER
401 West Georgia Street, Suite 1660
Vancouver, BC V6B 5A1

**Jennifer Klinck, Dustin Klaudt,
& Joshua Sealy-Harrington**

Tel: 778-658-0192
Fax: 778-658-0192
Email: dklaudt@powerlaw.ca

**Solicitors for the Proposed Intervener,
West Coast Legal Education
and Action Fund**

POWER LAW / JURISTES POWER
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette

Tel: 613-702-5573
Fax: 613-702-5573
Email: mvincelette@powerlaw.ca

**Agent for the Proposed Intervener,
West Coast Legal Education
and Action Fund**

**TO: THE REGISTRAR OF THE
SUPREME COURT OF CANADA**
301 Wellington Street
Ottawa, ON K1A 0J1

AND TO:

WESTSIDE FAMILY LAW
504 – 1367 West Broadway
Vancouver, BC V6H 4A7

Peter Mennie
Tel: 604-734-7911
Fax: 604-734-6366
Email: pmennie@westsidefamilylaw.ca

**Counsel for the Appellant,
Danelle Michel**

MICHAEL SOBKIN
Barrister & Solicitor
331 Somerset Street West
Ottawa, ON K2P 0J8

Michael Sobkin
Tel: 613-282-1712
Fax: 613-288-2896
Email: msobkin@sympatico.ca

**Agent for the Appellant,
Danelle Michel**

CENTRA LAWYERS LLP
102 - 20110 Lougheed Highway
Maple Ridge, BC V2X 2P7

GOWLINGS WLG (CANADA) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Karen Tiwana
Tel: 604-463-8890
Fax: 604-463-6760
Email: ktywana@centralawyers.ca

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

**Counsel for the Respondent,
Sean Graydon**

**Agent for the Respondent,
Sean Graydon**

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.

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

BETWEEN:

DANELLE MICHEL

APPELLANT
(Appellant)

AND:

SEAN GRAYDON

RESPONDENT
(Respondent)

**AFFIDAVIT OF RAJWANT MANGAT
(In support of West Coast LEAF's Application 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 have indicated the source and verily believe them to be true.
2. I was called to the bar in Ontario in 2004 and to the bar in British Columbia ("BC") 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 intervene in this appeal.
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, Danelle Michel, is the former spouse of

the Respondent, Sean Graydon, and is appealing from the judgment below denying orders for child support variance sought under the *Family Law Act*, S.B.C. 2011, c. 25 (“the *FLA*”).

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 an interpretation of the availability of child support under the *FLA*, that is broad, purposive, reflects the social and legislative context specific to the *FLA*, and respects the *Canadian Charter of Rights and Freedoms* (“*Charter*”) and international obligations that underpin the right to child support.

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

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. Working in collaboration with the community, West Coast LEAF uses litigation, law reform, and public legal education to make change. It 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 was a branch of a national organization, the Women’s Legal Education and Action Fund (“LEAF”). In 2009, West Coast LEAF became an affiliate of LEAF. Since 2009, 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.

8. During the last fiscal year, West Coast LEAF had approximately 370 members. As of September 5, 2019, West Coast LEAF employs 10 permanent staff members. It relies on the support of approximately 200 volunteers to carry out its work.

B. Experience of West Coast LEAF

9. West Coast LEAF acts to promote the equality interests of all women and gender diverse persons in BC, regardless of their 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. West Coast LEAF works to ensure that the law recognizes that discrimination and disadvantage are experienced as overlapping and intersecting axes of identity, including one's gender, family or marital status, age, and socioeconomic status.

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 either directly or indirectly relevant to the instant appeal in interventions before the Supreme Court of Canada and interventions or participation before lower courts and tribunals. Further, West Coast LEAF's submissions have been cited by multiple adjudicators. Lastly, West Coast LEAF does significant work in the areas of law reform and public education pertaining to gender equality.

i. Supreme Court of Canada intervention experience

12. West Coast LEAF has considerable intervention experience before the Supreme Court of Canada. It has intervened in many appeals before this Court (with one application for leave to intervene currently pending), either in its own name or through its participation in past litigation brought by LEAF, while West Coast LEAF was a branch of LEAF.

13. Interventions by West Coast LEAF, in its own name (seven appeals and one pending leave application), include:

- a. *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, B.W.S.S. Battered Women Support Services Association, and Women Against Violence Against Women Rape Crisis Center);
 - b. *Law Society of British Columbia v. Trinity Western University and Volkenant*, 2018 SCC 32 (“*TWU*”);
 - c. *Schrenk v. British Columbia Human Rights Tribunal*, 2017 SCC 62;
 - d. *R. v. Lloyd*, 2016 SCC 13;
 - e. *British Columbia Teachers’ Federation v. British Columbia Public School Employers’ Association*, 2014 SCC 70 (“*BCTF*”);
 - f. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59;
 - g. *British Columbia (Ministry of Education) v. Moore*, 2012 SCC 61; and
 - h. *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 (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 (3 appeals), these include:
- 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.).

16. LEAF intervened (once listed as a respondent) in several other cases dealing with issues specific to the present appeal, notably family law, statutory interpretation, and the evolving understanding of substantive equality. These include:

- a. *Dickie v. Dickie*, 2007 SCC 8 (“*Dickie*”);
- b. *Boston v. Boston*, 2001 SCC 43 (“*Boston*”);
- c. *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.) (“*Mills*”);
- d. *M. v. H.*, [1999] 2 S.C.R. 3 (S.C.C.) (“*M. v. H.*”);
- e. *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (S.C.C.) (“*Vriend*”);
- f. *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (S.C.C.) (“*Gordon*”);
- g. *Moge v. Moge*, [1992] 3 S.C.R. 813 (S.C.C.) (“*Moge*”); and
- h. *Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.) (“*Schachter*”) (listed as a respondent).

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, family law, and discrimination more broadly, as well as the resolution of statutory interpretation questions in a manner consistent with substantive equality, through its historic connection to and affiliation with LEAF. 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. In *Gordon*, this Court considered the general framework for variation of an order respecting children, in that matter relating to custody, under the federal *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.). In *Mills*, this Court considered a situation where “several provisions in [a] Bill [were] subject to differing interpretations” and despite this interpreted “the legislation in a constitutional manner where possible” (*Mills* at para. 22). In *Vriend*, this Court interpreted legislation that was underinclusive in providing protections against discrimination. In *Andrews*, *Schachter*,

Thibadeau, Eldridge, Vriend, M. v. H., Little Sisters, and TWU this Court considered various iterations of substantive equality in adjudicating alleged *Charter* rights infringements and non-conformity with *Charter* values (in *TWU*).

ii. Lower court and tribunal intervention experience

18. Additionally, West Coast LEAF has in its own name 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:

- (a) *A.B. v. C.D. and E. F.*, BC Court of Appeal File No. CA45940 (“*A.B.*”) (appeal heard September 3-5, 2019) (judgment reserved);
- (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] B.C.J. No. 335, 28 D.L.R. (4th) 429 (C.A.) (“*Shewchuk*”) (as part of a coalition with the 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) *Oger v. Whatcott*, 2019 BCHRT 58 (“*Oger*”);
- (r) *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
- (s) *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).

19. Many issues related to the present appeal have been considered in these other decisions. *Shewchuk* specifically dealt with the constitutionality of child support orders under the *Charter*, for predecessor legislation of the *FLA*, then the *Child Paternity and Support Act*, R.S.B.C. 1979, c. 49. *A.B.* deals with the interpretation and application of the *FLA*, specifically protections from family violence for a transgender minor. *Vilardell* considered the constitutionality of court hearing fees in BC Supreme Court trials in a family law dispute and required statutory interpretation of the scope of an indigency exception to those fees. *Inglis* considered the constitutionality of restrictions on child welfare, namely the denial of access of imprisoned mothers to their babies. The *Polygamy Reference*, *BCCLA*, and *CCD* each consider the systemic equality implications of criminal sanctions or administrative detention regimes.

20. Apart from 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).

iii. Citations by courts and tribunals

21. West Coast LEAF’s submissions have been cited by multiple court decisions and one tribunal decision, including in:

- a. *Oger* at paras. 69, 81, 111, 157, 244, and 324;
- b. *BCCLA BCSC* at paras. 439-442, 454, and 524;
- c. *TWU BCSC* at para. 140; and
- d. the *Polygamy Reference* at paras. 794, 847, 961, 964-965, 967-968, 976, and 978.

22. LEAF’s submissions have been cited with approval by this Court, including in:

- a. *Shearing* at para. 162; and
- b. *Schachter* at 702.

iv. Law reform and public education

23. West Coast LEAF's experience extends beyond litigation and advocacy to law reform and public education regarding women's equality.

24. West Coast LEAF's second program area is law reform. Its 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.

25. Public legal education rounds out West Coast LEAF's major program areas. West Coast LEAF's educational programming aims to help residents of BC 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.

26. West Coast LEAF has significant expertise in applying principles of substantive equality to constitutional and legislative interpretation, the development of the law, and state action that impacts the lives of women and children. This expertise is grounded in an understanding that sex and gender inequality are often compounded by and overlapping with other intersecting markers of stigma and disadvantage, such as one's age, family and marital status, and socioeconomic status.

C. Expertise of West Coast LEAF

27. The expertise that West Coast LEAF has developed through extensive advocacy, law reform, and public education efforts falls squarely within the scope of this appeal.

28. This appeal concerns access to child support that is owing to youth 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 greater child support, yet, fail to comply with that obligation.

29. The BC Court of Appeal declined to allow a retroactive variation of a child support order for the benefit of an “aged-out” child in this appeal, by accepting the statutory interpretation of the *FLA* that there is no jurisdiction of the BC Supreme Court to make such an order, as found by a narrow majority in *Dring v. Gheyle*, 2018 BCCA 435. West Coast LEAF is concerned that a confirmation of that outcome by this Court will undermine substantive equality by reinforcing the feminization of poverty and the entrenchment of child poverty post-parental separation.

30. 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*, R.S.B.C. 1996, c. 128 (the “*FRA*”)), 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 both the negative effects of deepening 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. West Coast LEAF’s work on child support is informed by its overall commitment to eliminating sex- and gender-based discrimination and poverty.

31. West Coast LEAF’s work on sex- and gender-based discrimination and alleviating poverty generally and with specific reference to the BC family law and Canada divorce regimes cuts across its litigation, law reform, and educational programming.

i. Relevant litigation submissions

32. A selection of recent relevant litigation and intervention submissions includes the following:

- a. *SMA Legal Aid Challenge* – West Coast LEAF developed and filed a constitutional challenge to BC’s family law legal aid scheme on behalf of the Single Mothers’ Alliance of BC and two individual plaintiffs. The notice of civil claim was filed in the BC Supreme Court on April 26, 2017. The respondents were recently unsuccessful in their application to have the challenge struck (*Single Mothers’ Alliance of BC Society v. British Columbia*, 2019 BCSC 1427). The case 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 the impugned scheme deprives women litigants of limited or moderate means, whose family law proceeding involves claims for child or spousal support, of their security of the person and equality rights. These women are denied the ability to alleviate continued or aggravated poverty and the impacts to the parent-child bond due to poverty post-separation. The pleadings also allege that the impugned scheme undermines the jurisdiction of superior courts to resolve disputes and decide questions of law. Specifically, some of the effects-based distinctions specific to family law legal aid in BC, alleged to violate *Charter* s. 15 equality rights, include:
 - i. That legal aid restrictions “limit the ability of women of limited or moderate means to access adequate legal representation in family law proceedings [...] den[ying] their right to equality before and under the law, and to the equal benefit and protection of the law, because it denies equal access to remedies under the [FLA], the [FRA], the *Divorce Act*, the common law and [the BC Supreme Court’s] equitable jurisdiction”;
 - ii. “Women litigants of limited or moderate means at the lowest end of the income spectrum experience disproportionately greater disadvantage from the cap on lawyers’ billable hours under legal aid retainers because they are the least able to afford legal representation when their legal aid hours run out”;

- iii. “Women litigants of limited or moderate means and their children are disproportionately affected by the inclusion of child support payments in the determination of net monthly household income for the purposes of assessing eligibility for legal aid. Child support payments are intended for the financial support of children, and inclusion of these payments in the calculation of a woman’s income for the purposes of determining legal aid artificially inflates household income and undermines the best interests of the children”; and
 - iv. “Women litigants are more likely than their male co-parents or ex-spouses to have primary economic and parental responsibilities for children following relationship breakdown”.
- b. *A.B.* – West Coast LEAF intervened in this matter where the appellant argued that a protection order granted under the *FLA* must not disproportionately constrain *Charter* freedom of conscience, expression, and liberty interests. West Coast LEAF articulated the various accepted standards to measure *Charter* compliance, including the use of *Charter* values as an interpretive guide to resolve genuine ambiguities when engaging in a statutory interpretation exercise. West Coast LEAF submitted that a *Charter* review should not be conducted in that case. It was further submitted that any rights of a parent are subordinate to the rights and best interests of a child and that a child’s rights must take precedence.
- c. *Oger* – West Coast LEAF intervened in a human rights complaint brought by a transgender woman concerning discriminatory publications. West Coast LEAF’s submissions focused on systemic discrimination against transgender people, as well as on the need for an administrative decision-maker to take a robust approach to reconciling or balancing potentially competing *Charter* rights or values.
- d. *TWU* – West Coast LEAF intervened at the BC Supreme Court, BC Court of Appeal and this Court to argue that the university’s community covenant discriminates against women and members of the LGBTQ+ community on the basis of sex, sexual orientation, and marital status.

- e. *BCTF* – West Coast LEAF intervened at this Court to stress the adverse effects to women resulting from the failure to recognize the distinct burdens of pregnancy, child-birth and post-partum recovery on birthing mothers. West Coast LEAF submitted that a parental leave supplemental employment benefits scheme that treated pregnancy leave and benefits and parental leave and benefits as serving the same purpose, failed to recognize these distinct adverse effects and constituted unlawful discrimination;
- f. *Rick* – West Coast LEAF (under the name of LEAF) intervened at this Court to address the duty of spouses to provide full and accurate disclosure during the negotiation of property agreements, and to submit that, where one spouse has exploited the known vulnerabilities of the other, separation agreements should be set aside as unconscionable. Further, it was submitted that *Charter* values related to substantive sex equality under s. 15 of the *Charter* should guide courts in their development of common law principles governing the validity of separation agreements. In that context, it was submitted that the *Charter* value of sex equality mandates the recognition of the disproportionately negative economic impact of family breakdown on women, and of the systemic disadvantages experienced by women relative to men in the negotiation of separation agreements.
- g. *Thibaudeau* – West Coast LEAF (under the name of LEAF and with co-interveners in a coalition) intervened at this Court arguing that both *Charter* values and Canada’s international human rights obligations should be used to interpret the content of s. 15 of the *Charter* equality protections. *Thibadeau* dealt with a *Charter* challenge to the constitutionality of the then s. 56(1)(b) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) which required separated parents to claim child support payments received where parents in a two parent family were not required to claim income transfers from one parent to another. West Coast LEAF, in its articulation of the larger social and economic context, noted that women experience an unfair disadvantage as a result of bearing the disproportionate share of the social costs of child-bearing and childrearing and that this disadvantage is exacerbated upon separation or divorce because women generally continue to be responsible for the care of children. It was further submitted that many women experience a severe decline in their standard of

living following separation and that single mother led families experience the highest incidence of family poverty in Canada.

ii. Relevant law reform submissions

33. A selection of recent relevant litigation and intervention submissions includes the following:

- 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 detailed the specific demography of women's poverty in BC. One of the focuses of the submissions was the need to harmonize any basic income framework with the *FLA* framework and to ensure there are no clawbacks of other policies to reduce women's systemic inequality including child and spousal support. The submissions also noted that despite BC's progressive family law legislation, "the difficulty in enforcing judicial orders" constitutes an ongoing significant barrier to participation in family law proceedings. 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 October 2018, West Coast LEAF prepared an online submission for the BC Budget 2019, to the Standing Committee on Finance and Government Services. That submission highlighted the gendered nature of poverty in BC and advocated for reforms in three areas impacting gender-based discrimination: the gender wage gap, a lack of appropriate child-care, and restricted access to social assistance. The submission highlighted the 2016 report of Westcoast LEAF "High Stakes: The Impacts of Child Care on Human Rights of Women and Children" and the findings that unpaid caregiving responsibilities disproportionately fall on women and the corresponding impact on their economic security. The submission further highlighted the deficiencies in BC's social assistance and income support regime, where certain familial relationships marked by likely insignificant financial support and that do not attract financial obligations of support (married but separated, co-residing with a partner for under three months, or co-residing with a roommate who sometimes indicates a parental role for the applicant's dependent child), disqualify a parent from

- social assistance and income support. West Coast LEAF recommended that the definitions of dependent and spouse in the social assistance legislation be amended to ensure that eligibility for social assistance is based on real financial need. West Coast LEAF has regularly made budget submissions since 2011 to the provincial and federal governments recommending increased investments for legal aid to combat gender-based discrimination.
- c. In September 2018, West Coast LEAF prepared a briefing note on Bill C-78 concerning reforms to the federal *Divorce Act*. West Coast LEAF highlighted how the complex dual jurisdictional issues exacerbated the access to justice crisis for women facing separation. The note also acknowledged that after a divorce, women, particularly those with dependent children, experience a more significant income drop than men and that female lone parent families have lower income and greater reliance on government transfers. West Coast LEAF recommended greater precision in the definitions of both spouse and parent to avoid future ambiguities. It further recognized the utility of proposed amendments to the *Family Orders and Agreements Enforcement Assistance Act*, R.S.C. 1985, c. 4 (2nd Supp.) (“*FOAEAA*”) 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. However, West Coast LEAF expressed concerns that unrepresented litigants may lack the ability to make use of court applications to obtain this relief, and recommended that judges be given jurisdiction to order release of information under the *FOAEAA* on their own motion.
- d. In March 2018, West Coast LEAF prepared written submissions for the Ministry of Social Development and Poverty Reduction on its BC Poverty Reduction Strategy. As part of its submissions, West Coast LEAF highlighted the disproportionate impact of poverty on income security and access to justice challenges for women. These adverse effects include the inability to leave abusive relationships due to economic insecurity, the impact of underfunding of legal aid and its effects on both women’s ability to launch financial claims successfully for financial support for themselves or their dependent children. West Coast LEAF recommended that the Strategy ensure

- there is adequate family law legal aid funding to allow women to navigate the complex family law system.
- e. 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.
 - f. In February 2017, West Coast LEAF wrote to the Standing Committee on Children and Youth to recommend that the Representative for Children and Youth maintain statutory oversight for the child protection system to ensure a robust accountability mechanism for the safety and security of children and youth.
 - g. In October 2016, West Coast LEAF (in partnership with the Coalition of Child Care Advocates of BC) submitted a report on the essential role of child-care for Canada’s compliance reporting on the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”). This report highlighted the gender imbalances that occur in relation to child care within families and the phenomenon of women’s career progression slowing in relation to that of their spouses, as they take on a disproportionate share of child care to allow the spouse to work more and maximize household income. CEDAW requires that state signatories take action to modify existing social and cultural patterns based on stereotyped roles for men and women and to ensure that women have the same rights and responsibilities during marriage as men. West Coast LEAF noted that steps to promote women’s access to affordable and high-quality child-care would be a key step in supporting this right to equal roles in the family.
 - h. 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, to enable women to leave violent spouses.

- i. In September 2016, West Coast LEAF wrote to the provincial government in response to a consultation papers about property division under the *FLA*. West Coast LEAF urged the province to ensure that the presumption of advancement operate on transfers of property between spouses to support economic equality by starting with a presumption that protects a non-property owning spouse by bringing excluded property back into the definition of family property where title was transferred during a relationship, which will most likely benefit women as men are more likely to have accumulated property prior to a marriage.
- j. In November 2013, Westcoast LEAF, along with First Call (the BC Child and Youth Advocacy Coalition) and the Community Legal Assistance Society, sent a letter to the BC Premier and Minister of Social Development and Social Innovation calling for an end to the provincial policy of clawing back child support payments from recipients who were also receiving income assistance.
- k. West Coast LEAF undertook public consultations in 2007 in response to the provincial review of the *FRA*. The result of this consultation was submitted to the Ministry of the Attorney General in December 2007 as part of the provincial review. West Coast LEAF recommended that family law legislation in BC be construed and applied in a manner that, among other things, highlighted in the consideration of spousal support the “social and economic disadvantages women experience in their role both in the workforce and also as the primary caregivers of children...[and that] women’s contributions to the management and maintenance of housework, food preparation and general organization of the home are also not fully appreciated or accounted for economically”. In 2010, West Coast LEAF made submissions in response to the Ministry’s White Paper on *FRA* Reform, highlighting the need for a resolution to the growing problem of inaccessibility of state funded legal counsel to ensure women are able to access the new provisions of the *FLA* and to prevent a situation “where women lack the ability to enforce their rights because they do not have access to legal aid or adequate translation services”.
- l. Since 2009, West Coast LEAF has reported annually on BC’s overall action to remedy gender-based discrimination by issuing a report card assessing the province’s

performance against the CEDAW in multiple areas impacting children and youth. As in past years, West Coast LEAF's 2018 CEDAW Report Card gives low grades to BC's overall action to remedy gender-based discrimination. In the areas of addressing access to justice and poverty, the Report Card identified the need for greater investment in legal aid to ensure access to justice for women who need it most, including migrant workers, women fleeing abusive relationships, and women at risk of having their children taken into government care.

iii. Relevant clinical legal assistance and public education

34. In May 2016, Rise Women's Legal Centre ("Rise") opened in Vancouver to provide legal services to women of low or moderate means. Many of the clients served by Rise are impacted by family violence. 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. Many clients of Rise are seeking recovery of outstanding child and spousal support entitlements.

35. A selection of recent relevant public legal education reports, workshops, and initiatives includes the following:

- a. West Coast LEAF also 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);
- viii. “Rights Based Legal Aid: Rebuilding BC’s Broken System” (in 2010);
- ix. “Not with a ten-foot pole: Law Students’ Perceptions of Family Law Practice” (in 2009);
- x. “Family Law Project: Court Watch Report 2005-2006”;
- xi. “Legal Aid Denied: Women and the Cuts to Legal Services in BC” (in 2004);
- xii. “Civil Legal Rights of Abused Women: A Transformative Public Legal Education Project” (in 2002).

36. West Coast LEAF has also prepared multiple reports on women’s and child poverty, as well as steps to alleviate barriers to substantive inequality for women facing compounded discriminatory effects, including:

- i. “Roads to Safety: Legal Information for Older Women in BC” (in 2016 with the Canadian Center for Elder Law”);
- ii. “Human Rights Denied: Single Mothers on Social Assistance in British Columbia” (in 2005);

- iii. “High Stakes: The impacts of child-care on the human rights of women and children” (in 2016); and
- iv. “Able Mothers: The intersection of parenting, disability, and the law” (in 2014).

37. West Coast LEAF maintains a Financial Issues in Family Law Workshop, which provides women with legal information about financial issues that come up in the course of separation and divorce, including:

- a. The legal test for when a separation agreement (which may include terms on spousal and child support) may be set aside on the basis that it is unfair;
- b. The *FLA* rules about division of property and debts and entitlements to child and spousal support;
- c. Legal tools for protecting family property; and
- d. Tips to assist women assess a family’s financial picture and prepare a financial statement for the relevant court.

38. West Coast LEAF was formerly engaged in a three year project (from 2010-2013) funded by Status of Women Canada, which included: the development of a workshop for lawyers on the intersections between equality and family law (the Equality Values in Family Law Webinar in February 2014) and a province-wide consultation with women serving organizations, lawyers, judges and others on how to meet legal needs through community based legal service delivery.

39. 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, some of which is described above.

D. West Coast LEAF’s Proposed Submissions

40. If granted leave to intervene in this appeal, West Coast LEAF proposes to make the following submissions:

- a. Child support disputes raise questions of substantive equality and gender justice because women are disproportionately represented amongst parents to whom child support payments are owed. The statutory interpretation of legislative provisions governing child support payments may, therefore, adversely impact women. Further, the support provisions of the *FLA* and *Divorce Act* are notionally social welfare legislation. It follows that a proper analysis of both acts requires a remedial and liberal approach.
- b. The BC Court of Appeal misapplied Supreme Court of Canada precedent. In the present appeal, the BC Court of Appeal followed its earlier majority ruling in *Dring v. Gheyle*, 2018 BCCA 435 and purported to apply this Court's decision in *D.B.S. v. S.R.G.*, 2006 SCC 37 to the appellant's application to vary an extant child support order, which was inconsistent with this Court's approach to *stare decisis* in *Canada (Attorney General) v. Bedford*, 2013 SCC 72. A new statutory interpretation exercise is therefore warranted.
- c. The availability of a variance in child support orders in circumstances such as the present appeal is supported by the plain language, purpose, and underlying context of the *FLA* and *Divorce Act*. Such interpretations also further the *Charter* values of substantive equality and compliance with Canada's international obligations.

41. 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 proposed submissions should leave to intervene in this appeal be granted.

42. If granted leave to intervene, West Coast 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.

43. 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 8th day of)
September, 2019.)
)
)
)
)

A Commissioner for taking Oaths
in British Columbia

RAJWANT MANGAT

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

BETWEEN:

DANELLE MICHEL

APPELLANT
(Appellant)

AND:

SEAN GRAYDON

RESPONDENT
(Respondent)

**MEMORANDUM OF ARGUMENT OF THE PROPOSED INTERVENER,
WEST COAST LEGAL EDUCATION AND ACTION FUND**

Pursuant to Rules 25(1)(c), 47(1)(c), and 55-59 of the *Rules of the Supreme Court of Canada*

**MEMORANDUM OF ARGUMENT OF THE PROPOSED INTERVENER,
WEST COAST LEGAL EDUCATION AND ACTION FUND**

PART I – FACTS

(a) Overview

1. West Coast Legal Education and Action Fund Association (“West Coast LEAF”) seeks leave to intervene in this appeal in order to make submissions on the importance of maintaining incentives to increase the likelihood that women and children have access to the support they are legally owed, with a view to promoting substantive equality. West Coast LEAF has a public interest in the issues raised in this appeal, and its submissions will be useful and distinct. It respectfully requests that it be granted leave on that basis.
2. This appeal concerns whether — under the British Columbia *Family Law Act*¹ and indirectly the federal *Divorce Act*²— a parent obtains absolute immunity from child support payments they were legally obligated to pay, simply on account of the passage of time — that is, simply because they shirked their obligations for enough time. As many mothers are the recipients of child support, and many fathers the payers, child support incentives are, structurally, a significant contributor to the feminization of poverty, and women’s inequality.
3. The issues raised in this appeal fall squarely in West Coast LEAF’s public interest mandate, which includes the aspiration to transform society by achieving “access to justice; economic security; [...] and, the right to parent”.³ As a longstanding public interest organization seeking substantive equality for women and children, West Coast LEAF has significant historical involvement with issues relating to family law, including the adverse effects certain family law provisions can have on women with respect to income insecurity, the feminization of poverty, and the entrenchment of child poverty resulting from parental separation and the denial of support.⁴ Further, West Coast LEAF has broad experience with the interpretation of substantive equality

¹ *Family Law Act*, [S.B.C. 2011, c. 25](#) (“FLA”).

² *Divorce Act*, [R.S.C. 1985, c. 3 \(2nd Supp.\)](#).

³ Affidavit of Rajwant Mangat, affirmed September 8th, 2019 (“Mangat Affidavit”) at para. 6; Motion Record at 10.

⁴ Mangat Affidavit at paras. 17 and 19-20; Motion Record at 14-15.

rights under the *Canadian Charter of Rights and Freedoms* (the “*Charter*”)⁵ and in statutory interpretation.⁶

4. If leave to intervene is granted, and subject to review of the Respondent’s submissions and consultation with other interveners, West Coast LEAF will submit that:

- a. Child support disputes raise questions of substantive equality and gender justice because women are disproportionately represented amongst parents to whom child support payments are owed. The statutory interpretation of legislative provisions governing child support payments may, therefore, adversely impact women. Further, the support provisions of the *FLA* and *Divorce Act* are notionally social welfare legislation. It follows that a proper analysis of both acts requires a remedial and liberal approach.
- b. The British Columbia Court of Appeal misapplied precedent from this Court. In the present appeal,⁷ the British Columbia Court of Appeal followed its earlier majority ruling in *Dring v. Gheyle*,⁸ and purported to apply this Court’s decision in *D.B.S. v. S.R.G.*⁹ to the appellant’s application to vary an extant child support order, which was inconsistent with this Court’s approach to *stare decisis* in *Canada (Attorney General) v. Bedford*.¹⁰ A new statutory interpretation exercise is therefore warranted.
- c. The availability of a variance in child support orders in circumstances such as the present appeal is supported by the plain language, purpose, and underlying context of the *FLA* and *Divorce Act*. Such interpretations also further the *Charter* values of substantive equality and compliance with Canada’s international obligations.

5. This Court’s decision in the present appeal will have a wide-reaching impact on the substantive equality of women and children, who rely on child support to provide income security and a minimum standard of welfare. West Coast LEAF’s submissions will be grounded in its

⁵ *Canadian Charter of Rights and Freedoms*, [Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 \(UK\), 1982, c 11](#).

⁶ Mangat Affidavit at paras. 17, 19-20, 30; Motion Record at 14-15 and 19.

⁷ *Graydon v. Michel*, [2018 BCCA 449](#) at paras. 2 and 28-30 (“BCCA Decision”).

⁸ *Dring v. Gheyle*, [2018 BCCA 435](#) at paras. 87 and 97-98 (“*Dring*”).

⁹ *D.B.S. v. S.R.G.*, [2006 SCC 37](#) at paras. 89 (“*D.B.S.*”).

¹⁰ *Canada (Attorney General) v. Bedford*, [2013 SCC 72](#) at para. 42 (“*Bedford*”). See also *Carter v. Canada (Attorney General)*, [2015 SCC 5](#) at para. 44 (“*Carter*”).

experience and knowledge in relation to issues of family law, substantive equality for women and children, and statutory interpretation.

(b) West Coast LEAF

6. West Coast LEAF was created in April 1985 when the equality provisions of the *Charter* came into force. 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.¹¹

7. As detailed in the Affidavit of West Coast LEAF's Executive Director, Rajwant Mangat, West Coast LEAF has extensive knowledge and experience in advocating for the substantive equality of women and children. West Coast LEAF has been granted leave to intervene in this Court and other courts and tribunals many times.¹² It has provided submissions before legislative committees and for government consultation processes on law reform.¹³ It runs a family law legal clinic¹⁴ and it has also prepared multiple reports and workshops on substantive access to family law legal aid to facilitate enforcement of child support entitlements.¹⁵ West Coast LEAF will provide a unique and useful perspective on this appeal, in particular, by highlighting the need for access to child support to promote women's and children's substantive equality, and for a liberal statutory interpretation of the *FLA* and *Divorce Act* regimes governing access to child support in British Columbia.

8. In its intervention, West Coast LEAF will work co-operatively with parties and other interveners to ensure that its submissions are not duplicative. West Coast LEAF does not seek leave to file any new evidence and if granted leave to intervene would rely entirely on the record as it has been created by the parties.

PART II – QUESTION IN ISSUE

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

¹¹ Mangat Affidavit at para. 6; Motion Record at 10.

¹² Mangat Affidavit at paras. 13-22 and 32; Motion Record at 11-17 and 20-23.

¹³ Mangat Affidavit at paras. 24 and 33; Motion Record at 18 and 23-27.

¹⁴ Mangat Affidavit at para. 34; Motion Record at 27.

¹⁵ Mangat Affidavit at paras. 35-38; Motion Record at 27-30.

PART III –ARGUMENT

10. An applicant seeking leave to intervene before this Court under s. 55 of the *Rules of the Supreme Court of Canada* must establish:

- a) A special interest or particular expertise in the subject matter of the appeal; and
- b) That its submissions will be useful to the Court and different from those of the other parties.¹⁶

(a) West Coast LEAF’s interest in this appeal

11. West Coast LEAF’s interest in this appeal flows directly from its mission to promote women’s equality across Canada. Central to this mission is advocacy on public interest issues that impact women, including with respect to the ways family law doctrines can adversely affect their access to justice and income security. The issues in this appeal will directly impact members of West Coast LEAF’s constituency, including women and children seeking to enforce child support entitlements. This appeal’s outcome could affect West Coast LEAF’s longstanding efforts to promote substantive equality for women and children.¹⁷ Given the direct relation between the issues in this appeal and West Coast LEAF’s mission, it has a direct stake in this appeal.

(b) If granted leave to intervene, West Coast LEAF will make useful and different submissions

12. The “useful and different submission” criterion is satisfied by an applicant who has a history of involvement with the issue giving the applicant expertise that can shed fresh light or provide new information on the matter.¹⁸

13. West Coast LEAF’s submissions will be useful because it brings to these proceedings considerable knowledge and experience with family law issues impacting women and children (and, in particular, the impacts of support obligations due to women and children). This knowledge and experience are the product of West Coast LEAF’s extensive direct engagement with the public through the Rise Legal Clinic, its public consultations and public education activities, its law reform advocacy, and broad history of past legal interventions in this Court and other courts,

¹⁶ *Rules of the Supreme Court of Canada*, [S.O.R./2002-156](#), ss. 55 and 57(2); *R. v. Barton*, [2019 SCC 33](#) at para. 52 (“*Barton*”).

¹⁷ Mangat Affidavit at paras. 13-22, 24, and 32-38; Motion Record at 11-18 and 20-30.

¹⁸ *Rules of the Supreme Court of Canada*, [S.O.R./2002-156](#), ss. 55 and 57(2); *Barton* at para. 52.

tribunals, and inquiries. West Coast LEAF's interventions before this Court include seven in its own name and at least 23 others through its historical affiliation with the national Women's Legal Education and Action Fund.¹⁹ These interventions have spanned issues of family law, substantive equality, and statutory interpretation. This makes West Coast LEAF particularly well-placed to offer this Court a useful perspective on the wider women's equality issues raised in this appeal, including the subtlety of how nominally neutral doctrines can adversely impact gender minorities, and in turn, compromise substantive equality.

14. West Coast LEAF's submissions will be different from those of the parties. It is uniquely positioned to apply a gender-conscious lens to scrutinize child support incentives, mindful of how unduly strict interpretations of support legislation will undermine women's equality. West Coast LEAF represents a demographic group particularly reliant on the child support regime specifically, and family law legislation more broadly. This perspective necessarily extends beyond the interests of the current parties in this appeal and, thus, West Coast LEAF can offer this Court a valuable and distinct perspective on the issues in dispute. West Coast LEAF's efforts to improve the conditions of sex and gender minorities would be prejudiced if its request to intervene were to be denied.

(c) West Coast LEAF's proposed submissions

15. West Coast LEAF proposes to make submissions on three discrete points, all critical to the proper interpretation of child support obligations under the *FLA* (and to the extent it is engaged the *Divorce Act* as well):

- (a) That the British Columbia Court of Appeal erred in failing to apply a gender-conscious and remedial lens to its interpretation of the *FLA* and *Divorce Act*;
- (b) That the British Columbia Court of Appeal erred in holding that *D.B.S.* was binding in the instant appeal. *D.B.S.* interpreted a distinct legislative scheme from that at issue in the present appeal (the federal *Divorce Act*, in contrast with British Columbia's *FLA*). For this reason, the British Columbia Court of Appeal misapplied vertical *stare decisis* as set out by this Court in *Bedford* and *Carter*. Similarly, the Court of Appeal's *obiter dicta* on the *Divorce Act*, deal with a

¹⁹ Mangat Affidavit at paras. 13-17, 20-21, and 32; Motion Record at 11-15, 17, and 20-23.

different provision from the one at issue in *D.B.S.* (s. 17 compared to s. 15), and accordingly misapplied the *Bedford/Carter* standard; and

- (c) That an interpretation of s. 152 of the *FLA* and s. 17 of the *Divorce Act* that is consistent with its text and remedial purpose, precludes time-based immunities. Such an interpretation is one that is consistent with *Charter* values and Canada's international obligations.

i. A gender-conscious and remedial lens precludes time-based immunities to established *FLA* child support obligations

16. By applying the majority holding in *Dring* and allowing, in effect, a time-based immunity for seeking variances of a child support order under s. 152 of the *FLA*,²⁰ the British Columbia Court of Appeal's analysis did not reflect a gender-conscious nor remedial interpretation of the *FLA*. To the extent that the *Dring* majority also found, in *obiter dicta*, that the *Divorce Act*'s s. 17 variation provision was held in *D.B.S.* to similarly impose a time-based immunity,²¹ that interpretation similarly lacks a gender-conscious and remedial focus.

17. This Court has previously recognized that women experience an unfair disadvantage because they shoulder a disproportionate share of the social costs of pregnancy and child-care, and that this disadvantage is exacerbated upon separation because women most commonly are responsible for child-care post-separation.²² Women form an overwhelming majority of child support recipients. The former federal Attorney General, Jody Wilson Raybould, recently highlighted this phenomenon in a speech before Parliament outlining proposed amendments (since enacted) to the *Family Orders and Agreements Enforcement Act* that conferred greater powers upon courts and provincial services, relating to the search and release of income information.²³ The former Attorney General noted:

“[t]his amendment is intended to allow child support orders to be made more quickly, accurately and with less trouble and expense. Costs would be reduced to families and

²⁰ BCCA Decision at paras. 2 and 28-30; *Dring* at paras. 97-98.

²¹ *Dring* at paras. 85-87.

²² *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (S.C.C.) at 1238; *Moge v. Moge*, [1992] 3 S.C.R. 813 (S.C.C.) at 849-850, 854-856, 861-864, and 867-869 per L'Heureux-Dubé J.; *Symes v. Canada*, [1993] 4 S.C.R. 695 (S.C.C.) at 762-763 per Iacobucci J.; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627 (S.C.C.) at 689 (“*Thibaudeau*”) per L'Heureux-Dubé J. in dissent.

²³ Canada, Parliament, *House of Commons Debates*, [42nd Parl., 1st Sess., Vol. 148, No. 326 \(26 September 2018\)](#); *Family Orders and Agreements Enforcement Act*, R.S.C. 1985, c. 4 (2nd Supp.).

courts. There are billions of dollars of unpaid child support payments in Canada. With this bill, we would be giving provinces, territories, and individuals more tools to ensure that those obligations are being paid. In addition, the vast majority, some 96% of cases registered in maintenance enforcement programs involve male payers paying female recipients. The problem of unpaid support contributes to the feminization of poverty, which the measures in this bill would help address.”²⁴

18. A narrow – and, indeed, counter-textual – interpretation of s. 152 of the *FLA* or s. 17 of the *Divorce Act* permitting time-based immunities, such as the one found by the majority of the British Columbia Court of Appeal in *Dring*, does nothing to alleviate the pressing social ill of failure to pay child support and its contribution to the feminization of poverty. West Coast LEAF will submit that a time-based immunity might also serve as a perverse disincentive for accurate and timely reporting of income information, which could exacerbate the child support default problem.

19. This pressing issue of child support default, must also inform a remedial and liberal construction of child support legislation, in stark contrast with the unduly narrow approach of the British Columbia Court of Appeal.²⁵ It is well established that “social welfare legislation is to be liberally construed so as to advance the benevolent purpose of the legislation” and a “court’s primary concern is ensuring that the intended benefits are received”.²⁶ This Court has grounded spousal support statutory obligations in a “social obligation model” which considers a “spouse’s actual ability to fend for himself or herself and the effort that has been made to do so”.²⁷ Statutory obligations for child support should receive the same remedial characterization and beneficial interpretation.²⁸

²⁴ *Ibid*. It is notable that the gender imbalance in receipt of support does not appear to be substantively declining as this Court found in *Thibaudeau* at 689 that “98 percent of alimony recipients [were] women”, almost 25 years ago.

²⁵ Ruth Sullivan, *Construction of Statutes*, 6th edition (Lexis Nexis, September 2014) at 487 (“Sullivan”).

²⁶ *Ibid* at 509-510; See also *Abrahams v. Canada (Attorney General)*, [1983] 1 S.C.R. 2 (S.C.C.) at 10.

²⁷ *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 40. Professor Rogerson has also characterized spousal support as “a scheme of income security, a private counterpart to public schemes of social assistance”. See Carol Rogerson, “Spousal Support After Moge” (1996-1997), 14 C.F.L.Q. 281 at 284.

²⁸ It is not insignificant that previously for many women in British Columbia, including the appellant (and indeed presently for women in some provinces), child support benefits were clawed back from social assistance benefits, functionally equating the two benefits. See BCCA

ii. Vertical stare decisis should not have applied as D.B.S. did not consider s. 152 of the FLA nor s. 17 of the Divorce Act

20. The majority in *Dring* found that “[t]he language of s. 152 of the *FLA* closely aligns with that in s. 17(1) of the *Divorce Act* [...]they are both application-based and are captured by the ratio in *D.B.S.* [...]in my respectful opinion, they should be interpreted in the same way”.²⁹ In holding that the ratio from *D.B.S.* had a “capturing” effect on the interpretation of the *FLA*, the majority found, in essence, that it was bound by precedent. That is, it considered the principle of vertical *stare decisis* to apply.³⁰ The majority did so, without considering this Court’s leading articulations of vertical *stare decisis* in *Bedford* and *Carter*.³¹

21. This appeal raises an entirely distinct legal issue not addressed in *D.B.S.*, namely the interpretation of a separate section of the *Divorce Act*³² and also an altogether separate enactment the *FLA*. The *FLA* s. 152 has distinguishable wording and a distinct underlying statutory scheme from s. 15 of the *Divorce Act*, which was interpreted in *D.B.S.* Lower courts should not use a *stare decisis* “straitjacket”³³ to avoid a full and robust statutory interpretation of related but distinct provisions of a previously considered statute or provisions in a different statute, where those provisions have distinctive text, purposes, and contexts. Indeed, to follow the British Columbia Court of Appeal’s approach would, in effect, jettison long-standing jurisprudence as to the proper methodology underpinning statutory interpretation.³⁴

iii. Interpreting the FLA and Divorce Act as precluding time-based immunities is consistent with Charter values and Canada’s international obligations

22. A full and robust statutory interpretation exercise, that considers the plain meaning of a statute, its purpose, and surrounding context, as was done by the *Dring* minority, leads to the conclusion that “a judge has the authority to change an existing order respecting child support

Decision at para. 7. Note that West Coast LEAF previously advocated against the clawbacks prior to their reversal, see *Mangat Affidavit* at para. 33(j); *Motion Record* at 26.

²⁹ *Dring* at para. 98.

³⁰ *Bedford* at paras. 38-39.

³¹ *Carter* at para. 44, citing *Bedford* at para. 42.

³² There is a divergence of appellate opinion on this point with the Ontario Court of Appeal finding that *D.B.S.* was not binding on s. 17 of the *Divorce Act* (*Colucci v. Colucci*, [2017 ONCA 892](#) at paras. 11-14) and the British Columbia Court of Appeal finding that *D.B.S.* did address s. 17, see *Dring* at para. 86.

³³ *Carter* at para. 44.

³⁴ *Rizzo & Rizzo Shoes Ltd. (Re)*, [\[1998\] 1 S.C.R. 27](#) at paras. 22-23, 27, 30-32, and 40.

whether or not the subject of that order is still a child within the meaning of the [FLA] when the Application is brought”.³⁵ Further, such a conclusion is consistent with both *Charter* values and Canada’s international obligations with respect to child support.

23. Statutes must comply with *Charter* rights. West Coast LEAF agrees here with the appellant that the statutory interpretation of s. 152 of the *FLA* is clear and no ambiguity is raised.³⁶ There is insufficient textual language in the *FLA*, legislative purpose, or contextual factors suggesting the British Columbia Legislature intended to deny jurisdiction for a child support order for those who have aged out.

24. Were this appeal a circumstance where a clear legislative prohibition on the appellant’s desired order was evident, such a provision might not pass *Charter* s. 15 scrutiny.³⁷ Even if the respondent established that s. 152 of the *FLA* (or s. 17 of the *Divorce Act*) is ambiguous, i.e., “is subject to differing, but equally plausible, interpretations” such ambiguity must be resolved in accordance with *Charter* values.³⁸ To deny child support based on a time bar runs counter to the *Charter* values of equality and dignity, as it contributes to the growing child support default crisis, thereby aggravating the feminization of poverty and entrenching child poverty.

25. Further, it is a “well-established interpretive principle of statutory interpretation that legislation will be presumed to conform to international law” and this “presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international

³⁵ *Dring* at para. 159.

³⁶ Appellant’s Factum at para. 53.

³⁷ Recent decisions have found that the *Charter* s. 15 equality rights mandated child support for disabled dependent adult children. See *Coates v. Watson*, [2017 ONCJ 454](#) at para. 227 and *Ryan v. Pitchers*, [2019 ABQB 19](#) at para. 27. As many young adults have increasing dependence on parents, a situation where a separated parent seeks support from their former spouse for a dependent adult child might attract *Charter* scrutiny.

³⁸ *Bell Express Vu Limited Partnership v. R.*, [2002 SCC 42](#) at para. 62. See Sullivan, at 22-24 and 528-531 for a critique of the *Charter* values principles’ confinement only to cases of legislative ambiguity. In some foreign jurisdictions, there is a general and mandatory canon of construction requiring review of constitutionalized rights when interpreting legislation. See e.g. South Africa where “when interpreting any legislation [...] every court, tribunal or forum must promote the spirit, purport and object of the Bill of Rights” under s. 39(2) of its Bill of Rights, see *Makate v. Vodacom (Pty.) Ltd.*, [\[2016\] ZACC 13](#); 2016 (6) BCLR 709 at paras. 87-93.

obligations, unless the wording of the statute clearly compels that result”.³⁹ The denial of access to child support for those who have aged out would be misaligned with multiple international obligations.⁴⁰

PART IV – SUBMISSION ON COSTS

26. West Coast LEAF does not seek costs in this motion and would not seek costs in its intervention if granted leave to intervene. West Coast LEAF asks that costs not be awarded against it in this motion or in the appeal if leave to intervene is granted.

PART V – ORDER SOUGHT

27. West Coast LEAF respectfully requests an Order from this Honourable Court:
- a. Granting West Coast LEAF leave to intervene in this appeal;
 - b. Permitting West Coast LEAF to file a factum of not more than ten (10) pages, or such other length as this Honourable Court deems appropriate;
 - c. Permitting West Coast LEAF to present oral argument at the hearing of the appeals of not more than five (5) minutes, or such other duration as this Honourable 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
 - e. Any such further or other Order that this Honourable Court deems appropriate.

ALL OF WHICH IS RESPECTULLY SUBMITTED, this 9th day of September, 2019

**Jennifer Klinck, Dustin Klaudt, &
Joshua Sealy-Harrington**

³⁹ *R. v. Hape*, [2007 SCC 26](#) at para 53.

⁴⁰ See *Convention on the Rights of the Child*, 20 November 1989, [1577 UNTS 3](#) (entered into force 2 September 1990, ratification by Canada 13 December 1991), Article 27(4); *Convention on the Elimination of All Forms of Discrimination against Women*, 1 March 1980, [1249 UNTS 13](#) (entered into force 3 September 1981, ratification by Canada 10 December 1981), Article 6(1)(d); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, [993 UNTS 3](#) (entered into force 3 January 1976, ratification by Canada May 1976), Articles 10(1) and 11(1).

PART VI – TABLE OF AUTHORITIES

		Reference para(s)
CASE LAW		
<i>Canadian</i>		
<i>Abrahams v. Canada (Attorney General)</i> , [1983] 1 S.C.R. 2 (S.C.C.)		19
<i>Bell Express Vu Limited Partnership v. R.</i> , 2002 SCC 42		24
<i>Bracklow v. Bracklow</i> , [1999] 1 S.C.R. 420		19
<i>Brooks v. Canada Safeway Ltd.</i> , [1989] 1 S.C.R. 1219 (S.C.C.)		17
<i>Canada (Attorney General) v. Bedford</i> , 2013 SCC 72		4, 15, 20
<i>Carter v. Canada (Attorney General)</i> , 2015 SCC 5		4, 15, 20-21
<i>Coates v. Watson</i> , 2017 ONCJ 454		24
<i>Colucci v. Colluci</i> , 2017 ONCA 892		21
<i>D.B.S. v. S.R.G.</i> , 2006 SCC 37		4, 15-16, 20-21
<i>Dring v. Gheyle</i> , 2018 BCCA 435		4, 16, 18, 20-22
<i>Graydon v. Michel</i> , 2018 BCCA 449		4, 16, 19
<i>Moge v. Moge</i> , [1992] 3 S.C.R. 813 (S.C.C.)		17
<i>R. v. Barton</i> , 2019 SCC 33		10, 12
<i>R. v. Hape</i> , 2007 SCC 26		25
<i>Rizzo & Rizzo Shoes Ltd. (Re)</i> , [1998] 1 S.C.R. 27		21

<i>Ryan v. Pitchers</i> , 2019 ABQB 19	24
<i>Symes v. Canada</i> , [1993] 4 S.C.R. 695 (S.C.C.)	17
<i>Thibaudeau v. Canada</i> , [1995] 2 S.C.R. 627 (S.C.C.)	17
Foreign	
<i>Makate v. Vodacom (Pty.) Ltd.</i> , [2016] ZACC 13 ; 2016 (6) BCLR 709	24
LEGISLATION, PARLIAMENTARY DEBATE, AND OTHER LEGAL INSTRUMENTS	
Canadian	
Canada, Parliament, <i>House of Commons Debates</i> , 42nd Parl., 1st Sess., Vol. 148, No. 326 (26 September 2018)	17
<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	4, 6, 15, 22-24
<i>Divorce Act</i> , R.S.C. 1985, c. 3 (2nd Supp.)	2, 4, 7, 15-16, 18, 20-21, 24, 26
<i>Family Law Act</i> , S.B.C. 2011, c. 25	2, 4, 7, 15-16, 18, 20-24, 26
<i>Family Orders and Agreements Enforcement Act</i> , R.S.C. 1985, c. 4 (2nd Supp.)	17
<i>Rules of the Supreme Court of Canada</i> , S.O.R./2002-156	10, 12
International	
<i>Convention on the Elimination of All Forms of Discrimination against Women</i> , 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981, ratification by Canada 10 December 1981)	26
<i>Convention on the Rights of the Child</i> , 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, ratification by Canada 13 December 1991)	26
<i>International Covenant on Economic, Social and Cultural Rights</i> , 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976, ratification by Canada May 1976)	26

SECONDARY SOURCES	
Carol Rogerson, "Spousal Support After Moge" (1996-1997), 14 C.F.L.Q. 281	19
Ruth Sullivan, <i>Construction of Statutes</i> , 6 th edition (Lexis Nexis, September 2014)	19, 24