

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

**BETWEEN:**

**ATTORNEY GENERAL OF BRITISH COLUMBIA**

**APPELLANT**  
**(Respondent)**

**AND:**

**COUNCIL OF CANADIANS WITH DISABILITIES**

**RESPONDENT**  
**(Appellant)**

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

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SCC File No. 39430

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

**BETWEEN:**

**ATTORNEY GENERAL OF BRITISH COLUMBIA**

APPELLANT  
(Respondent)

**AND:**

**COUNCIL OF CANADIANS WITH DISABILITIES**

RESPONDENT  
(Appellant)

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NOTICE OF MOTION FOR LEAVE TO INTERVENE  
OF WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION  
(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 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 Court deems appropriate;
3. Permitting West Coast LEAF to present oral argument at the hearing of this 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
5. Any such further or other Order as this Court deems appropriate.

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

6. As described in the affidavit of Rajwant Mangat, affirmed July 25, 2021, West Coast LEAF is a non-profit organization that has a direct and significant interest in the issues raised in this appeal.
7. West Coast LEAF's 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.
8. West Coast LEAF has appeared before this Court on twelve occasions as an intervenor (as outlined at paragraph 14 of the affidavit of R. Mangat), in addition to numerous appearances before the Court of Appeal for British Columbia and the Supreme Court of British Columbia, to address a variety of issues impacting gender equality, including issues relating to access to justice.
9. West Coast LEAF has particular interest and expertise in relation to the principles applicable to public interest standing that are at issue in this appeal. West Coast LEAF has past and present involvement in public interest litigation where it advocates on behalf of, and in consultation with, members of marginalized communities seeking to assert their rights and freedoms under the *Canadian Charter of Rights and Freedoms*.
10. In light of its interest in the questions at issue in this appeal, West Coast LEAF applied for and was granted leave to intervene in the Court of Appeal in this proceeding. Justice Dickson expressly noted at paragraph 59 of her judgment that these submissions were helpful to the court.
11. If granted leave to intervene in this Court, West Coast LEAF will submit that this Court should reject the narrow, constrained approach to public interest standing urged by the Attorney General. To this end, West Coast LEAF will generally follow the submissions it made in its factum filed in the court below, which is

attached as Exhibit A to the affidavit of R. Mangat. West Coast LEAF submissions are outlined as follows.

12. First, West Coast LEAF will argue that the reality of modern *Charter* litigation aimed at s. 52 remedies does not so heavily depend upon a plaintiff's own circumstances, contrary to the position of the Attorney General. Rather, recent *Charter* decisions seeking to strike down legislation demonstrate that the preponderance of evidence driving these cases comes from sources other than named individual plaintiffs. In making that submission, West Coast LEAF will provide this Court with a review of those recent decisions, showing that it is the whole body of evidence – usually a very substantial body of evidence, and much of it expert evidence – that supports the courts' findings, and not the particular evidence of individual litigants.
13. Second, in light of the practical need to muster a broad body of evidence – including expert evidence – to successfully obtain a s. 52 remedy, a narrow approach to public interest standing will disproportionately affect women and other traditionally marginalized groups that frequently rely upon public interest organizations for assistance in asserting their rights. West Coast LEAF will submit that courts should adopt a contextual approach that appreciates the essential role that public interest organizations play in advancing legal rights and access to justice for marginalized groups, including those that face intersecting forms of disadvantage.
14. Third, in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*] this Court established an expedient and proportional test for public interest standing that is commensurate with the preliminary nature of the standing inquiry and attuned to the unique circumstances in which private interest standing is unlikely to be a viable or effective means for bringing matters in the public interest before the courts. A challenge to the standing of an institutional plaintiff should occur at an early stage of the proceedings and should not become an occasion for parties to preview a trial of the claim on its merits. The Attorney General's position will turn

a challenge on standing into a dress-rehearsal of the merits of the claim at the earliest stages of litigation, presenting a substantial and additional barrier to institutional litigants, such as West Coast LEAF, who work in collaboration with equity seeking groups for whom involvement in public interest proceedings will require a significant deployment of resources.

15. These arguments will be useful to the Court in deciding this appeal. The review of recent *Charter* cases seeking s. 52 remedies will assist the Court in assessing whether the reality of modern *Charter* litigation necessarily depends upon facts pertaining to the direct experiences of an individual plaintiff, as the Attorney General insists. The submissions directed at the impact of a narrow approach to public interest standing on marginalized groups will provide this Court with real world context as to how the practical ability to bring and maintain constitutional litigation is intimately tied to the vindication of *Charter* rights. The argument directed at the practicality of the *Downtown Eastside* test will help this Court consider how to balance the competing needs of ensuring that a standing challenge is appropriately adjudicated, without presenting too onerous a burden at a preliminary stage of the litigation.
16. West Coast LEAF has been coordinating with the respondent and the other applicants for intervention on that side of the case, in order to avoid duplication. West Coast LEAF believes its submissions will be distinct from both the respondent and those other proposed interveners, and it will continue to coordinate with those groups in order to avoid duplication.
17. Granting leave to intervene to West Coast LEAF will not prejudice any of the parties, but West Coast LEAF and its constituents will suffer prejudice if leave to intervene in this appeal is denied.
18. West Coast LEAF will not seek to supplement the record.
19. West Coast LEAF 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:

- a. The affidavit of Rajwant Mangat, affirmed July 25, 2021;
- b. Such further and other materials as counsel for West Coast LEAF may advise and this Honourable Court may permit.

**DATED** at Vancouver, British Columbia this 25<sup>th</sup> day of July 2021.

SIGNED BY

 Digitally signed by Jason  
Malcolm Harman K6WLCI  
Date: 2021.07.25  
08:06:03 -07'00'

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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.

File No: 39430

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

BETWEEN:

**ATTORNEY GENERAL OF BRITISH COLUMBIA****APPELLANT**  
(Respondent)

AND:

**COUNCIL OF CANADIANS WITH DISABILITIES****RESPONDENT**  
(Respondent)

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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*)

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I, RAJWANT MANGAT, lawyer, of the City of Vancouver, in the Province of British Columbia, AFFIRM AS FOLLOWS:

1. I am the Executive Director of the West Coast Legal Education and Action Fund Association (“West Coast LEAF”) and as such have personal knowledge of the matters hereinafter deposed to, except where stated to be based on information and belief in which case I verily believe them to be true.
2. I was called to the Bar 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 in the within appeal.
4. This appeal concerns the application of the test for public interest standing set out by this Court in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45. On appeal, this Court is asked to determine whether the Court of

Appeal for British Columbia erred in its application of the test for public interest standing in allowing the Council of Canadians with Disabilities' ("CCD") appeal from the decision of the Chief Justice of the British Columbia Supreme Court denying CCD public interest standing to advance a constitutional challenge to provisions of the *Mental Health Act*, R.S.B.C. 1996, c. 288; the *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181 and the *Representation Agreement Act*, R.S.B.C. 1996, c. 405.

5. The appeal raises important access to justice concerns regarding the application of the test for public interest standing and the need for constitutional scrutiny of legislative regimes that impact marginalized members of society.

6. West Coast LEAF has a demonstrable, ongoing interest in ensuring access to justice, as described in more detail below, including by advocating for a broad and purposive interpretation and application of the test for public interest standing. West Coast LEAF intervened before this Court and at the BC Court of Appeal in *Downtown Eastside Sex Workers United Against Violence v. Canada (Attorney General)*, 2012 SCC 45, affirming 2010 BCCA 439 ("*Downtown Eastside*"). West Coast LEAF also intervened in this proceeding at the BC Court of Appeal, building on its arguments in *Downtown Eastside* concerning the need for a contextual and purposive approach to public interest standing to advance access to justice for equity-seeking groups.

7. West Coast LEAF seeks leave to intervene in this appeal on the basis of its long-standing interest and expertise in addressing barriers to accessing justice, 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**

8. West Coast LEAF is a non-profit society incorporated in British Columbia and registered federally as a charity. West Coast LEAF's mandate is to use the law to create an equal and just society for all women and people who experience gender-based discrimination in British Columbia. Working in collaboration with community, West Coast LEAF uses litigation, law reform, and public legal education to seek systemic change. West Coast LEAF's areas of focus

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

9. West Coast LEAF was formed in April 1985 when the equality provisions of the *Charter* came into force. Before 2009, West Coast LEAF operated as a branch of a national organization, Women's Legal Education and Action Fund ("LEAF"). In 2009, West Coast LEAF became a formal affiliate of LEAF. Since then, West Coast LEAF has involved itself in litigation in its own name. As of 2014, West Coast LEAF is no longer an affiliate of LEAF, but the two organizations continue to collaborate from time to time.

10. During the last fiscal year, West Coast LEAF had approximately 460 members. As of July 24, 2021, West Coast LEAF employs 11 permanent staff members. It relies on the annual support of approximately 200 volunteers to carry out its work.

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

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

12. Litigation is one of West Coast LEAF's three program areas. Through litigation, West Coast LEAF has contributed to the development of equality rights jurisprudence and the meaning of substantive equality in Canada, 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 this Court**

13. 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.

14. West Coast LEAF is intervening or has intervened in its own name in the following cases:

- a. *Ross McKenzie Kirkpatrick v. Her Majesty the Queen*, SCC File No. 39287 (appeal to be heard in November 2021);
- b. *Her Majesty the Queen v. J.J.*, SCC File No. 39133 (jointly with Women Against Violence Against Women Rape Crisis Centre) (appeal to be heard in October 2021);
- c. *Colucci v. Colucci*, 2021 SCC 24 (jointly with LEAF);
- d. *Michel v. Graydon*, 2020 SCC 24;
- e. *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);
- f. *Law Society of British Columbia v. Trinity Western University and Volkenant*, 2018 SCC 32;
- g. *Schrenk v. British Columbia Human Rights Tribunal*, 2017 SCC 62;
- h. *R v. Lloyd*, 2016 SCC 13;
- i. *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2014 SCC 70;
- j. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59;

- k. *British Columbia (Ministry of Education) v. Moore*, 2012 SCC 61; and
  - l. *Downtown Eastside Sex Workers United Against Violence v. Canada*, 2012 SCC 45 (jointly with Justice for Children and Youth and ARCH Disability Law Centre).
15. 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.).

16. 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**

17. West Coast LEAF is intervening or has intervened before the Court of Appeal for British Columbia and the Supreme Court of British Columbia in the following cases:

a. *T.L. v. Attorney General of British Columbia and Jennifer Burns delegate of the Director under the Child, Family and Community Service Act* (BCSC File No. 2158960, Prince George Registry) (heard in June 2021);

b. *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241;

c. *A.B. v. C.D.*, 2020 BCCA 11;

d. *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);



- e. *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);
- f. *British Columbia Civil Liberties Association and John Howard Society of Canada v Canada (Attorney General)*, 2018 BCSC 62;
- g. *Denton v Workers Compensation Board*, 2017 BCCA 403 (jointly with the Community Legal Assistance Society);
- h. *Law Society of British Columbia v. Trinity Western University and Volkenant*, 2016 BCCA 423;
- i. *Scott v College of Massage Therapists of British Columbia*, 2016 BCCA 180;
- j. *Trinity Western University and Volkenant v. Law Society of British Columbia*, 2015 BCSC 2326;
- k. *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2015 BCSC 534 (jointly with the Community Legal Assistance Society);
- l. *Vilardell v Dunham*, 2013 BCCA 65;
- m. *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309;
- n. *Friedmann v MacGarvie*, 2012 BCCA 445;
- o. *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (the *Polygamy Reference*); and
- p. *Downtown Eastside Sex Workers United Against Violence v Canada*, 2010 BCCA 439.

18. 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).

19. 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**

20. 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.
21. 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 Expertise and Interest in this Appeal**

22. This appeal concerns the interpretation and application of the test for public interest standing refined by this Court in *Downtown Eastside*.
23. West Coast LEAF is a long-standing advocate for meaningful and effective access to justice, particularly in support of women and others who are disproportionately and distinctly impacted due to intersecting and compounding markers of disadvantage. Much of West Coast LEAF's access to justice work has arisen in the context of advocating for legal aid services in the areas of family and poverty law. We have also seen first-hand how barriers to launching and sustaining complex public interest litigation can impede the ability of individuals to secure access to legal remedies through our work on the *Single Mothers' Alliance* case.
24. West Coast LEAF's work on access to justice forms a significant part of its litigation, law reform, and public legal education programs. A selection of relevant work includes the following:
  - a. *Single Mothers' Alliance* family law legal aid challenge – West Coast LEAF developed filed a constitutional challenge to BC's family law legal aid scheme on behalf of the Single Mothers' Alliance of British Columbia and two individual plaintiffs in April 2017. 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 involve protection from 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. Since filing the notice of civil claim in

the Supreme Court of British Columbia on April 26, 2017, one of the individual plaintiffs has discontinued her involvement as a plaintiff.

- b. *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241 – West Coast LEAF intervened in this proceeding at the court below, arguing in favour of a contextual and purposive approach to public interest standing with attention to the reality of constitutional litigation and the role that systemic constitutional challenges can play in enhancing access to justice for marginalized populations experiencing intersecting forms of disadvantage in society. West Coast LEAF’s intervention factum in the decision on appeal is attached to this affidavit as **Exhibit A**.
- c. *Denton v. Workers Compensation Board*, 2017 BCCA 403, leave to appeal to SCC refused, 37923 (October 25, 2018) – West Coast LEAF intervened before the BC Court of Appeal jointly with the Community Legal Assistance Society (CLAS). This case concerned a judicial review of a decision denying workers’ compensation to an individual who then sought to raise constitutional arguments about the legislation under which the decision was made upon judicial review. West Coast LEAF and CLAS made arguments in support of superior courts retaining the jurisdiction to hear *Charter* claims even when those claims had not been advanced before the first administrative decision-maker with *Charter* jurisdiction.
- d. *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, 2018 BCCA 132, leave to appeal to SCC refused, 38157 (January 31, 2019) – West Coast LEAF intervened before the BC Court of Appeal jointly with CLAS. This case concerned the evidentiary basis upon which a “connection or link” must be shown between the adverse treatment complained of and membership in a group protected under the BC *Human Rights Code*. West Coast LEAF and CLAS argued that there are no categorical limits on what type of connection will establish *prima facie* discrimination and that a flexible approach may be necessary to prove such a connection to meaningfully provide legal remedies in some instances.

- e. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 and *Vilardell v. Dunham*, 2013 BCCA 65 – West Coast LEAF intervened in this case before this Court and at court below. This case concerned the constitutionality of BC’s court hearing fees. West Coast LEAF argued that court hearings fees disproportionately impact women’s ability to access justice and deprive them of their security of the person and equality rights.
- f. *Downtown Eastside Sex Workers United Against Violence v. Canada*, 2012 SCC 45 and 2010 BCCA 439. West Coast LEAF intervened before this Court (jointly with Justice for Children and Youth and ARCH Disability Law Centre) and at the court below in this case concerning the evolution of the doctrine of public interest standing. West Coast LEAF and its co-intervener groups argued for a broad and purposive approach in line with constitutional commitments to advance substantive equality. The arguments sought to shape the development of the doctrine of public interest standing to ensure that marginalized communities have equitable access to justice.
- g. From 2011 to the present, West Coast LEAF has regularly made budget submissions to the provincial and federal governments recommending increased investments in the legal system to ensure access to justice in family, poverty, and immigration and refugee law. For instance, in June 2020, West Coast LEAF made submissions to the provincial Select Standing Committee on Finance and Government Services calling for, among other things, legal aid funding to provide full, comprehensive legal representation for child support applications if the recipient or their children are at risk of family violence.
- h. In November 2018, West Coast LEAF published a report titled, “We are Here: Women’s Experiences of the Barriers to Reporting Sexual Assault” focused on the barriers that impede survivors of sexual assault from accessing the justice system.
- i. In December 2017, West Coast LEAF called upon the federal Minister of Justice to sustainably fund immigration and refugee legal aid services to ensure that these services are not continuously at risk of being suspended. Our advocacy efforts focused on the need for principled and predictable funding to the provinces to



enhance access to justice across institutions, but also to ensure that Canada meets its constitutional and international law obligations.

- j. 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.
- k. In May 2016, Rise Women’s Legal Centre opened in Vancouver to provide legal services to women. 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 the University of British Columbia, Rise runs a student legal clinic where clients are represented by upper-year law students under supervision by Rise staff.
- l. In April 2016, West Coast LEAF appeared before the House of Commons Standing Committee on Justice and Human Rights as part of the committee’s study of Access to the Justice System. We spoke in favour of, among other things, a robust revived Court Challenges Program which would enhance access to justice by providing funding to individuals and public interest organizations to develop and engage in litigation and intervene in cases raising important constitutional issues.
- m. The formation of Rise was significantly informed by West Coast LEAF’s research and reporting on disparities in accessing family justice in BC. In 2014, West Coast LEAF published a report, “Putting Justice Back on the Map”, which charted a path forward to ensure access to justice in family law was both equitable and meaningful. West Coast LEAF also published reports jointly with the Canadian Centre for Policy Alternatives on the gendered impact of the erosion of access to justice in BC in 2010 (“Rights Based Legal Aid: Rebuilding BC’s Broken System”) and in 2004 (“Legal Aid Denied: Women and Cuts to Legal Services in BC”).

- n. In January 2013, West Coast LEAF prepared a report on access to meaningful justice in the child protection system, titled: “Supporting Mothers or Shutting Them Out: Results of a Court Watch.” The report summarizes the results of a court watch project that took place between March and April 2012 with volunteers observing child protection proceedings in Vancouver and Surrey.
- o. In March 2012, West Coast LEAF contributed to the government’s justice system review by making submissions to the Legal Services Society through the Coalition for Public Legal Services. The Coalition was co-founded by West Coast LEAF in 2010, and consisted of organizations, legal advocates and lawyers from across the province working together to advocate for improved legal aid services.
- p. West Coast LEAF published two reports focused on “mapping the gap” in resources available to women seeking legal assistance in British Columbia. The first, *Mapping the Gap: A Summary of Legal Resources for Women in British Columbia*, was released in March 2010. The second, *Mapping the Gap: Linking Aboriginal Women with Legal Services and Resources*, was released in 2012.
- q. In 2009-2010, West Coast LEAF campaigned for a restoration of legal aid funding to that was in place before cuts were made to the system in 2002. In collaboration with other legal advocacy organizations, we disseminated a petition and presented it to the Attorney General and Leader of the Opposition.
- r. Since 2009, West Coast LEAF has reported on British Columbia’s overall action to remedy gender-based discrimination by issuing a report card assessing the province’s performance against international standards and treaty obligations. As in past years, West Coast LEAF’s Gender Equality Report Card 2019/2020 gives low grades to BC’s overall action to remove barriers to accessing justice in the province.
- s. In April 2007, West Coast LEAF released the results of a court watch project undertaken between October 2005 and April 2006. The report, *Court Watch Report: 2005-2006*, focused on access to justice barriers identified at family remand provincial court proceedings.

- t. West Coast LEAF also continues to offer a range of public legal education resources and workshops aimed at improving access to justice by informing BC residents about their legal rights across different contexts. For instance, West Coast LEAF offers a “Youth in the Workplace” workshop to educate young people aged 15-25 about their rights under employment and human rights legislation.

#### **D. West Coast LEAF’s Proposed Submissions**

25. If granted leave to intervene in this appeal, West Coast LEAF will advance the arguments set out in the Notice of Motion for Leave to Intervene, generally following the submissions it made in the court below. These are briefly outlined below:

- a. The reality of modern *Charter* litigation aimed at s. 52 remedies does not so heavily depend upon a plaintiff’s own circumstances, as the preponderance of the evidence considered by courts in recent cases where plaintiffs sought to strike down legislation as unconstitutional has necessarily come from a broad array of sources other than individual plaintiffs. This broad body of evidence, which frequently includes expert evidence and lay evidence from those impacted by the impugned legislative regime, provides the court with the necessarily broad factual matrix required to appreciate the implications of systemic change.
- b. Moreover, a narrow approach to public interest standing as urged by the Appellant will disproportionately impact women and other equity-seeking groups who frequently rely upon the assistance of public interest organizations to assert their rights. Public interest organizations play a vital role in supporting marginalized populations to advance their legal rights and secure access to justice, especially where intersecting forms of disadvantage are at play.
- c. In *Downtown Eastside*, this Court established an expedient and proportional test for public interest standing that is commensurate with the preliminary nature of the standing inquiry and attuned to the unique circumstances in which private interest standing is unlikely to be a viable or effective means for bringing matters in the public interest before the courts. The Appellant’s position will turn a challenge on



standing into a dress-rehearsal of the merits of the claim at the earliest stages of litigation, presenting a substantial and additional barrier to institutional litigants, such as West Coast LEAF, who work closely with equity-seeking groups for whom involvement in public interest proceedings will require a significant deployment of resources.

26. I have reviewed the Notice of Motion for Leave to Intervene and confirm that it is an accurate reflection of West Coast LEAF's proposed submissions should leave to intervene in this appeal be granted.

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

28. 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 25th day of July, 2021.



Commissioner for Taking Affidavits  
in British Columbia

Kim Hawkins  
Barrister + Solicitor  
516 Richards St  
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RAJWANT MANGAT



This is Exhibit "A" referred to in the  
Affidavit of Rajwant Mangat affirmed  
before me at Vancouver, BC this 25th  
day of July 2021

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**VANCOUVER**

**APR 29 2018**

**COURT OF APPEAL  
REGISTRY**

Commissioner for Taking Affidavits  
in British Columbia

**Court of Appeal File No. CA45711**

**IN THE COURT OF APPEAL**

ON APPEAL FROM: the Order of the Honourable Chief Justice Hinkson of the Supreme Court  
of British Columbia, pronounced on the 12<sup>th</sup> day of October 2018.

BETWEEN:

COUNCIL OF CANADIANS WITH DISABILITIES

APPELLANT  
(Plaintiff)

- and -

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT  
(Defendant)

- and -

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, WEST COAST LEGAL EDUCATION  
AND ACTION FUND, and ECOJUSTICE CANADA SOCIETY

INTERVENORS

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**FACTUM OF THE INTERVENOR,  
WEST COAST LEGAL EDUCATION AND ACTION FUND**

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## Part 1: OVERVIEW

1. Public interest standing is a crucial tool by which traditionally marginalized and oppressed persons can challenge laws that function to reproduce or magnify their oppression. As a consequence of marginalization, oppressed persons frequently do not have access to the capital (financial, human, and cultural) to sustain complex legal challenges against the power of the state. A contextual approach to the public interest standing test set out in *SWUAV*<sup>1</sup> must appreciate how intersecting forms of disadvantage can reduce access to justice for some groups. Courts must also acknowledge that public interest organizations fulfill a necessary and critical function in a free and democratic society by helping traditionally marginalized communities access legal representation by facilitating capital (as defined above) and also by providing persistence of presence.

2. When assessing whether public interest standing offers a “reasonable and effective”<sup>2</sup> means of litigating systemic claims on behalf of traditionally marginalized groups, courts should also recognize that modern *Charter* litigation – particularly in claims seeking remedies under s. 52 of the *Constitution Act, 1982* – already relies predominantly on evidence from sources other than the individual plaintiffs. Contrary to Chief Justice Hinkson’s statement in this case, the reality of modern *Charter* litigation demonstrates that, particularly for these kinds of claims, an “individual evidential record” is in fact not “necessary to decide the constitutional issues alleged.”<sup>3</sup>

## Part 2: WC LEAF’S POSITION ON THE QUESTION IN ISSUE

3. The British Columbia Supreme Court erred by unduly narrowing the test for public interest standing.

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<sup>1</sup> *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [SWUAV].

<sup>2</sup> *SWUAV*, *supra* note 1 at paras. 37 and 50-51.

<sup>3</sup> *MacLaren v. British Columbia (Attorney General)*, 2018 BCSC 1753 [MacLaren] at para. 95.

### Part 3: STATEMENT OF ARGUMENT

#### A. Adopting a Contextual Approach

4. A narrow interpretation of *SWUAV* disproportionately and adversely impacts women and other traditionally marginalized groups that frequently rely upon public interest organizations for assistance in vindicating their constitutionally protected rights and freedoms.

5. Public interest standing is indispensable in determining the scope of rights and protections under the *Charter* in the modern era. Meaningful adjudication of *Charter* claims promotes the rule of law and permits the growth of our living tree Constitution. The *Charter's* promise as a means for enhancing democratic engagement and substantive equality requires an analytical approach to public interest standing that enables those most in need of the *Charter's* protection to bring systemic challenges to allegedly infringing legislation.

6. The evolution of the doctrine of public interest standing and the proliferation of *Charter* challenges mounted by public interest organizations – either on their own or in conjunction with individual plaintiffs – highlights the need for meaningful access to the courts and a systemic framing of challenges to laws and government actions that have broad social impacts. This access need is particularly acute where rights claimants are members of marginalized communities, such as persons with disabilities or women, and those who experience intersecting disadvantaging barriers to their full and equitable participation.

7. Courts have recognized the interconnection between access to justice and the rule of law as a core constitutional value, such that ensuring access to the courts to hold governments accountable and to seek vindication of constitutionally protected rights and freedoms is an essential component of the rule of law.<sup>4</sup> As such, inherent in the notion of public interest standing is the aim of enhancing or facilitating access to justice.<sup>5</sup> The Supreme Court of Canada recognizes that public interest standing animates access to justice for members of

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<sup>4</sup> *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 at para. 40.

<sup>5</sup> *Canadian Council for Refugees, et al. v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1131 [*Canadian Council for Refugees*] at paras. 61-63.

society who experience disadvantage and whose legal rights are engaged.<sup>6</sup>

8. Courts have long recognized the disproportionate impact of economic disadvantage, which can create barriers to accessing justice. The “feminization of poverty” is understood by the Supreme Court of Canada as arising from the “multiplicity of economic barriers women face in society.”<sup>7</sup> The “persistent social and economic disadvantage” experienced by persons with disabilities has been understood to arise from histories of their exclusion from society and attitudes of paternalism.<sup>8</sup> The fact that such barriers may result in the unwillingness or practical inability of many people from marginalized communities to come forward as individual plaintiffs was recognized in the Supreme Court of Canada’s reformulation of public interest standing as an access to justice issue in *SWUAV*.<sup>9</sup>

9. Compounded by economic disadvantage, the barriers that members of marginalized communities experience in seeking access to the courts to vindicate their *Charter* rights are not remediable simply by funding cases brought by individual litigants, as the chambers judge appears to suggest.<sup>10</sup> Courts recognize a constellation of factors that effectively bar individuals from pursuing systemic constitutional challenges, including considerations well beyond

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<sup>6</sup> *SWUAV*, *supra* note 1 at para. 51.

<sup>7</sup> *Moge v. Moge*, [1992] 3 SCR 813 at 853-854 (*per* L’Heureux-Dubé J.); *Marzetti v. Marzetti*, [1994] 2 SCR 765 at 801. See also, *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 and *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18 (concerning the economic disadvantage experienced by women in the workforce).

<sup>8</sup> *Eldridge v. British Columbia (Attorney General)*, [1997] 2 SCR 624 at 668-669; see also *Moore v. British Columbia (Education)*, 2012 SCC 61 (concerning the disadvantage experienced by persons with mental disabilities).

<sup>9</sup> *SWUAV*, *supra* note 1 at paras. 51, 71; see also, *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (Ont. Sup. Ct. J.) (finding seasonal farmworkers experience significant barrier to participation in litigation, granting public interest standing to union).

<sup>10</sup> *MacLaren*, *supra* note 3 at para. 95.



financial means.<sup>11</sup> The adverse impact that serving as a plaintiff in a multi-year, multi-court, adversarial and often high profile case may have on an individual's social life, physical health and mental well-being, employment, family, privacy interests and security are recognized barriers to participation as a plaintiff in constitutional litigation.<sup>12</sup>

10. Moreover, the fact that some members of a marginalized community may be motivated and able to pursue individual or even systemic challenges does not obviate the need to fully consider whether granting public interest standing will facilitate or stymie access to justice more broadly. That analysis must be conducted in light of both the lived reality of individuals whose the public interest organization seeks to vindicate and the systemic nature of the claim at issue.<sup>13</sup>

11. Further, in many constitutional challenges, adjudication of the case requires analysis of a multiplicity of considerations that would not arise on the facts of one, or even a few, directly impacted individuals. Public interest litigation widens the lens on understanding the constitutionality of laws and state action, promoting a broader notion of access to justice informed by the principle of legality. The court must therefore exercise its discretion in applying the test for public interest standing in a contextual manner animated by access to justice concerns and in recognition of the many pertinent benefits of public interest litigation that diverge from the private law paradigm of an adversarial dispute between individual litigants.

12. Public interest litigation advances the rights of those who may be unwilling or unable to pursue a constitutional challenge, or who may be unaware of arguable constitutional infirmities in the legislative scheme. In the current challenge to the constitutionality of Canada's Safe

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<sup>11</sup> See, e.g., *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2010 BCCA 439 [SWUAV BCCA] at paras. 51, 55, 59; *Chaoulli v. Quebec*, 2005 SCC 35 at para. 189; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2016 BCSC 1391 at para. 28.

<sup>12</sup> See, e.g., *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651 at para. 340 (concerning the impediments to participation by individual litigants, including physical and mental health).

<sup>13</sup> SWUAV, *supra* note 1 at para. 71.



Third Country Agreement with the United States, the Federal Court dismissed Canada's suggestion that the three public interest organizations who were successfully granted public interest standing should instead "assist" the individual plaintiffs in the background. The court observed: "It is generally not appropriate for 'ghost' parties to lurk in the background, providing extensive funding, evidence, advice, or information."<sup>14</sup>

13. Given the highly contentious issues that arise in *Charter* challenges, it is unlikely that any public interest organization could purport to represent the multiplicity of perspectives that are likely to exist in connection with a particular law or government action. The fact that different constituencies have deeply divergent perspectives and that no one litigant – whether a public interest litigant or an individual directly impacted – can speak for all with one voice does not answer the court's inquiry into whether a grant of public interest standing in a specific case will enhance access to justice and promote the principle of legality. These considerations are especially significant in litigation against the Crown, where the effect of an unduly narrow application of the test for public interest standing stands to deter or impede litigation seeking to assert, apply or expand *Charter* rights and freedoms.

#### **B. Public Interest Litigants May Anchor Systemic Claims, as a Matter of Law and Practice**

14. Courts have also recognized the unique nature of systemic constitutional challenges and have differentiated such cases from the adjudication of private disputes in which an individualized factual matrix is necessary for the adversarial process. In *Crockford*, for instance, this Court found that complaints of systemic discrimination are legally distinct from individual claims of discrimination, and that:

The types of evidence required for each kind of claim are not necessarily the same. Whereas a systemic claim will require proof of patterns, showing trends of discrimination against a group, an individual claim will require proof of an instance or instances of discriminatory conduct.<sup>15</sup>

15. Likewise in *SWUAV BCCA*, this Court acknowledged the context of the claim as a

<sup>14</sup> *Canadian Council for Refugees*, *supra* note 5 at paras. 66-68.

<sup>15</sup> *British Columbia v. Crockford*, 2006 BCCA 360 at para. 49.

comprehensive challenge to a legislative scheme which relied heavily on systemic considerations.<sup>16</sup> Systemic constitutional claims are manifestly not cases in which a “series of claims for individual relief” are sought in the aggregate.<sup>17</sup>

16. The Supreme Court of Canada has also consistently held that challenges to legislation are remedied under s. 52 of the *Constitution Act, 1982* and that such challenges do not necessarily require that the impugned legislation contravene the rights of the claimant directly, otherwise “bad laws might remain on the books indefinitely”.<sup>18</sup> If an individual plaintiff may obtain a s. 52 remedy because legislation infringes the rights of non-litigants, then there should be little hesitation in granting a public interest organization standing to pursue such a remedy.

17. Further, the practical reality of modern *Charter* litigation is that trial records predominantly draw on evidence from sources other than the named plaintiffs. Justice Thomas of the Ontario Superior Court recently encapsulated this reality when he rejected an argument that the relief sought

requires a detailed examination of each individual [case]. Such is not the nature of public interest litigation examining systematic misconduct. It seems to me that representative evidence coupled with expert evidence could potentially make a case for a broad declaration fashioned appropriately by the trial judge.<sup>19</sup>

18. In the following sections we provide a brief review of four recent *Charter* judgments showing that, irrespective of the presence of individual plaintiffs, and whether or not they are

<sup>16</sup> *SWUAV BCCA*, *supra* note 11 at para. 56.

<sup>17</sup> *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 44.

<sup>18</sup> *R. v. Nur*, 2015 SCC 15 at para. 51, citing *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 314; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Heywood*, [1994] 3 S.C.R. 761 at 799; *R. v. Mills*, [1999] 3 S.C.R. 668 at 704-5; *R. v. Ferguson*, 2008 SCC 6 at paras. 58-66. See also “imaginable circumstances” in *R. v. Goltz*, [1991] 3 S.C.R. 485 at 515-16.

<sup>19</sup> *Williams v. London Police Services Board*, 2019 ONSC 227 (Chambers) at para. 49 [emphasis added].

joined by a public interest organization as a party, it is the whole body of evidence – usually a very substantial body of evidence, much of it expert opinion – that supports the courts' findings, and not the evidence of the individual litigants.

**Carter v. Canada (Attorney General)**

19. *Carter* is the physician assistance in dying case brought by four individual plaintiffs and by the BC Civil Liberties Association as a public interest litigant. The trial judgment spans 1416 paragraphs, with only 32 paragraphs (2%) dedicated to the facts of the individual plaintiffs. Expert evidence, on the other hand, consisted of 722 paragraphs (51%).<sup>20</sup> Justice Lynn Smith commented in the reasons for judgment on the “extensive nature of the record” before her, encompassing as it did “some 36 binders of affidavits, transcripts and documents ... [composed of] 116 affidavits”.<sup>21</sup>

20. In distinguishing the case from an earlier one (*Rodriguez*),<sup>22</sup> Justice Smith noted that, while the adjudicative facts were not meaningfully distinguishable, the legislative and social fact evidence was far more robust in the case before her, including “an enormous amount of evidence about the experience with legal physician-assisted death in other jurisdictions.” Justice Smith held:

The record permits assessment of the current approach to and understanding of end-of-life decision-making, and the current understanding of the efficacy of possible safeguards that might permit persons in the position of Ms. Taylor to have the option that she seeks, while protecting those who are vulnerable.<sup>23</sup>

21. She further noted that, while the amplification of the record did not permit her to ignore *stare decisis*, the “importance of the factual matrix in constitutional adjudication” was a factor in

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<sup>20</sup> *Carter v. Canada (Attorney General)*, 2012 BCSC 866 [*Carter*] at paras. 44-76 and 160-882.

<sup>21</sup> *Carter*, *supra* at note 20 at paras. 114-5.

<sup>22</sup> *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519.

<sup>23</sup> *Carter*, *supra* at note 20 at paras. 941-5 and 1001.

justifying a fresh determination of the issues.<sup>24</sup> In affirming the trial judgment, the Supreme Court of Canada acknowledged that record was grounded on broad legislative and social fact evidence, even as the adjudicative facts were bound by *stare decisis*.<sup>25</sup>

### **Bedford v. Canada**

22. *Bedford* is the Ontario trial decision challenging the prostitution provisions of the *Criminal Code*.<sup>26</sup> *Bedford* was brought by three plaintiffs with private standing; no public interest organization was a party in the case. The trial judgment spans 541 paragraphs with only 17 paragraphs (3%) dedicated to summarizing the facts of the individual plaintiffs. Summaries of expert evidence, on the other hand, consisted of 94 paragraphs (17%).<sup>27</sup>

23. Justice Himel noted that the application record consisted of

[o]ver 25,000 pages of evidence in 88 volumes, amassed over two and a half years.... The applicants' witnesses include current and former prostitutes, an advocate for prostitutes' rights, a politician, a journalist, and numerous social science experts who have researched prostitution in Canada and internationally. The respondent's witnesses include current and former prostitutes, police officers, an assistant Crown Attorney, a social worker, advocates concerned about the negative effects of prostitution, social science experts who have researched prostitution in Canada and internationally, experts in research methodology, and a lawyer and a researcher at the Department of Justice. The affidavit evidence from all of these witnesses was accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard, and many other documents.<sup>28</sup>

24. The trial judge further relied predominantly on expert evidence when addressing the individual legal arguments<sup>29</sup> and the Supreme Court of Canada largely upheld her order.<sup>30</sup>

<sup>24</sup> *Carter*, *supra* at note 20 at para. 946.

<sup>25</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5 at paras. 3 and 44-7.

<sup>26</sup> *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>27</sup> *Bedford v. Canada*, 2010 ONSC 4264 [*Bedford*] at paras. 26-43 and 119-213.

<sup>28</sup> *Bedford*, *supra* note 27 at para. 84.

<sup>29</sup> See, for example, *Bedford*, *supra* note 27 at paras. 226-7, 293-8, 302-25, and 328-51.

<sup>30</sup> *Canada (Attorney General) v. Bedford*, 2013 SCC 72.



**British Columbia Civil Liberties Association v. Canada (Attorney General) (BCCLA v. Canada)**

25. The British Columbia Civil Liberties Association (“BCCLA”) challenged in BC Supreme Court sections of the *Corrections and Conditional Release Act*<sup>31</sup> that permitted the “administrative segregation” of inmates in federal penitentiaries. The John Howard Society of Canada joined BCCLA; no private interest litigants were involved. The government did not dispute the public interest standing of either public interest organization, apparently on the basis that they were seeking a s. 52(1) remedy.<sup>32</sup>

26. Justice Leask noted that “under very tight timelines” the plaintiffs compiled “a substantial evidentiary record”.<sup>33</sup> The plaintiffs’ evidence consisted of 10 expert witnesses and 8 lay witnesses, including former Correctional Service of Canada employees and prisoners who had experienced administrative segregation.<sup>34</sup> In the resulting judgment, which was over 600 paragraphs long, Justice Leask found the impugned provisions to infringe unjustifiably ss. 7 and 15 of the *Charter*.<sup>35</sup> This Court’s judgment on the appeal is under reserve.

**Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen (“CCLA v. Canada”)**

27. In *CCLA v. Canada*, the Corporation of the Canadian Civil Liberties Association (“CCLA”) sought and received public interest standing to challenge the same provisions in Ontario. The CCLA was the sole plaintiff at the hearing; no individual plaintiffs joined.<sup>36</sup> The CCLA successfully argued that the Act violated the s. 7 rights of prisoners and that the

<sup>31</sup> *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

<sup>32</sup> *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62 [BCCLA v. Canada] at para. 6.

<sup>33</sup> *BCCLA v. Canada*, *supra* note 32 at para. 8 (WC LEAF intervened in the case at the trial and on appeal).

<sup>34</sup> *BCCLA v. Canada*, *supra* note 32 at para. 9.

<sup>35</sup> *BCCLA v. Canada*, *supra* note 32 at para. 609.

<sup>36</sup> The Canadian Association of Elizabeth Fry Societies had originally joined the CCLA as a co-public interest plaintiff but withdrew from the case before it proceeded to the hearing.

infringement was not saved by s. 1.<sup>37</sup>


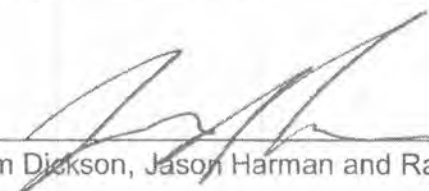
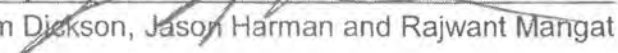
28. The Attorney General of Canada acquiesced to the plaintiff's standing so long as it sought a declaration of invalidity pursuant to s. 52(1).<sup>38</sup> The AGC's acquiescence in this regard properly reflects the relationship between public interest standing and claims for relief against systemic oppression of marginalized and vulnerable populations.

29. Given the absence of private interest litigants, the record before Justice Marrocco consisted entirely of social and legislative fact evidence, including numerous reports and international statements and rules, as well as the evidence of the former United Nations Special Rapporteur on Torture, Professor Mendez.<sup>39</sup> On appeal, the court expanded Justice Marrocco's holding to include a finding of an unjustifiable s. 12 infringement.<sup>40</sup>

### C. Conclusion

30. The test for public interest standing appropriately affords judges considerable flexibility and discretion in its application. However, the exercise of that discretion must not lose sight of the unique nature of systemic constitutional challenges and their divergence from the paradigm of private dispute resolution, the potential for public interest organizations to advance access to justice both for members of disadvantaged groups and in the broader public interest, and the role of such cases in protecting and promoting the rule of law.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, April 29, 2019

    
Tim Dickson, Jason Harman and Rajwant Mangat

<sup>37</sup> *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 [CCLA v. Canada] at para. 167.

<sup>38</sup> *CCLA v. Canada*, *supra* note 37 at para. 14.

<sup>39</sup> *CCLA v. Canada*, *supra* note 37 at paras. 29-42 and 62.

<sup>40</sup> *Canadian Civil Liberties Association v. Canada*, 2019 ONCA 243 at paras. 2 and 150.

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