

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

BETWEEN:

ROSS MCKENZIE KIRKPATRICK

APPELLANT  
(Respondent)

AND:

HER MAJESTY THE QUEEN

RESPONDENT  
(Appellant)

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**MOTION RECORD FOR LEAVE TO INTERVENE**  
**BY 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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**Sugden, McFee and Roos LLP**  
700-375 Water Street  
Vancouver, BC V6B 5C6

**Power Law**  
Suite 1103 - 130 Albert Street  
Ottawa, ON K1P 5G4

**Jessica Lithwick**  
**Jennifer Crossman**  
Tel: 604-259-0846  
Fax: 604-687-5596  
Email: [jlithwick@smrlaw.ca](mailto:jlithwick@smrlaw.ca)

**Maxine Vincelette**  
Tel: 613-702-5573  
Fax: 613-702-5573  
Email: [mvincelette@powerlaw.ca](mailto:mvincelette@powerlaw.ca)

**West Coast LEAF**  
800-409 Granville St  
Vancouver, BC V6C 172

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

**Kate Feeney**  
Tel: 604.684.8772  
Fax: 604.684.1543  
Email: [kfeeney@westcoastleaf.org](mailto:kfeeney@westcoastleaf.org)

**Counsel for the Proposed Interveners,  
West Coast Legal Education and Action  
Fund Association**

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

**AND TO:**

**Cote & Evans Trial Lawyers**  
303 – 6321 King George Boulevard  
Surrey, BC V3X 1G1

**Philip W. Cote**  
Telephone: (778) 395-6200  
Facsimile: (778) 395-6226  
Email: [pcote@coteevans.ca](mailto:pcote@coteevans.ca)

**Counsel for the Appellant,  
Ross McKenzie Kirkpatrick**

**Attorney General of British Columbia**  
865 Hornby Street, 6<sup>th</sup> Floor  
Vancouver, BC. V6Z 2G3

**John R.W. Caldwell**  
**Janet Dickie**  
Telephone: (604) 660-1126  
Facsimile: (604) 660-1133  
Email: [john.caldwell@gov.bc.ca](mailto:john.caldwell@gov.bc.ca)

**Counsel for the Respondent,  
Her Majesty the Queen**

**Attorney General of Ontario**  
Crown Law Office Criminal  
720 Bay Street, 10th floor  
Toronto, Ontario. M7A 2S9

**Dena Bonnet**  
**Rebecca De Filippis**  
Telephone: (416) 326-4600  
Facsimile: (416) 326-4656  
Email: [dena.bonnet@ontario.ca](mailto:dena.bonnet@ontario.ca)

**Counsel for the Attorney General of Ontario**

**Supreme Law Group**  
900 – 275 Slater Street  
Ottawa, ON K1P 5H9

**Moira S. Dhillon**  
Telephone: (613) 691-1224  
Facsimile: (613) 691-1338  
Email: [mdhillon@supremelawgroup.ca](mailto:mdhillon@supremelawgroup.ca)

**Agent for Counsel for the Appellant,  
Ross McKenzie Kirkpatrick**

**Gowlings LLP**  
2600 – 160 Elgin Street  
Ottawa, ON K1P 1C3

**Matthew Estabrooks**  
Telephone: (613) 783-8817  
Facsimile: (613) 788-3500  
Email: [robert.houston@gowlingwlg.com](mailto:robert.houston@gowlingwlg.com)

**Agent for Counsel for the Respondent,  
Her Majesty the Queen**

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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 the appeal of not more than five (5) minutes, or such other duration as this Court deems appropriate;
4. Providing that no order of costs of this motion and this appeal may be made for or against West Coast LEAF; and
5. Any such further or other Order that this Court deems appropriate.

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

1. As described in the affidavit of Rajwant Mangat, sworn June 3, 2021, West Coast LEAF is a non-profit organization that has a genuine and substantial interest in this appeal;
2. West Coast LEAF was created as a branch of the Women's Legal Education and Action Fund ("LEAF") in 1985, when s.15 of the *Canadian Charter of Rights and Freedoms* ("the Charter") came into force. It has operated independently of LEAF since 2014;
3. 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;
4. West Coast LEAF has appeared before the Supreme Court of Canada, the British Columbia Court of Appeal, and the Supreme Court of British Columbia on multiple occasions to address a wide variety of issues affecting women and people who experience gender-based discrimination, including issues related to gender-based violence and the rights and interests of survivors of that violence;
5. If granted leave to intervene, and drawing on its expertise and experience with respect to the rights and interests of survivors of sexual violence, West Coast LEAF will take a survivor-centred and intersectional perspective to argue that a restrictive definition of "sexual activity in question" under s. 273.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, harms survivors of violative condom practices. The consequent need for the Crown to prove fraud vitiating consent under s. 265(3)(c) and, more specifically, the Crown's burden to prove a significant risk of serious bodily harm as per *R. v. Cuerrier*, [1998] 2 SCR 371 at para. 128, as a part of that analysis:
  - a. Results in highly invasive and harmful inquiries into the complainant's physical, reproductive and mental health which impair their equality, security and privacy interests;

- b. Leads to regressive modes of analysis by providing lesser criminal law protection to complainants who have less stereotypical or animated reactions to their experience of a violative condom practice; and
- c. Perpetuates the harm and disadvantage that sexual assault survivors experience within and outside the criminal justice system, especially where they are members of one or more marginalized groups;

6. West Coast LEAF will also argue that violative condom practice cases are distinguishable from and should thus be treated differently than HIV non-disclosure cases. The former cases should have a broader autonomy-protecting purpose, while the latter, concerning the risk of transmission of a sexually transmitted infection, should not. As such, liability in violative condom practice cases should not turn on the health-related facts before the court;

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

8. 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;

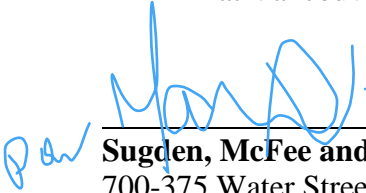
9. West Coast LEAF will take the record as they find it and will not seek to supplement it; and

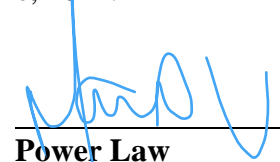
10. West Coast LEAF will abide by the schedule set by the Registrar for filing materials.

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

1. The affidavit of Rajwant Mangat, affirmed June 3, 2021;
2. The Memorandum of Argument of West Coast LEAF, dated June 3, 2021; and
3. Such further and other material as counsel for West Coast LEAF may advise and this Honourable Court may permit.

DATED at Vancouver, British Columbia, this 4<sup>th</sup> day of June, 2021.

  
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**Sugden, McFee and Roos LLP**  
700-375 Water Street  
Vancouver, BC V6B 5C6

  
\_\_\_\_\_  
**Power Law**  
Suite 1103 - 130 Albert Street  
Ottawa, ON K1P 5G4

**Jessica Lithwick and Jennifer Crossman**  
Tel: 604-259-0846  
Fax: 604-687-5596  
Email: [jlithwick@smrlaw.ca](mailto:jlithwick@smrlaw.ca)

**Maxine Vincelette**  
Tel: 613-702-5573  
Fax: 613-702-5573  
Email: [mvincelette@powerlaw.ca](mailto:mvincelette@powerlaw.ca)

**West Coast LEAF**  
800-409 Granville St  
Vancouver, BC V6C 172

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

**Kate Feeney**  
Tel: 604.684.8772  
Fax: 604.684.1543  
Email: [kfeeney@westcoastleaf.org](mailto:kfeeney@westcoastleaf.org)

**Counsel for the Proposed Interveners,  
West Coast Legal Education and Action  
Fund Association**

**TO: THE REGISTRAR OF THE  
SUPREME COURT OF CANADA**  
301 Wellington Street  
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**AND TO:**

**Cote & Evans Trial Lawyers**  
303 – 6321 King George Boulevard  
Surrey, BC V3X 1G1

**Supreme Law Group**  
900 – 275 Slater Street  
Ottawa, ON K1P 5H9

**Philip W. Cote**  
Telephone: (778) 395-6200  
Facsimile: (778) 395-6226  
Email: [pcote@coteevans.ca](mailto:pcote@coteevans.ca)

**Moira S. Dhillon**  
Telephone: (613) 691-1224  
Facsimile: (613) 691-1338  
Email: [mdhillon@supremelawgroup.ca](mailto:mdhillon@supremelawgroup.ca)

**Counsel for the Appellant,  
Ross McKenzie Kirkpatrick**

**Agent for Counsel for the Appellant,  
Ross McKenzie Kirkpatrick**

**Attorney General of British Columbia**  
865 Hornby Street, 6<sup>th</sup> Floor  
Vancouver, BC. V6Z 2G3

**John R.W. Caldwell and  
Janet Dickie**  
Telephone: (604) 660-1126  
Facsimile: (604) 660-1133  
Email: [john.caldwell@gov.bc.ca](mailto:john.caldwell@gov.bc.ca)

**Counsel for the Respondent,  
Her Majesty the Queen**

**Attorney General of Ontario**  
Crown Law Office Criminal  
720 Bay Street, 10th floor  
Toronto, Ontario. M7A 2S9

**Dena Bonnet and  
Rebecca De Filippis**  
Telephone: (416) 326-4600  
Facsimile: (416) 326-4656  
Email: [dena.bonnet@ontario.ca](mailto:dena.bonnet@ontario.ca)

**Counsel for the Attorney General of  
Ontario**

**Gowlings LLP**  
2600 – 160 Elgin Street  
Ottawa, ON K1P 1C3

**Matthew Estabrooks**  
Telephone: (613) 783-8817  
Facsimile: (613) 788-3500  
Email: [robert.houston@gowlingwlg.com](mailto:robert.houston@gowlingwlg.com)

**Agent for Counsel for the Respondent,  
Her Majesty the Queen**

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



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---

**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 whether, as a matter of law, a person can make their consent to a sexual activity dependent on their insistence that their sexual partner wear a condom. The question of whether condom use can form part of subjective consent has implications not only

for the scope of the criminal law's protection against violative condom practices, but also for the treatment and experiences of complainants in the criminal justice system.

5. As described in further detail herein, West Coast LEAF has a demonstrable and ongoing interest in ending gender-based violence against all women and people who experience gender-based discrimination in British Columbia. West Coast LEAF's work on gender-based violence includes advocating for the rights and interests of sexual assault survivors, including through the removal of barriers to reporting sexual assault.

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

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

7. West Coast LEAF is a non-profit society incorporated in British Columbia and registered federally as a charity. West Coast LEAF's mandate is to use the law to create an equal and just society for all women and people who experience gender-based discrimination in British Columbia. Working in collaboration with community, West Coast LEAF uses litigation, law reform, and public legal education to seek systemic change. West Coast LEAF's areas of focus are freedom from gender-based violence, access to healthcare, access to justice, economic security, justice for those who are criminalized, and the right to parent.

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

9. During the last fiscal year, West Coast LEAF had approximately 460 members. As of June 3, 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**

10. 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.

11. Litigation is one of West Coast LEAF's three program areas. Through litigation, West Coast LEAF has contributed to the development of equality rights jurisprudence and the meaning of substantive equality in Canada, both in specific challenges to discriminatory or unconstitutional laws and government actions, as well as in matters where statutory interpretation compromises the realization of substantive equality through the adverse effects of such interpretation. West Coast LEAF works to ensure that the law incorporates an intersectional analysis of discrimination and disadvantage.

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

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

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

- a. *Her Majesty the Queen v. J.J.*, SCC File No. 39133 (jointly with Women Against Violence Against Women Rape Crisis Centre) (appeal has been tentatively set for October 2021);
- b. *Colucci v. Colucci*, SCC File No. 38498 (jointly with LEAF) (appeal heard November 4, 2020; judgment reserved);

- c. *Michel v. Graydon*, 2020 SCC 24;
  - d. *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);
  - e. *Law Society of British Columbia v. Trinity Western University and Volkenant*, 2018 SCC 32;
  - f. *Schrenk v. British Columbia Human Rights Tribunal*, 2017 SCC 62;
  - g. *R v. Lloyd*, 2016 SCC 13;
  - h. *British Columbia Teachers’ Federation v. British Columbia Public School Employers’ Association*, 2014 SCC 70;
  - i. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59;
  - j. *British Columbia (Ministry of Education) v. Moore*, 2012 SCC 61; and
  - k. *Downtown Eastside Sex Workers United Against Violence v. Canada*, 2012 SCC 45 (jointly with *Justice for Children and Youth* and *ARCH Disability Law Centre*).
14. Interventions brought by LEAF, originating in British Columbia, in which West Coast LEAF was involved, include:
- a. *Rick v. Brandsema*, 2009 SCC 10 (“Rick”);
  - b. *Blackwater v. Plint*, 2005 SCC 58 (as part of a coalition with the Native Women’s Association of Canada and the DisAbled Women’s Network of Canada);
  - c. *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 (co-intervening with the DisAbled Women’s Network of Canada);
  - d. *R. v. Shearing*, 2002 SCC 58 (“*Shearing*”);

- e. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 (“*Little Sisters*”);
  - f. *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44;
  - g. *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees’ Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 (S.C.C.) (as part of a coalition with the DisAbled Women’s Network of Canada and the Canadian Labour Congress);
  - h. *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 (S.C.C.) (“*Eldridge*”) (co-intervening with the DisAbled Women’s Network of Canada);
  - i. *R. v. O’Connor*, [1995] 4 S.C.R. 411 (S.C.C.) (as part of a coalition with the Aboriginal Women’s Council, the Canadian Association of Sexual Assault Centres, and the DisAbled Women’s Network of Canada);
  - j. *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (S.C.C.);
  - k. *R. v. Sullivan*, [1991] 1 S.C.R. 489 (S.C.C.); and
  - l. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 (S.C.C.).
15. West Coast LEAF provided background information and support to several LEAF interventions originating in other jurisdictions, including:
- a. *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (N.A.P.E.)*, 2004 SCC 66;
  - b. *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627 (S.C.C.) (“*Thibaudeau*”) (as part of a coalition with the Charter Committee on Poverty Issues, Federated Anti-Poverty Groups of British Columbia, and the National Action Committee on the Status of Women); and
  - c. *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (S.C.C.).

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

16. West Coast LEAF is intervening or has intervened before the British Columbia Court of Appeal 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);
- 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.
17. Additionally, West Coast LEAF has intervened or had interested party status before an administrative decision-maker or a commission of inquiry in the following cases:
- a. *RR v. Vancouver Aboriginal Child and Family Services Society*, BCHRT File No. 16765 (hearing ongoing);
  - b. *Oger v Whatcott*, 2019 BCHRT 58;
  - c. *National Inquiry into Missing and Murdered Indigenous Women and Girls* (Order dated August 17, 2017 granting participant status in Part II and Part III hearings) (final report released June 2019) and the *BC Missing Women Commission of Inquiry* headed by Hon. Wally Oppal, Q.C. (report released November 2012); and
  - d. *In the Matter of an Inquiry Pursuant to Section 63(1) of the Judges Act Regarding the Hon. Justice Robin Camp* (Canadian Judicial Council) (report released November 29, 2016) (as part of a national coalition of six organizations).
18. Apart from its intervention work, West Coast LEAF is currently litigating a constitutional challenge to British Columbia's family law legal aid regime before the Supreme Court of

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

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

19. West Coast LEAF's second program area is law reform. West Coast LEAF's law reform initiatives seek to ensure that all legislation and policies comply with guarantees of sex and gender-based equality found in the *Charter*, human rights legislation, and relevant international instruments to which Canada is a signatory. West Coast LEAF's law reform work consists of conducting comprehensive community-based research and analysis, drafting best practices and policy recommendations, and making submissions to governmental and other decision-makers on a range of issues impacting equality-seeking groups.
20. Public legal education rounds out West Coast LEAF's major program areas. West Coast LEAF's educational programming aims to help residents of British Columbia understand and access their equality rights, and to think critically about the law as it affects them. The program aims to transform public legal education, collaborate with diverse equality-seeking groups, present workshops and talks to diverse audiences, and distribute public legal education materials. West Coast LEAF's public legal education projects complement and support its litigation and law reform activities, based on the premise that the first step toward asserting rights is understanding them.

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

21. West Coast LEAF's work on gender-based violence, including sexual violence, forms a significant part of its litigation, law reform, and public legal education programs. A selection of relevant work includes the following:
  - a. West Coast LEAF is currently intervening in *Her Majesty the Queen v. J.J.*, which will be heard by this Court in October 2021. West Coast LEAF will be making submissions about the relevance and significance of meaningful complainant participation in admissibility applications under ss. 278.92 to 278.94 of the *Criminal Code*.



- b. Commencing in 2016, West Coast LEAF has been engaged in a law reform project, *Dismantling the Barriers to Reporting Sexual Assault*, which is aimed at identifying strategies to reduce barriers in the justice system for sexual assault survivors through dialogue among key stakeholders, including front-line anti-violence activists and service providers, law enforcement, former Crown prosecutors, retired judges, defence counsel and academics. In November 2018, as part of this project, West Coast LEAF published a report titled, “We are Here: Women’s Experiences of the Barriers to Reporting Sexual Assault”. This report centred the voices of 18 female survivors of sexual assault who shared with us their experiences of navigating the criminal justice system. Following this report, in March 2020, West Coast LEAF published a toolkit for complainant’s counsel in criminal proceedings who are dealing with applications under sections 276 and 278 of the *Criminal Code*.
- c. In November 2019, West Coast LEAF was part of a coalition of anti-violence organizations from British Columbia which intervened in two appeals heard together by this Court: *Bent v. Platnick*, 2020 SCC 23, and *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22. The coalition made submissions on the barriers to the reporting and disclosure of gender-based violence, including the use and threat of SLAPP suits. It argued for an interpretation of Ontario’s *Protection of Public Participation Act* (upon which BC’s *PPPA* is modelled) which would empower survivors to report, disclose, and/or seek basic supports related to gender-based violence without the fear of being sued.
- d. In June 2019, West Coast LEAF wrote to the government of British Columbia to urge the province to invest in a rights-based framework for survivors of sexual assault by committing to providing dedicated, sustained funding for community-based sexual assault crisis response teams and integrated sexual assault clinics across British Columbia. We were joined in this request by several BC-based umbrella and direct-service provider organizations who work to support survivors of sexual assault.
- e. In July 2017, West Coast LEAF was granted standing to participate in Part II (institutional hearings) and Part III (expert hearings) of the *National Inquiry into*

*Missing and Murdered Indigenous Women and Girls* (final report released June 2019). West Coast LEAF participated at several of the National Inquiry's hearings held over the course of 2018 and prepared final oral and written submissions in late 2018. West Coast LEAF's participation in the National Inquiry focused on how governments could be held accountable for action in resolving the root causes of violence against Indigenous women, girls and Two Spirit persons, including violence of a sexual nature. Earlier, West Coast LEAF had also been granted leave to participate in the provincial Missing Women Commission of Inquiry headed by Hon. Wally Oppal, Q.C., which completed its work in November 2012. After withdrawing from the provincial inquiry, West Coast LEAF joined, and continues to participate in, a coalition of Indigenous, women's and grassroots anti-poverty organizations in the Downtown Eastside of Vancouver pushing for action in addressing violence against Indigenous women, girls and Two Spirit people.

- f. In April 2017, West Coast LEAF filed a notice of civil claim in the Supreme Court of British Columbia representing the Single Mothers' Alliance of British Columbia and two individual plaintiffs (once of whom has since discontinued her involvement in the litigation.) The case, *Single Mothers Alliance of British Columbia et al v. British Columbia*, Vancouver Registry, File No. S1733843, is a challenge under ss. 7 and 15(1) of the *Charter* and under s. 96 of the *Constitution Act, 1867* on the basis that BC's family law legal aid scheme deprives women litigants of limited or moderate means whose family law proceeding involves protection from violence (including sexual violence), histories of family violence, or the disruption of the parent-child bond of their security of the person and equality rights. The pleadings also allege that the impugned scheme undermines the jurisdiction of superior courts to resolve disputes and decide questions of law.
- g. In June 2016, West Coast LEAF was granted intervener status (as part of a coalition of six women's organizations from across Canada) in proceedings concerning a judge's conduct of a sexual assault trial: In the matter of an Inquiry Pursuant to s. 63(1) of the *Judges Act* regarding the Honourable Justice Robin Camp. The Coalition made submissions on, among other things, low reporting rates of sexual assault, the

lack of confidence among survivors of sexual assault in the criminal justice system, and the chilling effect that the perpetuation of rape myths and stereotypes has on reporting.

- h. In May 2016, Rise Women's Legal Centre opened in Vancouver to provide legal services to self-identified women of low or moderate means. Many of the clients served by Rise are impacted by family violence, including sexual assault and other violence of a sexual nature. Rise was developed by West Coast LEAF to respond to women's increasingly unmet family justice needs, after decades of advocacy for increased funding to family law legal aid. In partnership with the Peter A. Allard School of Law at UBC, Rise runs a student legal clinic where clients are represented by upper-year law students under close supervision by Rise staff.
- i. In November 2015, West Coast LEAF intervened at the Court of Appeal for British Columbia in *Scott v. College of Massage Therapists of British Columbia*, 2016 BCCA 180. This case concerned the ability of the College to place interim conditions on the registrant's practice to protect the public while investigating a complaint of sexual misconduct. West Coast LEAF intervened to make submissions that the evidence required to establish a risk to the public must not result in the complainant's evidence being assessed on the basis of gendered myths and stereotypes about sexual violence.
- j. Since 2009, West Coast LEAF has reported annually on British Columbia's overall action to remedy gender-based discrimination by issuing a report card assessing the province's performance against the United Nations' *Convention on the Elimination of Discrimination against Women* in a number of areas. As in past years, West Coast LEAF's Gender Equality Report Card 2019/2020 gives low grades to BC's overall action to remedy gender-based discrimination. In the area of addressing gender-based violence, the report card identifies the lack of a provincial policy on addressing sexual assault.
- k. West Coast LEAF offers a range of public legal education resources and workshops aimed at educating the public about gender-based discrimination and forms of

gender-based violence. In 2017, in part as a response to the requirement that all post-secondary institutions in British Columbia have in place sexual misconduct policies, West Coast LEAF developed a legal education project called “Only Yes Means Yes” about sexual assault and consent designed by and for post-secondary students. Along with the workshop, through which we have reached approximately 800 students, faculty and staff, West Coast LEAF produced a social media-friendly video called “The Unfinished Story of Yes” about the development of sexual assault and consent law in Canada.

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

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

22. If granted leave to intervene, and drawing on its expertise and experience with respect to the rights and interests of survivors of sexual violence, West Coast LEAF will take a survivor-centred and intersectional perspective to argue that a restrictive definition of “sexual activity in question” under s. 273.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, harms survivors of violative condom practices. The consequent need for the Crown to prove fraud vitiating consent under s. 265(3)(c) and, more specifically, the Crown’s burden to prove a significant risk of serious bodily harm as per *R. v. Cuerrier*, [1998] 2 SCR 371 at para. 128, as a part of that analysis:
  - a. Results in highly invasive and harmful inquiries into the complainant's physical, reproductive and mental health which impair their equality, security and privacy interests.
  - b. Leads to regressive modes of analysis by providing lesser criminal law protection to complainants who have less stereotypical or animated reactions to their experience of a violative condom practice.

c. Perpetuates the harm and disadvantage that sexual assault survivors experience within and outside the criminal justice system, especially where they are members of one or more marginalized groups.

23. West Coast LEAF will also submit that violative condom practice cases are distinguishable from and should thus be treated differently than HIV non-disclosure cases. The former cases should have a broader autonomy-protecting purpose, while the latter, concerning the risk of transmission of a sexually transmitted infection, should not. As such, liability in violative condom practice cases should not turn on the health-related facts before the court.

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

25. 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.

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

AFFIRMED BEFORE ME at the City of  
Vancouver, in the Province of British  
Columbia, this 3<sup>rd</sup> day of June, 2021.



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Commissioner for Taking Affidavits

in British Columbia



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RAJWANT MANGAT

**Kate Feeney**  
*Barrister & Solicitor*  
**West Coast LEAF**  
800 - 409 Granville  
Vancouver, BC V6C  
Tel: 604.684.1177

## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Introduction

1. Underreporting of sexual assault is a chronic systemic issue in Canada. This cannot be ameliorated if survivors of sexual assault are unnecessarily revictimized in their interactions with the criminal justice system.
2. West Coast Legal Education and Action Fund Association (“West Coast LEAF”) seeks leave to intervene in this appeal to address one such source of revictimization in cases like the case at bar. That source of revictimization is the intrusive inquiries regarding a complainant’s private sexual, reproductive and mental health information that result from the Crown’s need to marshal evidence of a significant risk of serious bodily harm in order to prove that consent was vitiated by fraud under s. 265(3)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46 (the “*Criminal Code*”).
3. The requirement of a significant risk of serious bodily harm results in inquiries that are embarrassing, alienating and invasive. This is not only contrary to the privacy, equality and security interests of complainants, but reflects an analysis which is out of sync with the autonomy-preserving purpose of the law of sexual assault.<sup>1</sup>
4. The harmful impact of the fraud analysis is one of several powerful factors which militate in favour of this Court confirming the British Columbia Court of Appeal’s ruling that sex with a condom is a different sexual activity than sex without a condom for the purposes of inquiring into the presence of subjective consent under s. 273.1 of the *Criminal Code*.
5. The outcome of this appeal will have a significant impact on people who seek the criminal law’s protection in the wake of their sexual partner’s violation of their subjective consent to only have sex with a condom (“violative condom practices”). This case will impact both their experience within the administration of justice and their ability to access its protections at all. Ultimately, this will affect the confidence that such survivors have in the administration of justice and, in turn, reporting rates.

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<sup>1</sup> *R v Ewanchuk*, [1999] 1 SCR 330 at para 28 [*Ewanchuk*].

## **B. West Coast LEAF**

6. West Coast LEAF is a non-profit organization from British Columbia (“BC”) with demonstrated expertise and longstanding experience promoting the rights and interests of women and people who experience gender-based discrimination, including those who have survived sexual violence.
7. West Coast LEAF’s mandate is to use the law to create an equal and just society for all women and people who experience gender-based discrimination in British Columbia.<sup>2</sup> Working in collaboration with community, West Coast LEAF uses litigation, law reform, and public legal education to make change.<sup>3</sup>
8. West Coast LEAF has extensive knowledge and experience from its work with and on behalf of survivors of gender-based violence, including sexual violence. West Coast LEAF has intervened, or is intervening, in numerous proceedings before this Court, the BC Court of Appeal, and the BC Supreme Court, including on issues related to gender-based violence and the rights and interests of survivors.<sup>4</sup> West Coast LEAF has also written reports, prepared workshops, and made submissions to government with the goal of improving legal and societal responses to gender-based violence.<sup>5</sup> Since 2016, West Coast LEAF has been engaged in a law reform project entitled *Dismantling the Barriers to Reporting Sexual Assault*, which aims to improve the treatment of complainants in the criminal justice system.<sup>6</sup>

## **C. Issue Raised in This Appeal**

9. This case concerns the allegation that the accused had sex with and ejaculated inside the complainant without a condom when she only consented to sex with a condom. Such conduct

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<sup>2</sup> Affidavit of Rajwant Mangat, affirmed June 3, 2021 [Mangat Affidavit], at para 7, Tab 2.

<sup>3</sup> *Ibid*

<sup>4</sup> Mangat Affidavit, at paras 13-16, 21, Tab 2.

<sup>5</sup> Mangat Affidavit, at paras 19-21, Tab 2.

<sup>6</sup> Mangat Affidavit, at para 21, Tab 2.



constitutes a violative condom practice. Other examples of violative condom practices include condom sabotage and non-consensual condom removal, sometimes referred to as “stealthling”.<sup>7</sup>

10. Where there is no agreement, being penetrated without a condom is a serious violation of personal autonomy and physical integrity.
11. In *R. v. Hutchinson*, 2014 SCC 19 (“*Hutchinson*”), the majority was faced with a case where the accused had been surreptitiously poking holes in the condoms he was using with the complainant. It held that this did not prevent her from subjectively consenting to the sexual activity in question for the purposes of s. 273.1 of the *Criminal Code* despite the fact that she only agreed to have sex with a condom. Instead, the Court held that criminal liability was established because her consent was vitiated by fraud pursuant to s. 265(3)(c).
12. The current test for proof of fraud under s. 265(3)(c) was established in an HIV non-disclosure case: *R. v. Cuerrier*, [1998] 2 SCR 371 (“*Cuerrier*”). To establish fraud, the Crown must prove both deceit and proof of a significant risk of serious bodily harm.<sup>8</sup>
13. The question in this case is whether the accused’s failure to wear a condom altogether can be considered in determining whether or not the complainant subjectively consented to the sexual activity in question as required by s. 273.1 of the *Criminal Code*. If the answer is no, the Crown must prove fraud vitiating consent under s. 265(3)(c) to secure a conviction.

## **PART II – STATEMENT OF QUESTIONS IN ISSUE**

14. Whether West Coast LEAF should be granted leave to intervene in this appeal.

## **PART III - ARGUMENT**

15. This Court has broad discretion to decide whether to permit a person to intervene. Applicants seeking leave to intervene must establish that: (1) they have an interest or particular expertise

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<sup>7</sup> Allira Boadle et al, “Young Women Subjected to Nonconsensual Condom Removal: Prevalence, Risk Factors, and Sexual Self-Perceptions” (2020) *Violence Against Women* [Boadle], Tab 4A.

<sup>8</sup> *R v Cuerrier*, [\[1998\] 2 SCR 371](#) at para 35.



in the subject matter of the appeal; and (2) their submissions will be useful to the Court and different from those of the parties.<sup>9</sup>

#### **D. West Coast LEAF's particular interest and expertise**

16. West Coast LEAF has a particular interest in this appeal because of its decades-long work with, and on behalf of, survivors of sexual violence. The issues in this appeal will directly affect members of its constituency, many of whom have lived experience of sexual violence or are at heightened risk of sexual violence.
17. Further, this appeal's outcome will affect West Coast LEAF's long-standing goals of improving societal and legal responses to sexual violence. Complainants must be able to require condom use regardless of their personal characteristics and/or their reasons for desiring condom use. Relatedly, the justice system must avoid unnecessarily re-traumatizing complainants, such as by subjecting them to invasive inquiries that bear no relationship to the purpose of the criminal law of sexual assault: protecting the sanctity of every individual's right to dignity, autonomy and physical integrity.<sup>10</sup>

#### **E. West Coast LEAF's submissions will be useful and distinct**

18. The "useful and different submission" criterion is satisfied by applicants who have a history of involvement with the issue, giving them expertise that can illuminate and provide new perspective on the matters under consideration. Where the applicant will provide the Court with a fresh perspective on an important constitutional or public issue, leave to intervene may be warranted.<sup>11</sup> As set out herein, West Coast LEAF has significant experience supporting survivors of sexual violence and advocating on their behalf, including before this Court.
19. Further, West Coast LEAF's submissions will be useful to the Court's determination of this appeal and different from those of other parties. Unlike West Coast LEAF, no party to this appeal will be focused on how the fraud analysis shapes the complainant's experience in

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<sup>9</sup> *Rules of the Supreme Court of Canada*, [SOR/2002-156](#), r 55, 57(2); *R v Barton*, [2019 SCC 33](#) at para 52 [*Barton*]; *Reference re Workers' Compensation Act 1983 (Nfld.)*, [\[1989\] 2 SCR 335](#) at 339 [*Workers' Compensation*]; *R v Finta*, [\[1993\] 1 SCR 1138](#) at 1142-1143.

<sup>10</sup> *Ewanchuk*, *supra* note 1, at para 28.

<sup>11</sup> *Workers' Compensation*, *supra* note 9, at 340.

interacting with the criminal justice system, from the time of the initial report to the trial process. Moreover, West Coast LEAF's submissions will be informed by its knowledge of the diverse interests and needs of complainants, including complainants with overlapping inequalities. Given that complainants continue to be highly vulnerable witnesses within the criminal process,<sup>12</sup> it is important for the law in this area to develop in a way that is cognizant of its range of impacts on complainants.<sup>13</sup>

20. West Coast LEAF's work in furthering the equality interests of survivors renders it well-equipped to address the ways in which making a complainant's health information a focal point in violative condom practice prosecutions exacerbates rather than ameliorates the disadvantage of sexual assault complainants in their interactions within the criminal justice system.

#### **F. Proposed Submission**

21. If granted leave to intervene, West Coast LEAF will provide a survivor-centered and intersectional perspective in arguing that when assessing the consent framework for violative condom practices, this Court should consider the harmful "on the ground" impact of the fraud analysis required by s. 265(3)(c) of the *Criminal Code* on the dignity and substantive equality of survivors of sexual violence.
22. West Coast LEAF's specific proposed submissions are set out below.

##### **1. Immediate Harm: The Crown's Burden to Prove a Significant Risk of Serious Bodily Harm Leads to Deeply Invasive Inquiries**

23. The application of the fraud analysis to violative condom practices creates a zone in sexual assault law where a violation of a complainant's physical integrity is insufficient to establish criminal liability. Instead, the Crown must prove that there was a significant risk of serious bodily harm to the complainant. The fraud analysis thus opens the door to highly invasive inquiries by the police, Crown, and defence regarding a complainant's preexisting vulnerabilities and risk of harm post-assault. These inquiries into the complainant's pre-and

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<sup>12</sup> Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal, QUE & Kingston, ON: McGill-Queen's University Press, 2018) [Craig], Tab 4B.

<sup>13</sup> *Ibid.*

post-assault sexual, reproductive and/or psychological health,<sup>14</sup> may be accompanied by requests or applications for the complainant's health records.

24. The need to disclose deeply private and often sensitive health information to the police or in open court, whether voluntarily or under compulsion, risks inflicting trauma on the complainant or aggravating preexisting trauma. Further, in many cases, these health inquiries will elicit information about the complainant that renders them more susceptible to stigma and further victimization. Such information includes a complainant's ability to become pregnant, transgender or gender-diverse status (where it would affect their ability to become pregnant or vulnerability to STIs), pregnancy, post-assault abortion history, history of sexually transmitted infections, and mental health history.
25. The result is a deep intrusion into a complainant's equality, security of the person and privacy rights which is largely disconnected from the nature of the harm they experienced—a violation of their dignity and physical autonomy, which exists whether or not the accused's conduct placed them a significant risk of serious bodily harm. This is the type of intrusion that, in other instances, the Canadian law of sexual assault has made strides to avoid.<sup>15</sup>

## **2. The Crown's Burden to Prove a Significant Risk of Serious Bodily Harm Leads to Regressive Consideration of the Complainant's Post-Assault Reaction**

26. Historically, a complainant who failed to raise an immediate "hue and cry" was likely to be found uncredible at trial.<sup>16</sup> However, that is no longer the case. Our law has long-since recognized that there is no one way react to sexual assault.<sup>17</sup>
27. The Crown's burden to prove a risk of serious bodily harm reintroduces, albeit in different form, a systemic practice of providing less criminal law protection to complainants who fail to have sufficiently animated or stereotypical reactions to being violated. Although the fraud

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<sup>14</sup> This Court has recognized that the harms capable of vitiating consent include unwanted pregnancy and sexually transmitted infections. In *R v Lupi*, [2019 ONSC 3713](#) [*Lupi*], Justice Roberts suggested that psychological harms may also be capable of vitiating consent.

<sup>15</sup> *R v Goldfinch*, [2019 SCC 38](#) at para 1; *A(M) v Ryan*, [\[1997\] 1 SCR 157](#) at para 36; *R v O'Connor*, [\[1995\] 4 SCR 411](#) at paras 111–116.

<sup>16</sup> *R v DD*, [2000 SCC 43](#) at para 60.

<sup>17</sup> *Criminal Code*, [RSC 1985, c C-46](#), s 275 [*Criminal Code*].

analysis does not similarly reflect antiquated notions of credibility, the requirement of harm operates so that complainants who fail to have a strong reaction to being subjected to violative condom practices are less likely to be able to provide the evidence needed to support a conviction. For example, in the case at bar, if the complainant had not decided, or been able to, seek prophylactic medical care, the harm requirement may not have been met. This is a step in the wrong direction.

28. If significant psychological harm qualifies as “serious bodily harm” for the purposes of fraud-vitiating consent under s. 265(3)(c) of the *Code*, the nexus between the problematic law of recent complaint and the fraud-vitiating consent analysis is even tighter. Complainants who are less traumatized or more stoic about their trauma will receive less protection from the criminal law. Needless to say, this is deeply problematic. Whether or not the complainant “cried every day for two months” should not determine whether or not the law will recognize the violation she has survived.<sup>18</sup>
29. It is also conceivable that evidence of a complainant’s sexual history could become relevant to the defence as a result of the requirement to prove a risk of serious bodily harm. If, for example, the complainant had unprotected sex with other people, the accused could seek to defend the charge by raising a reasonable doubt as to whether the harm alleged by the Crown, for example an unwanted pregnancy, was caused by the accused.<sup>19</sup> The regressive nature of this inquiry is patent and undermines the significant efforts the justice system has made to date to prevent a complainant’s broader sexual history from being unnecessarily aired at trial.<sup>20</sup> The problem is resolved if a complainant is entitled to consent to sex with a condom only, regardless of their reason for doing so.

### **3. Systemic Harm: Perpetuating Harm and Disadvantage**

30. The criminal justice system has made strides toward protecting complainants, including through decades of reforms to the rules of evidence and the substantive law of sexual assault. At the heart of that effort has been the recognition of complainants’ equality, privacy, and

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<sup>18</sup> *Lupi*, *supra* note 14, at para 37. See also *R v Chen*, [2003 BCSC 984](#) at paras 35, 36.

<sup>19</sup> *R v Boone*, [2016 ONCA 227](#) at para 42.

<sup>20</sup> *Barton*, *supra* note 9, at para 56; *Criminal Code*, s 276..

security rights. However, sexual assault complainants continue to be highly vulnerable witnesses for reasons including the gendered and highly sensitive nature of their testimony, their inferior position relative to other criminal justice actors, the pernicious influence of discriminatory beliefs surrounding sexual assault, and the existence of abusive defence tactics.<sup>21</sup> Moreover, complainants who experience overlapping inequalities face disproportionate and particular barriers to accessing the criminal law's protection, including because of their greater susceptibility to being considered through a lens of myth or stereotype and profound power differentials with members of the administration of justice.<sup>22</sup>

31. The toll that criminal investigations and trials take on complainants is a societal concern. Sexual assault is the most underreported criminal offence in Canada.<sup>23</sup> The goals of removing unnecessary barriers to complainants' access to justice and increasing their confidence in the justice system thus cannot be overstated.
32. The invasive and regressive fraud analysis in the violative condom practice context operates to contribute to the system's deficits in protecting survivors of sexual assault, a crime which targets marginalized populations at excessive rates. This impact is particularly acutely felt by people who are members of more than one marginalized group and who may already have to overcome significant barriers in accessing the criminal justice system. The need to discuss deeply sensitive and private sexual health information in addition to particulars of sexual interactions with the accused may deter many survivors of violative condom practices from accessing the criminal justice system at all.

#### **4. The Difference Between Violative Condom Practice Cases and HIV Non-Disclosure Cases Calls for a Different Approach**

33. If granted leave, West Coast LEAF seeks to argue that violative condom practice cases are distinguishable from and should thus be treated differently than HIV non-disclosure cases. The former cases should have a broader autonomy-protecting purpose, while the latter, concerning

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<sup>21</sup> Craig, *supra* note 12, at 9.

<sup>22</sup> *Ibid.*

<sup>23</sup> Canada, "GSS", Juristat, [Criminal Victimization in Canada](#), 2014, by Samuel Perreault, Catalogue No. 85-002-X (Ottawa: Minister of Industry, 2015) at 3; *R v Seaboyer*, [1991] 2 SCR 577 at para 171.

the risk of transmission of a sexually transmitted infection, should not. As such, liability in violative condom practice cases should not turn on the health-related facts before the court.

34. The criminal law of HIV non-disclosure as established in *Cuerrier* has been subjected to considerable legitimate criticism for contributing to the over-criminalization and stigmatization of people living with HIV.<sup>24</sup> While West Coast LEAF shares the view that sexual assault law is not suitable for dealing with the issue of HIV non-disclosure, its proposed submissions in this appeal would focus on whether the analytical framework originating in the HIV non-disclosure context operates in a rational way in the vastly different context of violative condom practices.<sup>25</sup>
35. The commission of a violative condom practice is an immediate, physical and tangible violation of physical integrity, whether or not it creates the risk of health-related implications. As such, the public interest in prohibiting violative condom practices does not only arise where the Crown can prove that the complainant had a good health-related reason for wanting to use a condom. Like other sexual assault cases,<sup>26</sup> violative condom practice prosecutions should be driven by the protection of the complainant's human dignity and physical integrity.
36. As the facts of *Hutchinson* and *Kirkpatrick* show, the fraud analysis puts the health of the person violated under the microscope in order to determine the accused's criminal liability. This further disenfranchises the complainant and also impoverishes the law of sexual assault by failing to recognize a serious affront to the claimant's right to physical integrity as sufficient to ground criminal liability.
37. The outcome of this appeal will have a significant impact on the experiences of survivors of violative condom practices within the criminal justice system. The law should avoid subjecting complainants to invasive personal health inquiries that should not be a necessary precondition to the reinforcement of their right to physical integrity. This appeal represents an opportunity

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<sup>24</sup> Lise Gotell & Isabel Grant, "[Does 'No, Not without a Condom' Mean 'Yes, Even Without a Condom'? The Fallout from R v Hutchinson](#)" (2020) 43:2 Dal LJ 767.

<sup>25</sup> *Boadle*, *supra* note 7, at 6.

<sup>26</sup> *R v Osolin*, [1993] 4 SCR 595 at 669.

for the law to continue to pursue the goal of building confidence in the administration of justice amongst survivors of sexual violation.

**PART IV – SUBMISSIONS**

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


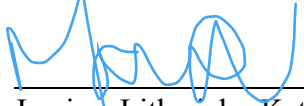
39. In this motion and in its intervention if granted leave to intervene, West Coast LEAF does not seek costs and ask that costs not be awarded against it.

**PART V – ORDER SOUGHT**

40. West Coast LEAF respectfully requests an Order from this 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 Court deems appropriate;
- c. Permitting West Coast LEAF to present oral argument at the appeal of not more than five (5) minutes, or such other duration as this Court deems appropriate;
- d. Providing that no order of costs of this motion and this appeal may be made for or against West Coast LEAF; and
- e. Any further or other Order that this Court deems appropriate

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of June, 2021

   
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Jessica Lithwick, Kate Feeney and  
Jennifer Crossman  
Counsel for West Coast LEAF

## PART VI – TABLE OF AUTHORITIES

<b>JURISPRUDENCE</b>	<b>PARA(S)</b>
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Elaine Craig, <i>Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession</i> (Montreal, QUE & Kingston, ON: McGill-Queen’s University Press, 2018)	19, 30
Lise Gotell & Isabel Grant, “ <a href="#">Does ‘No, Not without a Condom’ Mean ‘Yes, Even Without a Condom’?: The Fallout from R v Hutchinson</a> ” (2020) 43:2 Dal LJ 767	34
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