

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

BETWEEN:

ASHLEY SUZANNE BARENDREGT

Appellant
(Respondent)

-and-

GEOFF BRADLEY GREBLIUNAS

Respondent
(Appellant)

**MEMORANDUM OF ARGUMENT OF THE PROPOSED INTERVENERS
WEST COAST LEAF ASSOCIATION AND RISE WOMEN'S LEGAL CENTRE**

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PART I – OVERVIEW AND FACTS

A. Overview

1. West Coast LEAF Association (“West Coast LEAF”) and Rise Women’s Legal Centre (“Rise”) seek leave to intervene in this appeal pursuant to Rule 55 of the *Rules of the Supreme Court of Canada* (the “Rules”).¹
2. This appeal is from a judgment of the British Columbia Court of Appeal (“BCCA”) reversing the decision of the British Columbia Supreme Court in a family law relocation matter. The Court of Appeal relied on new evidence of the father’s financial position to overturn the trial judge’s relocation order.
3. The trial judge had made findings of family violence, namely that the father was overbearing and emotionally abusive toward the mother during their marriage, physically assaulted her prior to their separation, and engaged in litigation abuse by attaching a nude selfie of the mother to an affidavit filed in court. These findings, along with findings about the father’s continued animosity toward the mother, informed the trial judge’s order which permitted the mother to relocate with the children to a community in which she would have greater supports. The BCCA, after admitting the new evidence of the father’s financial position, re-weighed the evidence, giving less weight to the findings of family violence and the mother’s need for support.
4. West Coast LEAF and Rise seek leave to intervene to present their perspective on the legal issues arising in this appeal. West Coast LEAF and Rise do not seek to take any position on the facts or the ultimate disposition of the appeal.
5. If granted leave to intervene, West Coast LEAF and Rise will present a distinct perspective that would assist this Court in assessing the role of appellate courts in reviewing findings on family violence. They propose to make submissions regarding (i) the level of deference that should be accorded on appeal to findings of family violence in a trial judgment; (ii) the procedural approach of appellate courts after admitting “fresh” or “new” evidence in

¹ *Rules of the Supreme Court of Canada*, SOR/2002-156, r. 55 [*Rules*].

appeals which involve findings of family violence; and (iii) the need for all courts to be alert to myths or stereotypes when determining the presence of or considering family violence.

6. Family violence is a pervasive and gendered social problem in Canada which disproportionately affects the safety, security and substantive equality of women and children. However, it largely takes place behind closed doors and evidence is often minimized or dismissed, making it notoriously difficult to prove. The outcome of this appeal will affect the ability of courts to meaningfully respond to the presence of family violence in family law matters and ensure the best interests of children affected by family violence.

B. Description of West Coast LEAF and Rise

7. West Coast LEAF is a non-profit society incorporated in British Columbia (“BC”) 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 BC. 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.²

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.³

9. During the last fiscal year, West Coast LEAF had approximately 460 members. As of September 7, 2021, West Coast LEAF employs 11 permanent staff members. It relies on the annual support of approximately 200 volunteers to carry out its work.⁴

² Mangat Affidavit, para. 8

³ Mangat Affidavit, para. 9

⁴ Mangat Affidavit, para. 10

10. West Coast LEAF has considerable intervention experience before the Supreme Court of Canada, as well as lower courts and tribunals in BC. Through its intervention work, West Coast LEAF has contributed to the development of equality rights jurisprudence and the meaning of substantive equality in Canada.⁵

11. Rise is a community legal clinic based in Vancouver, BC, which opened in 2016 and provides family law services throughout BC. While West Coast LEAF developed the plans to open Rise, Rise is an independent, non-profit organization which is registered federally as a charity. Its mandate is to provide legal services for self-identifying women and people of marginalised genders in family law matters, and to provide education to law students. In order to fulfil these purposes, Rise provides direct legal services to clients, trains and supports family advocates and community support workers, and engages in original research on systemic family law issues.⁶

12. Rise currently employs 9 full-time staff and 4 part-time staff and provides a clinical externship for up to 18 law students each year. The clinical externship program is open to upper year law students from the University of British Columbia's Peter A. Allard School of Law. Students work at Rise for a full academic term and provide direct family law services to clients under the supervision of staff lawyers. Rise also provides direct services through other programs, including a virtual legal clinic which provides services outside of Vancouver and the Lower Mainland. In its last fiscal year from July 1, 2020, to June 30, 2021, Rise provided a range of direct legal services to approximately 1000 women and people of marginalized genders. Approximately 70% of them had experienced family violence as defined by the British Columbia *Family Law Act*.⁷

PART II – POSITION ON THE QUESTION IN ISSUE

13. The question on this motion is whether West Coast LEAF and Rise satisfy the test for leave to intervene.

⁵ Mangat Affidavit, para. 11-14

⁶ Hawkins Affidavit, para. 7-9

⁷ Hawkins Affidavit, para. 10

PART III – ARGUMENT

A. CRITERIA FOR LEAVE TO INTERVENE

14. Leave to intervene is granted where a prospective intervener has: (i) a real interest in the appeal; and (ii) useful submissions that will be argued from a perspective different from the parties.⁸

i. West Coast LEAF and Rise have an interest in this appeal

15. West Coast LEAF and Rise each have a demonstrable and ongoing interest in family law, access to family law justice, and combatting family violence. While West Coast LEAF focuses on systemic change, Rise provides direct legal services to clients in family law matters. West Coast LEAF and Rise focus their work on advancing the rights, interests and safety of mothers, other parents of marginalized genders, and children who are affected by family violence.

16. West Coast LEAF has a long track record of contribution to the development of substantive equality in family law, including through ensuring that the justice system meaningfully responds to family violence. In addition to its intervention work in several family law matters before this Court and courts in BC, West Coast LEAF is currently litigating a constitutional challenge to BC'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). The plaintiffs will be arguing that the regime unjustifiably infringes the equality, security, and access to justice rights of mothers who have experienced family violence.⁹

17. In addition to its direct legal services to clients, Rise runs the Family Advocate Support Line, which provides regular training sessions, legal advice and coaching to Law Foundation-funded family advocates and other community support workers throughout BC who are supporting clients with family law matters.¹⁰

⁸ *Reference v. Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335 at 339; see also *Rules*, r. 57(2).

⁹ Mangat Affidavit, para. 16

¹⁰ Hawkins Affidavit, para. 14

18. Rise's original research includes a three-year project funded by Women and Gender Equality Canada which aimed to improve the quality of legal services available for clients who experience family violence. This project culminated in 2021 with the publication of three reports addressing family violence in BC's family law system, which include practical information for family lawyers.¹¹

19. Rise's practical experience providing family law services to clients who have experienced family violence, coupled with its work with family advocates and original research, provide Rise with a unique vantage point from which to observe the intersection of family violence and the family law system.

20. Rise and West Coast LEAF seek leave to intervene in this appeal on the basis of their long-standing interest and expertise and their ability to provide a unique and useful perspective to aid the Court in its consideration of the issue on appeal.

ii. West Coast LEAF and Rise's submissions will be useful to the Court and different from the other parties

21. West Coast LEAF and Rise will bring a unique and helpful perspective to the issues on appeal before the Court.

22. The criterion of useful submissions is "easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter."¹²

23. West Coast LEAF has a long history of involvement in issues pertaining to gender equality and rights of children including in relation to family law. Rise has practical experience representing clients in circumstances involving family violence and is involved in original research in the area. Their submissions will draw on each of Rise's and West Coast LEAF's experience in advocating for equality rights for women and people who experience gender-based

¹¹ Hawkins Affidavit, para. 15-6.

¹² *Reference Re Workers' Compensation* at 240

discrimination, as well as their experience serving women facing family violence, and using the family justice system.

24. Rise and West Coast LEAF's submissions are directly relevant to the second issue in this appeal, namely, the appropriate deference owed to findings of the trial court in family law appeals. The proposed interveners' submissions do not extend the proceedings to encompass matters that are not germane to this appeal.

25. Although West Coast LEAF and Rise are generally supportive of the outcome that the appellant seeks, their submissions will differ from the appellant in several respects.

26. In particular, the proposed interveners will make no submissions in respect of the difference between "fresh" and "new" evidence. Rise and West Coast LEAF's submissions are not only distinct from the other parties but also informed by its specialized expertise on gender and equality issues. In arguing that the Court of Appeal did not adequately defer to the findings of the trial court, the proposed interveners will employ an approach that is informed by their expertise in matters of family law and family violence.

B. PROPOSED ARGUMENT

27. If granted leave to intervene, West Coast LEAF and Rise will advance the following arguments which are expanded upon below:

(i) Family violence, particularly family violence in the nature of emotional or psychological abuse, is notoriously difficult to prove in family law matters. Findings of family violence should be accorded a high level of deference on appeal.

(ii) Where "new" or "fresh" evidence is admitted on appeal in a matter in which family violence has been found, updated evidence of the impact of family violence should also be admitted.

(iii) All courts must avoid reliance on myths or stereotypes when determining the presence of or considering family violence.

i. Findings of Family Violence at Trial Require Deference on Appeal

28. Family violence is the term used in BC's *Family Law Act* and other provincial statutes to describe violence or abuse by a person against someone in their family. It includes physical, sexual, psychological, emotional, and financial abuse. While people of all genders can perpetrate or be victimized by family violence, family violence is a highly gendered social problem, with men being the primary perpetrators and women and children being the primary victims (including, in the case of children, through indirect exposure to family violence).¹³ The effects of family violence on women and children are compounded by other experiences of marginalization and oppression, including as a result of systemic racism, disability, immigration status, and poverty.

29. Generally speaking, where children are involved in a family law dispute, trial courts are guided by the best interests of the child.¹⁴ These analyses involve considering, among other factors, the impact of family violence on the child's safety, security and well-being, as well as the perpetrator's ability to care for the child and meet the child's needs. Courts must also consider whether an arrangement that would require the child's guardians to cooperate could increase any risks to the safety, security or well-being of the child or other family members.¹⁵

30. Family violence is notoriously underreported and hard to prove in court. Raising the issue of family violence falls entirely on the victims of it and evidence particularly of psychological or emotional abuse is often minimized.¹⁶

¹³The Chief Public Health Officer's Report on the State of Public Health in Canada 2016 - A Focus on Family Violence in Canada, p. 6.

¹⁴ *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), s. 16 [*Divorce Act*]; and *Family Law Act*, SBC 2011, c. 25 [*BC FLA*].

¹⁵ *Divorce Act*, s. 16(4); and *BC FLA*, s. 38.

¹⁶ See Donna Martinson and Margaret Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017) 30 Can J Fam L 11.

31. Many family violence survivors do not readily disclose their history of abuse to anyone, particularly people they do not know, including lawyers.¹⁷ A survivor may feel shame, be afraid she will not be believed or that there will be reprisals by the abuser, be in denial about the seriousness of the abuse, not realize it has any relevance to her family law case, still care about her partner, or be afraid that disclosing abuse will lead to the involvement of child protection authorities.¹⁸

32. Where victims do make allegations of family violence in their family law matter, their allegations are often difficult to prove in an adversarial context because family violence largely takes place in private and may not leave physical marks. Furthermore, access to justice issues and/or litigation abuse may compromise victims' ability to effectively present their case in what are often complex proceedings. Finally, myths and stereotypes about family violence continue to pervade and undermine the adjudicative process. Even where family violence allegations are proven, those same myths and stereotypes may result in courts giving those findings little weight.

33. Trial judges have an opportunity to observe the parties, including the manner in which they relate to each other in their appearances before the court and the manner in which they conduct themselves in litigation. The inferences drawn from direct observation of the conduct of the parties during the litigation process in making findings about the power dynamics and violence in relationships cannot be fully assessed by recourse to a transcript of the trial.

34. Given the cultural and structural barriers to establishing the presence of family violence in family law matters and the opportunity for the trial judge to directly observe the parties conduct in the litigation process as it may relate to the dynamics in their relationship, findings of family violence should be entitled to a heightened standard of deference.

¹⁷ Bingham, S., Beldin, K., & Dendinger, L., Mediator and Survivor Perspectives on Screening for Intimate Partner Abuse. *Conflict Resolution Quarterly*, 31(3), 305–330, 2014; Cattaneo, L., Stuewig, J., Goodman, L., Kaltman, S., & Dutton, M., Longitudinal Helpseeking Patterns Among Victims of Intimate Partner Violence: The Relationship Between Legal and Extralegal Services. *American Journal of Orthopsychiatry*, 77(3), 467-477, 2007; Cross P, Crann, S., Mazzuocco, K., and Morton, M., “What You Don’t Know Can Hurt You: The importance of family violence screening tools for family law practitioners.”, 2018.

¹⁸ Cross, Pamela, Part 1: How can I help a woman disclose abuse, 2016.

ii. Findings of Family Violence Should be Considered on Applications to Admit New or Fresh Evidence

35. The impacts of family violence on women and children of the relationship continue and in some cases become more obvious after the breakdown of the relationship. In many cases, family violence is not fully reported until some period after the relationship breakdown and until the victims of family violence are sufficiently removed from the situation to feel safe in making a report.

36. An appellate court considering new or fresh evidence should ensure that they have current evidence relevant to the best interests of the children, assuming that there may have been other changes since trial, as was the case here. Where findings of family violence have been made, an appellate court in considering “fresh” or “new” evidence in one area should ensure that it has equally current and updated evidence on any impacts of family violence on family members as well as the impact of implementation of trial orders such as relocation orders on those family members.

37. Moreover, appellate courts should be conscious in considering “fresh” or “new” evidence in family matters of the material change in circumstances test for variation which is specifically calibrated to strike an appropriate balance between flexibility and finality in family matters.

iii. In Determining the presence of Family Violence, the Court must not Rely on Myths and Stereotypes

38. In *R. v. A.G.*, the Supreme Court of Canada wrote that “myths and stereotypes have no place in a rational and just system of law, as they jeopardize the courts' truth-finding function.”¹⁹

39. Myths and stereotypes about women are common in the justice system, and in particular in family cases. Among these myths and stereotypes are these: a credible woman would disclose violence early and leave their relationship; violence against a woman by her spouse is an issue between the two of them and is irrelevant to the issue of custody; and abuse will end when the relationship ends so there is no risk of future harm.

¹⁹ *R. v. A. G.*, 2000 SCC 17

40. In family law cases, courts must distinguish myths and stereotypes from legitimate lines of reasoning in their analysis of the best interests of the children, which itself requires the court to consider whether there is family violence. A trial judge alert to the risk of reliance on myths and stereotypes is best placed to consider the whole of the evidence, including the parties' conduct at trial to make appropriate decisions respecting children. Conduct of a party at during the litigation process which is observed by the trial judge in the context of the proceeding, such as the father's filing of the nude photograph of the mother in this case, is appropriately considered by the trial judge in the analysis.

41. The proposed intervention would argue that in the absence of live witnesses and the ability to directly observe the parties' conduct during litigation, appellate courts must be particularly cautious to avoid relying on myths and stereotypes to reweigh the evidence.

PARTS IV AND V – COSTS SUBMISSIONS AND NATURE OF THE ORDER SOUGHT

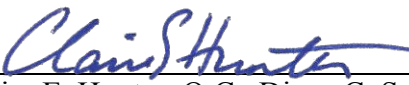
42. Rise and West Coast LEAF does not seek costs and asks that no costs be ordered against them.

43. Rise and West Coast LEAF seek an order granting:

- a. Leave to intervene in the hearing of this appeal;
- b. Leave to file up to a 10-page factum;
- c. Leave to make oral argument at the hearing of this appeal of such length as the Court deems appropriate; and
- d. Such further or other Order as the Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Vancouver, Province of British Columbia, this 7th day of September, 2021



Claire E. Hunter, Q.C., Diana C. Sepúlveda,
Kate Feeney and Kimberley Hawkins
Counsel for West Coast LEAF and Rise
Women's Legal Centre

PART VI – TABLE OF AUTHORITIES

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