

MISSING WOMEN COMMISSION OF INQUIRY

WEST COAST LEAF'S APPLICATION FOR STANDING

Introduction

1. In this application, West Coast Women's Legal Education and Action Fund (West Coast LEAF) seeks standing as a participant in the Missing Women Commission of Inquiry ("the Commission").
2. On September 28, 2010, the Attorney General of British Columbia announced the terms of reference for the Commission, noting that the purpose is to "inquire into and report on the conduct of the missing women investigations". Section 4(c) of the Terms of Reference mandate the Commission "to recommend changes considered necessary respecting the initiation and conduct of investigations in British Columbia of missing women and suspected multiple homicides".
3. The Missing Women Commission of Inquiry Practice and Procedure Directive for Evidentiary Hearings states:
 11. The Commissioner may accept an applicant as a participant after considering all of the following:
 - a. whether, and to what extent, the person's interests may be affected by the findings of the commission (see Public Inquiry Act, s. 11(4)(a)). ,
 - b. whether the person's participation would further the conduct of the inquiry (see Public Inquiry Act, s. 11(4)(b)).,
 - c. whether the person's participation would contribute to the fairness of the inquiry (see Public Inquiry Act, s. 11(4)(c)).
4. West Coast LEAF seeks leave to participate in the Commission pursuant to s.11(4) of the *Public Inquiries Act* and s.11 of the Missing Women Commission of

Inquiry Practice and Procedure Directive for Evidentiary Hearings, and intends to contribute to the work of the Commission pursuant to s.4(c) of the Terms of Reference.

5. West Coast LEAF respectfully requests full rights of participation in the Commission during both the submission of evidence and delivery of legal argument. If granted standing, West Coast LEAF will undertake not to duplicate the evidence or submissions of the other parties.

6. West Coast LEAF has an historical interest in violence against women and in particular in the issue of missing and murdered Aboriginal women in British Columbia. If granted leave to participate, West Coast LEAF will ask questions and make arguments in order to bring before the Commission a substantive equality analysis of the issues in the missing women investigations.

West Coast LEAF and its interest in this Commission

7. West Coast LEAF has been an incorporated non-profit society in British Columbia and a federally registered charity since 1985. The mission of West Coast LEAF is to achieve equality by changing historic patterns of systemic discrimination against women through British Columbia based equality rights litigation, law reform and public legal education.

8. West Coast LEAF is an affiliate of the national organization Women's Legal Education and Action Fund (LEAF). West Coast LEAF has worked with LEAF to intervene in 13 cases, including cases at the British Columbia Court of Appeal, the Ontario Court of Appeal, and the Supreme Court of Canada.

9. In the following cases, West Coast LEAF's involvement was limited to providing general information and support to LEAF: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120; *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*, [2002] O.J. No. 1771 (C.A.); *Miller v. Canada (Attorney General)*, 2002 FCA 370; *R. v. Shearing*, [2002] 3 S.C.R. 33; *Canada (Attorney General) v. Lesiuk (C.A.)*, [2003] 2 F.C. 697 (C.A.); *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and*

Private Employees (N.A.P.E.), [2004] 3 S.C.R. 381; and *Blackwater v. Plint*, [2005] 3 S.C.R. 3.

10. In the following cases, West Coast LEAF's involvement was substantial, and involved management of the intervention, including managing relations with coalition partners, covering costs in most cases, facilitating the subcommittee (which is the internal organizational body that instructs counsel) and providing administration and staff support: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307; *Smith (Guardian ad litem of) v. Funk*, 2003 BCCA 449; *R. v. Demers*, 2003 BCCA 28; and, most recently, *R. v. Watson*, 2008 BCCA 340 and *Rick v. Brandsema*, 2009 SCC 10.

11. West Coast LEAF has also intervened in its own name at the British Columbia Court of Appeal in *SWUAV v. Canada*, 2010 BCCA 439, and has been granted leave to intervene at the British Columbia Supreme Court in the trial of *A Reference concerning the constitutionality of s.293 of the Criminal Code of Canada* (the hearing of the Reference is ongoing).

12. In all of these cases, West Coast LEAF and LEAF have focussed their submissions on the application of principles of substantive equality for women to the issue at bar. Through its litigation work with LEAF and on its own, West Coast LEAF has contributed to the development of the meaning of substantive equality and of equality rights jurisprudence in Canada and in British Columbia. In accordance with its commitment to the realization of substantive equality for women, West Coast LEAF has publicly called for an inquiry into missing and murdered Aboriginal women in BC for many years, as well as worked on numerous issues concerning violence against women.

13. West Coast LEAF is a member of the BC CEDAW Group, a coalition of women's organizations that prepare shadow reports to the Committee on the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). The BC CEDAW

Group submitted shadow reports to the UN Committee in 2003, 2008 and 2010 calling attention to the problem of Aboriginal women going missing and being murdered in BC, and the lack of adequate investigation and protection by the justice system. In 2008 and 2010, the Group called for a public inquiry into the problem.

14. In its 2008 Concluding Comments on Canada, the CEDAW Committee recommended that the government undertake a broad based inquiry into the systemic problems associated with missing and murdered Aboriginal women, stating:

The Committee urges the State party to examine the reasons for the failure to investigate the cases of missing or murdered aboriginal women and to take the necessary steps to remedy the deficiencies in the system. The Committee calls upon the State party to urgently carry out thorough investigations of the cases of aboriginal women who have gone missing or been murdered in recent decades. It also urges the State party to carry out an analysis of those cases in order to determine whether there is a racialized pattern to the disappearances and take measures to address the problem if that is the case.

15. West Coast LEAF has produced an annual report on how BC is measuring up to international standards on women's rights starting in 2009. This project is called the CEDAW Report Card. In 2009, BC received a failing grade on the issues concerning the missing and murdered Aboriginal women and girls but in 2010 this grade rose to a C because of the announcement of the Commission. The 2010 Report noted:

In order to satisfy the CEDAW requirements, the scope of the Inquiry must be broad enough to address the race, gender and class dimensions of the failed systemic response to the violence against women in these cases. Whether the Inquiry will engage with such important systemic issues remains to be seen.

16. On September 1, 2010, West Coast LEAF's Executive Director Alison Brewin wrote a letter to the Attorney General of BC, urging him to launch an inquiry with the broad mandate to uncover the systemic causes of the failures in the investigations of the missing and murdered women.

17. West Coast LEAF also has a history of involvement in legal reform in relation to violence against women more generally, particularly in the family law context. The Family Law Project (FLP) has worked on access to justice issues, reforms of the *Family Relations Act* and identifying gaps in the dissemination of legal information to women

servicing agencies across the province. All of these activities, as well as other initiatives of the FLP, have focused on an analysis of violence against women as an important human rights issue and an integral aspect of women's inequality within the province.

West Coast LEAF's contribution to the Commission

18. If granted standing as a participant, West Coast LEAF intends to bring a substantive equality analysis to bear on the evidence before the Commission and on its submissions regarding the appropriate recommendations to come out of the Commission.

19. A substantive equality analysis requires not merely an elimination of distinctions on the face of the law, but rather the accommodation of difference where a failure to accommodate such difference results in an exclusion of a particular group from the operation of the law. In *Eaton*, the Court described substantive inequality (or "adverse effects discrimination") in the context of persons with disabilities:

Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. **Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.** The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability. [emphasis added]

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241 at paras.66-67

20. Discrimination on the basis of disability includes such issues as mental health and addiction problems. In addition, the equality analysis articulated in *Eaton* in regard

to disability is also applicable to other forms of discrimination, including against women, Aboriginal people, and people living in poverty.

21. West Coast LEAF is particularly concerned that the Commission focus its attention on an intersectional equality analysis. All individuals have complex and intersecting alliances and identities, and discrimination works in much the same way. In this case in particular, the intersecting ways in which the victims, families and witnesses involved in the Missing Women Investigations identified as women, Aboriginal persons, persons living in poverty, sex trade workers, and members of the Downtown Eastside (DTES) community impacted their interactions with the justice system and the way in which justice professionals (including police) treated and served them. These strands of identity are not distinguishable in the context of an individual's experience of discrimination and inequality, nor are they distinguishable in the way in which discriminatory policies or actions apply to each individual. The substantive equality analysis in this case is profoundly impacted by this intersectionality and West Coast LEAF seeks leave to participate in the hearing in part to ensure that this aspect of the analysis is well understood.

22. West Coast LEAF also anticipates drawing the Commission's attention to the ways in which the investigations may have been impeded by *systemic* inequality.

23. In the recent decision from the BC Court of Appeal in *SWUAV v. Canada*, the majority of the Court considered the definition of "systemic" in the context of an equality claim:

The term "systemic" is something of a chameleon: it is used where an entire legislative scheme is challenged and, particularly in human rights cases, **is used to describe situations in which disproportionately adverse consequences accrue to persons from legislative provisions that do not, on their face, target those persons adversely.**

[...] The differences between a systemic challenge and an individual direct challenge, particularly in cases alleging discrimination, was the subject of comment by this Court in *British Columbia v. Crockford*, 2006 BCCA 360, 271 D.L.R. (4th) 445 at para. 49.

[49] A complaint of systemic discrimination is distinct from an individual claim of discrimination. **Establishing systemic discrimination depends on showing that practices, attitudes, policies or procedures impact disproportionately on certain statutorily protected groups:** see Radek, [2005] B.C.H.R.T.D. No. 302, at para. 513. A claim that there has been discrimination against an individual requires that an action alleged to be discriminatory be proven to have occurred and to have constituted discrimination contrary to the Code. 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.

[emphasis added]

Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General), 2010 BCCA 439 at paras.58 and 60

24. While the Vancouver Police Department's (VPD) internal investigation ("the LePard Report") reveals some incidents of individual bias, which West Coast LEAF expects will be aired before the Commission, the report does not appear to account for systemic barriers to substantive equality. Systemic barriers may arise in this case where the justice system failed to account for the different forms and modes of evidence arising in circumstances involving marginalized individuals and the community of the DTES. Systemic barriers may have created obstacles to the protection of marginalized women.

25. If granted leave to participate, West Coast LEAF's position will be that the Commission should interrogate the systemic means by which substantive inequality may have played a role in the missing women investigations. The Missing Women Investigations involved women and some men, many of whom were Aboriginal, sex workers, drug addicts and living in poverty. As per the recommendations of the CEDAW Committee, West Coast LEAF submits that the Commission must examine the reasons for the failure to properly investigate these cases, and in particular to carry out an analysis of whether there is a racialized pattern to the disappearances and the failed investigations. The Commission must interrogate why the justice system neglected this

file involving so many poor, Aboriginal, drug addicted, sex working women and men, as opposed to a file involving victims and witnesses without these intersecting layers of vulnerability.

26. West Coast LEAF submits that the evidence is likely to reveal systemic patterns of substantive inequality, and seeks leave to assist the Commission in applying the appropriate analysis to this evidence and the resulting recommendations.

27. In fact, West Coast LEAF submits that its contribution to the Commission through such a systemic analysis is what is required in part to differentiate the work of the Commission from the LePard Report and internal VPD investigation. In order to reduce redundancy, the Commission must go beyond the findings of the internal investigation to examine the systemic reasons behind the justice system's failures (including the VPD, RCMP and Crown counsel).

28. A further contribution of West Coast LEAF to the work of the Commission may lie in the law regarding police obligation to warn the public about serial violent criminals. The LePard report documents the growing suspicion within the VPD during the early years of the investigation that a serial killer was at work, as well as delays in warning the public about these suspicions until 1999. This situation may be analogous to the *Jane Doe* case in Ontario, where the police's failure to warn women about a serial rapist endangered women's safety and contributed to the assaults of a number of women including Jane Doe.

Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (1998), 39 O.R. (3d) 487 (Gen.Div)

29. Depending on the evidence that emerges during the Commission, a reliance on stereotypes may have resulted in the endangerment of women in the DTES community, and arguably violated their s.7 (security of the person) and 15 (equality) rights. West Coast LEAF is prepared to elicit such evidence and make submissions where the evidence supports this analysis.

Conclusion

30. West Coast LEAF seeks full rights of participation before the Commission in order to make arguments concerning the systemic engagement of substantive equality rights. West Coast LEAF is particularly concerned about the ways in which intersecting aspects of personal identity and discrimination may have impacted the equality interests of the missing women and their supporters.

All of which is respectfully submitted,

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