

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

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

**APPELLANT
(Respondent)**

AND:

**DOWNTOWN EASTSIDE SEX WORKERS UNITED
AGAINST VIOLENCE SOCIETY and SHERYL KISELBACH**

**RESPONDENTS
(Appellants)**

MOTION RECORD OF THE PROPOSED INTERVENER,

**THE COALITION OF WEST COAST WOMEN'S LEGAL
EDUCATION AND ACTION FUND,
JUSTICE FOR CHILDREN AND YOUTH AND
ARCH DISABILITY LAW CENTRE**

(Pursuant to Rules 47 and 55-59 of the Rules of the Supreme Court of Canada)

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S.C.C. Court File No. 33981

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**RESPONDENTS
(Appellants)**

**NOTICE OF MOTION FOR LEAVE TO INTERVENE OF THE PROPOSED
INTERVENER, COALITION OF WEST COAST WOMEN'S LEGAL EDUCATION AND
ACTION FUND, JUSTICE FOR CHILDREN AND YOUTH AND
ARCH DISABILITY LAW CENTRE**

(Pursuant to Rules 47 and 55-59 of the Rules of the Supreme Court of Canada)

TAKE NOTICE that the Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth and ARCH Disability Law Centre hereby applies to a Judge of this Court, at a date fixed by the Registrar pursuant to Rules 55-59 of the *Rules of the Supreme Court of Canada*, for an order granting leave to intervene in the present appeal, to file a factum of not more than twenty (20) pages, and leave to present oral arguments not exceeding fifteen (15) minutes, or such further or other Order that the said Judge may deem appropriate;

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

THE PROPOSED INTERVENER

1. In this application, West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth (JFCY) and ARCH Disability Law Centre (ARCH) apply for leave to intervene in coalition ("the Coalition").

2. 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. West Coast LEAF defines substantive equality for women in accordance with s.15 of the *Charter of Rights and Freedoms* and the *Convention on the Elimination of all forms of Discrimination Against Women*. West Coast LEAF intervened in the case at bar at the British Columbia Court of Appeal.

3. The Canadian Foundation for Children, Youth and the Law was incorporated in the Province of Ontario in 1978 as an independent non-profit organization. The organization operates as a community legal clinic specializing in children's law under the name "Justice for Children and Youth". The clinic is one of the only of its kind in Canada, practising in areas of law that affects children and youth: education law, child protection, criminal justice, privacy, and human rights, including children's rights under the United Nations *Convention on the Rights of the Child*. JFCY was constituted for the purpose of promoting the rights of children and youth and their recognition as individuals under the law.

4. ARCH is a specialty legal aid clinic dedicated to defending and advancing the rights, entitlements, fundamental freedoms and inclusion of people with disabilities in the community in accordance with domestic human rights standards and the *Convention on the Rights of People with Disabilities*. ARCH was founded over thirty years ago as a charitable organization with an Ontario wide mandate and is governed by a community-based board of directors, the majority of whom must be people with disabilities. ARCH engages in the provision of summary advice and referrals, law reform initiatives, test case litigation, community development and public legal education.

5. The Coalition seeks leave in this case to bring the perspectives of marginalized people, particularly women, children and youth, and people with disabilities, to the determination and application of the test for public interest standing. In particular, the Coalition seeks to apply a legal analysis rooted in the equality guarantees of the *Charter* to the third part of the test; whether there is another reasonable and effective manner to bring the issue before the Court.

THE COALITION'S PAST INVOLVEMENT IN PUBLIC INTEREST AND CHARTER LITIGATION

6. All three members of the Coalition have extensive experience bringing the lived experiences of their stakeholders to the Court and applying this perspective to arguments concerning s.15 of the *Charter*.

7. Through its litigation work with LEAF and on its own, West Coast LEAF has contributed to the development of equality rights jurisprudence and of the meaning of substantive equality in Canada and in British Columbia, in particular in its application to women's equality before and under the law.

8. West Coast LEAF was granted leave to intervene and make legal arguments at the BC Court of Appeal hearing in this matter. In addition, West Coast LEAF has participated in intervention with LEAF in 12 cases, including cases at the BC Court of Appeal, the Ontario Court of Appeal and the Supreme Court of Canada. West Coast LEAF has also intervened in three legal matters in its own name, including the appeal court hearing of the current case, *SWUAV v. Canada*, 2010 BCCA 439, and at the British Columbia Supreme Court in the trial of *A Reference Concerning the Constitutionality of s.293 of the Criminal Code of Canada*, which was heard in late 2010 and early 2011 (reasons pending).

9. In addition, West Coast LEAF has been involved with LEAF in intervening in the following cases: *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; *Blackwater v. Plint*, [2005] 3 S.C.R. 3; *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.

10. JFCY has presented legal arguments on behalf of children and youth before all levels of court including the Supreme Court of Canada, and has brought a child and youth rights-based perspective to public interest litigation. JFCY represented affected minors in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and *Francis (Litigation Guardian of) v. Canada (Minister of Citizenship and Immigration)* (1999), 49 O.R. (3d) 136 (Ont. C.A.). JFCY represents individual young people and sometimes parents on behalf of their children in education cases, child protection cases, deportation cases, and cases involving unaccompanied minors who live permanently in Canada and wish to challenge the special welfare requirements imposed on social assistance applicants under 18.

11. JFCY has intervened at the Supreme Court of Canada in, among other cases: *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44; *R. v. J.Z.S.*, [2010] 1 S.C.R. 3; *A.C. et al. v. Manitoba (Director of Child and Family Services)* [2009] 2 S.C.R. 181; *R. v. S.A.C.* [2008] 2 S.C.R. 675; *R. v. A.M.* [2008] 1 S.C.R. 569; *R. v. D. B.* [2008] 2 S.C.R. 3; *R. v. L.T. H.* [2008] 2 S.C.R. 739; *R. v. B.W.P.*; *R. v. B.V.N.*, [2006] 1 S.C.R. 941; *R. v. C.D.*; *R. v. C.D.K.*, [2005] 3 S.C.R. 668; *R. v. R.C* [2005] 3 S.C.R. 99; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 S.C.R. 76; *F.N. (Re)* [2000] 1 S.C.R. 880; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Eaton v. Brant County Board of Education*, [1997] 2 S.C.R. 241; *R. v. O'Connor*, [1995] 4 S.C.R. 411; and *L.L.A. v. B.* [1995] 4 S.C.R. 536.

12. Among other litigation, ARCH engages in test case litigation on behalf of both individuals with disabilities and organizations that represent their interests, bringing a disability analysis to cases before appellate level courts. ARCH has represented interveners before the Supreme Court of Canada in the following cases: *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37; *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 SCR 362; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 SCR 650; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161; *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 51; *Hilewitz v. Canada (Minister of Citizenship and Immigration)*; *De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57; *Nova Scotia (Minister of Health) v. J.J.*, [2005] 1 S.C.R. 177, 2005 SCC 12; *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, 2004 SCC 78; *Martin v. Nova Scotia (WCB)* [2003] 2 S.C.R. 504; *R. v. LePage*, [1999] 2 S.C.R. 744; *Orlowski v. British Columbia (Forensic Psychiatric Inst.)*, [1999] 2 S.C.R. 733; *Bese v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 722; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Gibbs v. Battlefords and District Cooperative*, [1996] 3 S.C.R. 566; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872; *Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970; *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Bhinder v. Canadian National Railway*, [1985] 2 S.C.R. 561; and *Ontario (Human Rights Commission) v. Simpsons-Sears*, [1985] 2 S.C.R. 536.

**THE COALITION HAS A CLEAR INTEREST IN THE SUBJECT MATTER OF THE
APPEAL**

13. As legal organizations working on behalf of marginalized and historically disadvantaged groups, the members of the Coalition each have extensive experience with the obstacles faced by such groups in accessing justice and therefore in enforcing their constitutional rights and other legal entitlements. The Coalition seeks leave to intervene in the case at bar in order to submit argument that demonstrates the clear connection between the interpretation of the public interest standing test and the fulfilment of the constitutional rights of *Charter* protected groups.

14. The Coalition is uniquely positioned to assist this Honourable Court in understanding the implications of the test for public interest standing on broader communities of equality seeking groups, such as women, children and youth and people with disabilities. A narrow interpretation of the public interest standing test is directly related to the obstacles to utilizing private interest standing for marginalized people, including but not limited to the women belonging to the Respondent Sex Workers United Against Violence (SWUAV). The Coalition will submit that, without a broad and purposive approach to public interest standing, the legal rights and interests of disadvantaged groups will be overshadowed by those who can afford the financial, emotional and social resources that are often necessary to access justice with private interest standing.

15. The Coalition has a demonstrable interest in ensuring that the principles of substantive equality are reflected in the application of the common law, and will be prejudiced if their proposed intervention is denied. With respect, we submit that the Coalition's proposed submissions, with our particular focus on substantive equality, are both useful and distinct from the other proposed interveners and the parties to this dispute. The Coalition is committed to ensuring that the test for public interest standing is interpreted and applied in a manner that allows women, particularly vulnerable women, children and youth and people with disabilities, equal and expansive access to courts to enforce their equality rights.

THE COALITION'S PROPOSED POSITION IN THIS APPEAL

16. The Coalition will argue that the Court of Appeal's application of the public interest standing test is consistent with the right to equality enshrined in s.15(1) of the *Charter of Rights and Freedoms*, the unwritten constitutional principle of the rule of law and international human rights law.

17. The Coalition will argue that equal access to justice is constitutionally mandated by s.15(1) of the *Charter*. Section 15(1) of the *Charter* reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

18. The Coalition will also submit that the explicit constitutional guarantees of equality in the *Charter* are bolstered by the principle of the rule of law and by international law, including obligations binding upon Canada in the *Convention on the Rights of the Child (CRC)*, the *Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)*, and the *Convention on the Rights of Persons with Disabilities (CRPD)*.

19. The Coalition will argue that equality concerns are engaged when the primary effects of a law are visited on disadvantaged or marginalized individuals whose capacity to mount an effective challenge is hindered or denied due to social or economic circumstances, or other substantial barriers to the courts.

20. The Coalition will submit that equal access to justice must be regarded as an integral aspect of equality. As a result of the restrictive interpretation of the public interest standing test contained in the dissenting reasons at the Court below, the very persons intended to benefit from the *Charter* lack the means to enforce its guarantees, a lack which compounds and exacerbates the effects of their exclusion from the legislative process. To deny access to justice to persons who are the most marginalized, most isolated and most disempowered is a profound denial of the equality

before the law which underlies all of the *Charter's* guarantees and is an essential foundation of the rule of law in a democratic society.

21. If, in order to bring a claim of discrimination, the very people claiming such discrimination must act alone and be directly and concurrently impacted by the impugned law, the most vulnerable people will be rendered even more vulnerable by the very processes intended to promote the interests of justice. A narrow and overly formalistic interpretation of the public interest standing test will restrict their ability to bring equality claims and undermine both their human dignity and the rule of law. Such a compromise to the fundamental principles of the rule of law not only detrimentally impacts those whose rights are directly at stake in the litigation but also undermines the public interest in ensuring the implementation of the *Charter* and the maintenance of a rights-respecting society.

22. The Coalition will argue that the third branch of the test for public interest standing must be construed in a manner that is consistent with substantive equality principles and contextualized by an understanding of the situation of inequality experienced by women, children and youth and people with disabilities, including the vulnerable and marginalized group of women engaged in the sex trade, in accessing the courts.

23. The Coalition will submit that a restrictive interpretation of public interest standing in the case at bar effectively results in the omission of any analysis of reasonableness or effectiveness in the third step of the test. In the Appellant's construction of the law, it is as if the plaintiffs are required to show that there are *no other means* for this matter to come before the Court, rather than what the test actually requires, which is for the plaintiffs to show that there are no other *reasonable and effective means*. The Coalition will argue that the test must be applied in a purposive and fulsome manner that ensures that the words "reasonable" and "effective" are given substantial meaning.

24. An application of the test for public interest standing that does not fully consider the lived experience of affected individuals would have an adverse effect on the ability of vulnerable people including women, children and youth and people with disabilities to

assert their constitutional rights and would exempt government action from appropriate judicial oversight. All three groups encounter systemic barriers in utilizing a justice system that is designed for people with the physical, economic and other resources to litigate. Children and people with disabilities are often presumed to lack capacity to conduct litigation on their own behalf. The feminization of poverty means that women and their children, particularly those with additional barriers such as disabilities, often lack the financial resources to conduct litigation. The proposed intervener will bring this contextualized approach to its argument for a broad and purposive interpretation and application of the public interest standing test.

ORDER REQUESTED

25. The Coalition respectfully requests an order granting it leave to intervene in the present appeal for the purposes of presenting arguments by way of a factum and oral submissions according to the following terms:


- a. The Coalition will accept the record as is and will not file any additional evidence;
- b. The Coalition will serve and file a factum of no more than 20 pages on such date as the Court may determine to be appropriate
- c. The Coalition will make oral submissions of no more than 15 minutes; and
- d. The Coalition will not seek costs nor will costs be awarded against it.

AND FURTHER TAKE NOTICE that the following documentary evidence shall be submitted in support of this motion:

1. Affidavit of Catalina Rodriguez, sworn September 14, 2011;
2. Affidavit of Jeffrey Rosekat, sworn September 23, 2011;
3. Affidavit of Ivana Petricone, affirmed September 27, 2011;
4. Such further and other evidence as this Honourable Court may permit.

Dated at Toronto, Ontario this 27 day of September, 2011


SIGNED BY:

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

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RESPONDENTS
(Appellants)

AND:

COALITION OF WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND,
JUSTICE FOR CHILDREN AND YOUTH AND ARCH DISABILITY RIGHTS CENTRE

Proposed Intervener

AFFIDAVIT OF CATALINA RODRIGUEZ

(In support of The Coalition's Application for Leave to Intervene)

(Pursuant to Rules 47, 55, 56(b) and 57(1) of the Rules of the Supreme Court of Canada)

1. I, Catalina Rodriguez, of the City of Vancouver, in the Province of British Columbia,
MAKE OATH AND SAY AS FOLLOWS:

2. I am the President of the West Coast Legal Education and Action Fund Association, and
as such have 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.

3. I was called to the bar in British Columbia in 2006. I have been on the Board of Directors of West Coast LEAF since 2008, and have been on the Executive of the Board since 2009.

4. This appeal involves the definition and application of the test for public interest standing in the context of a constitutional challenge. West Coast LEAF has a demonstrable historical and current interest in ensuring access to justice on issues concerning women's equality, and particular in ensuring a broad and purposive application of the public interest standing test, and seeks leave to intervene on that basis.

5. In this application for leave to intervene, West Coast LEAF applies in coalition with Justice for Children and Youth and the ARCH Disability Law Centre.

6. West Coast LEAF takes no position on the legal issue in the case in chief, namely the decriminalization of laws related to prostitution. West Coast LEAF does not have any current intention of seeking leave to intervene in the case in chief.

A. Background and Expertise of West Coast LEAF

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

8. West Coast LEAF formed in April of 1985, when the equality provisions of the *Canadian Charter of Rights and Freedoms* ("Charter") came into force. West Coast LEAF is an affiliate of the national organization Women's Legal Education and Action Fund (LEAF). Both LEAF and West Coast LEAF grew out of a group of women who were working in the early 1980s on ensuring that ss.15 and 28 of the Charter contained language that would effectively protect women's substantive equality.

9. West Coast LEAF currently has approximately 200 members, approximately 130 volunteers, seven full-time staff persons and one part-time staff person.

10. West Coast LEAF seeks to represent the equality interests of all British Columbian women, regardless of race, national origin, immigration status, sexual preference or identity, family or marital status, disability or ability, age, socio-economic status or any other personal characteristic.

11. Central to West Coast LEAF's mandate and legitimacy as an equality rights organization is our commitment to work on a consultative and collaborative basis to ensure that all West Coast LEAF legal arguments and programs are informed by the diversity of women's experiences. The consultative process ensures that West Coast LEAF's arguments are as inclusive as possible, and that the organization remains accountable to its stakeholders.

12. West Coast LEAF also develops its legal arguments and programs in consultation and collaboration with leading equality rights academics and practitioners to ensure that its arguments and program work are of the highest calibre possible.

13. Public legal education is one of West Coast LEAF's three key project areas. The goal of West Coast LEAF's public legal education program is to help British Columbians learn about their equality rights while empowering them to access their legal rights and think critically about the law. West Coast LEAF recognizes that if women are informed about their equality rights, they will be able to take an active role in asserting their rights and be more able to mobilize to shape the laws that define them. The program aims to transform public legal education, collaborate with diverse equality seeking groups, distribute public legal education materials and build upon other West Coast LEAF initiatives. West Coast LEAF's public legal education projects are based on the premise that our constitutional rights are meaningful and enforceable in court, and that the first step to enforcing our rights is understanding them.

14. Public legal education initiatives include: a workshop entitled Transforming Our Future aimed at educating adults and community organizations about *Charter* rights and the strategies that can be used to enforce those rights; a workshop entitled No Means No, aimed at educating children and youth about their rights and obligations under the law regarding consent to sexual

activity; and a workshop entitled Youth in the Workplace aimed at educating youth about their rights as employees.

15. Another of West Coast LEAF's key project areas is law reform. West Coast LEAF engages in law reform initiatives designed to work towards ensuring that all legislation in British Columbia complies with guarantees of equality for woman pursuant to both s.15 of the *Canadian Charter of Rights and Freedoms*, and the United Nations *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW), to which Canada is a signatory. Law reform initiatives include making written submissions to (and meeting with) the Attorney General of BC and other key law-makers to share West Coast LEAF's legal analysis of certain legislation or bills, making submissions to standing committees of the Legislature, researching and writing reports on issues of concern to women in BC, in particular in the area of family law, and drafting an annual report card on BC's compliance with the 2008 concluding comments on Canada from the UN CEDAW Committee.

16. Our third key project area is litigation. West Coast LEAF was granted leave to intervene and make legal arguments at the BC Court of Appeal hearing in this matter. In addition, West Coast LEAF has participated in the intervention with LEAF in 12 cases, including cases at the BC Court of Appeal, the Ontario Court of Appeal and the Supreme Court of Canada. West Coast LEAF has also intervened in three legal matters in its own name, including the appeal court hearing of the current case, *SWUAV v. Canada*, 2010 BCCA 439, and at the British Columbia Supreme Court in the trial of *A Reference Concerning the Constitutionality of s.293 of the Criminal Code of Canada*, which was heard in late 2010 and early 2011 (reasons pending).

17. In the following cases, West Coast LEAF's involvement included 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.

18. 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.

19. 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.

B. West Coast LEAF's Expertise and Interest in Public Interest Standing

20. West Coast LEAF has developed expertise in the area of access to justice for women. West Coast LEAF has also developed expertise in the area of substantive equality for women, in particular regard to s.15(1) of the *Charter*, and in applying these principles to legislation, common law, and state action impacting upon women's equality.

21. West Coast LEAF's interest in access to justice stems from its mandate. Without access to justice, women have no means of enforcing their rights under the law, which directly impacts upon women's equality. Most of our recent legal program work has centred on improving women's access to justice, as the necessary first step in improving women's equality in other areas.

22. The federal Court Challenges Program was a national federally funded non-profit organization which was set up in 1985 to provide financial assistance for important court cases that advanced language and equality rights guaranteed under Canada's Constitution. The Canadian Government cancelled its funding of the Court Challenges Program in 2006, and the Program was forced to close its doors to new applications to fund equality and language rights cases. Between 1985 and 2006, West Coast LEAF received grants from the Court Challenges Program for conferences on equality and for case development.

23. The closure of the Court Challenges Program has had an impact on women's access to justice by reducing funding opportunities for equality cases.

24. In 2004, then Executive Director Alison Brewin wrote a report entitled "Legal Aid Denied: Women and Cuts to Legal Services in BC", which documented the impact on women of recent cuts to legal aid in British Columbia.

25. In 2010, Ms. Brewin and then Legal Director Kasari Govender authored a report on legal aid entitled "Rights Based Legal Aid: Rebuilding BC's Broken System", which explored the gendered impact of further legal aid cuts implemented in 2009 and 2010.

26. In the course of the research conducted for both reports, Ms. Brewin and Ms. Govender found that cuts to legal aid impact women more than men. Family law services in British Columbia have faced substantial cutbacks in services, while criminal law services have not faced as severe cutbacks. They found that women are more likely to access legal aid for family law services than for criminal law services, and therefore the cuts to family law legal aid have a disproportionate impact on women.

27. Cuts to criminal law legal aid have added to this by eliminating legal aid on charges where the accused does not face a reasonable likelihood of incarceration, including charges such as those the *Criminal Code* provisions at issue in the original case that is the subject of the case at bar. This will contribute to women's inability to raise constitutional challenges.

28. Other actions West Coast LEAF has been involved in regarding legal aid services include writing a letter to the Attorney General of BC drawing his attention to the disproportionate impact of legal aid cuts on women and asking for services to be restored to the pre-2002 programs. West Coast LEAF also worked in cooperation with Pivot Legal Society to draft a petition calling for the restoration of pre-2002 funding and the improvement of access to justice for women. On February 24, 2009, Ms. Govender presented the first 1000 signatures to Wally Oppal, Attorney General of British Columbia, and Carole James, leader of the Opposition. Ms. Brewin and Ms. Govender have served as successive co-chairs of the Coalition for Public Legal Services, a province-wide coalition of organizations advocating for greater access to legal aid. In 2010, West Coast LEAF also made both written and oral submissions to the Public Commission on Legal Aid and made written submissions to BC's Standing Committee on Finance and Governmental Services as part of the Committee's 2011 Budget Consultations about the importance of legal aid funding.

29. Given the severe cuts to legal aid in BC between 2002 and 2010, and the disproportionate impact of those cuts on women, it has become even more important that women's access to justice is improved in other ways. The ability of organizations of women such as the Downtown Eastside Sex Workers United Against Violence (SWUAV) to appear before the Court as public interest litigants is one such means of improving women's access to justice.

30. One of the recent projects undertaken by West Coast LEAF was the Single Mothers Human Rights Project. This project began in 2003. The primary purpose of our work on this project was to identify test case claimants who would be willing and able to pursue a human rights claim against the provincial government challenging changes to the *BC Benefits Act* that have had a negative impact on low income women, particularly single mothers. The purpose of identifying the claimants was to facilitate the filing of a human rights complaint and support the claimant's action before the BC Human Rights Tribunal, as well as any subsequent judicial review and appeals.

31. West Coast LEAF was not successful in identifying a woman who was prepared to be a test case litigant for the Single Mothers Human Rights Project due to the time, energy and resources required to be the litigant in a *Charter* or human rights case.

32. As part of our Family Law Project, West Coast LEAF has also worked closely with direct service community organizations to identify legal strategies to respond to the lack of legal aid in BC. The Family Law Project was officially launched in 2004. Prior to this date, West Coast LEAF had already begun its Affidavit Campaign, which was a project to find women who had experienced the impacts of the 2002 cuts to legal aid and to document their stories. One of the purposes of the Affidavit Campaign was to identify possible test case litigants. The Affidavit Campaign did not result in a test case challenging the cuts to family law legal aid.

33. One possible legal strategy that has been explored in response to the legal aid cuts in 2002 and in 2009 is test case litigation, so that some of our work on the Family Law Project has been on identifying a willing test case litigant to launch a constitutional challenge to the cuts to legal aid services. Similarly to the Single Mothers Human Rights Project, West Coast LEAF has not yet been successful in identifying such a plaintiff, primarily due to potential litigants' safety concerns as well as the emotional and financial costs of such litigation and the amount of time required to complete such litigation.

34. Women who are experiencing the impact of laws and policy, and whose stories reflect the legal implications of the issue, are the very individuals who, most often, do not have the resources, language capacity, or safety to challenge the impact of the social assistance scheme on single mothers or the impact of the cuts to family law legal aid on women. In my experience with West Coast LEAF, this is because women who are experiencing such problems are too vulnerable and marginalized already to consider taking on the additional battle of becoming a plaintiff in protracted litigation against the government. Such litigation often takes many years, and is costly both financially and emotionally.

35. Our inability to find a complainant for the Single Mothers Human Rights Project and potential legal aid challenges has further spurred West Coast LEAF's interest in ensuring that

the test for public interest standing promotes equal and adequate access to justice for women who are seeking to ensure that their rights to equality are respected and protected.

C. West Coast LEAF's Proposed Intervention

36. West Coast LEAF has a demonstrable and historical interest in ensuring equal and meaningful access to justice, including in ensuring that the test for public interest standing is interpreted in a broad and purposive manner.

37. If granted leave to intervene, West Coast LEAF, in coalition with Justice for Children and Youth and ARCH Disability Rights Centre, will argue that the test for public interest standing must be based on principles of substantive equality, and must be applied in a manner that promotes substantive equality for all people, regardless of gender, race, age, ability, sexuality or any other identifying characteristic.

38. The Coalition will argue that the third step of the public interest standing test, namely that there is no other reasonable or effective means to bring the matter to Court other than through the proposed plaintiff, must be applied in a manner that recognizes the vulnerabilities of highly marginalized women, including survival sex workers involved in the criminal justice system.

39. The Coalition will argue that the test for public interest standing must be applied in a contextualized manner, with due regard to the particular implications of the test on women's, children's and people with disabilities' access to justice. The test for public interest standing, particularly the third step, must have a fulsome and purposive application that does not unduly restrict marginalized peoples' ability to ensure that their constitutional right to equality is fulfilled and protected.

40. The decision in this case regarding the interpretation of the public interest standing test may have profound implications for West Coast LEAF and its constituents, if the restrictive application of the trial judge is upheld on appeal. If public interest standing is given a narrow and exclusive application, West Coast LEAF's project work in regard to equality rights litigation

may be curtailed, and women in BC will have less access to the courts to resolve legal issues and assert their *Charter* rights to equality.

41. West Coast LEAF, as a member of this Coalition, seeks leave to intervene in this appeal because of the importance of the application of public interest standing requirements to West Coast LEAF's constituents, and because its expertise in the areas of substantive equality and access to justice offers a unique and important perspective that would be of assistance to this Court in the resolution of the issues raised in this appeal.

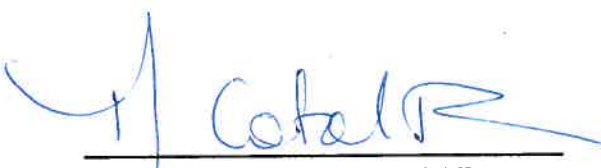
42. The Applicant undertakes to work in coalition with Justice for Children and Youth and ARCH Disability Rights Centre and in cooperation with the parties and other possible interveners, and will not attempt to detract from the particular issues at stake between the parties to the litigation. The Coalition will have joint counsel and will make joint submissions.

43. The Applicant's request for leave to intervene in this appeal is limited to making written and oral submissions on the questions of law upon which leave to appeal has been sought. The Applicants are not seeking leave to adduce fresh evidence.

AFFIRMED BEFORE ME at the City of)
Vancouver, in the Province of)
British Columbia, this 14th day)
September, 2011.)



Kristian Littmann
A Commissioner for taking Oaths
in British Columbia

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- CATALINA RODRIGUEZ

KRISTIAN J. LITTMANN
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Notary Public in and for the
Province of British Columbia

SCC File No. 33981

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

BETWEEN:

ATTORNEY GENERAL OF CANADAAppellant
(Respondent)

-and-

**DOWNTOWN EASTSIDE SEX WORKERS UNITED AGAINST VIOLENCE SOCIETY
and SHERYL KISELBACH**Respondents
(Appellants)

AFFIDAVIT OF JEFFREY ROSEKAT
(In support of the Proposed Coalition's Application for Leave to Intervene)
(Pursuant to Rules 47, 55, 56(b) and 57(1) of the *Rules of the Supreme Court of
Canada*)

I, JEFFREY ROSEKAT, lawyer, of the City of Vaughan, in the Province of Ontario,
MAKE OATH AND SAY AS FOLLOWS:

1. I am the Chair of the Board of Directors of Justice for Children and Youth ("JFCY") and as such have knowledge of the matters deposed to herein, except where stated to be based on information and belief in which case I verily believe them to be true. This affidavit outlines my information and belief as to the expertise of the organization and its commitment to the legal interests and human rights of young people as individual rights-holders.

2. This appeal involves critical issues around the interpretation and application of the test for public interest standing in the context of a constitutional challenge. JFCY has a long history of acting as public interest litigant to advance the rights of children and youth, a group in society who often face inequality and significant barriers in accessing justice. Leave to intervene is being sought to ensure that a broad and purposive application of the public interest standing test occurs which safeguards the rights of children and youth to be heard in matters affecting them.

3. In this application for leave to intervene, JFCY applies in coalition with the West Coast Women's Legal Education and Action Fund and ARCH Disability Law Centre.

BACKGROUND OF JUSTICE FOR CHILDREN AND YOUTH

4. The Canadian Foundation for Children Youth and the Law was incorporated in the Province of Ontario in 1978 as an independent non-profit organization. Since December 1982, the Foundation has received its core funding from Legal Aid Ontario and its predecessor Ontario Legal Aid Plan as a community legal clinic specializing in children's law. The Foundation operates under the name "Justice for Children and Youth". The clinic is the only one of its kind in Canada, practising in areas of law that affects children and youth: education law, child protection, criminal justice, privacy, and human rights, including children's rights under the *United Nations Convention on the Rights of the Child*.

5. JFCY has an Ontario-wide membership comprised of individuals and agencies who work with children and youth or who are committed to protecting and promoting their

rights. JFCY was constituted for the purpose of promoting the rights of children and youth and their recognition as individuals under the law.

6. JFCY provides direct legal representation for low-income children and youth. It specializes in protecting the rights of those facing conflicts with the law, parents, schools, and the social service or mental health systems. JFCY provides summary legal advice, information, public education and assistance to young people, parents, professionals and community groups.

7. JFCY has been consulted numerous times by government, agencies and counsel from across the country in respect of youth issues including education issues (generally, but including standing for young people in proceedings affecting them), the implementation of a best interests test in immigration matters, the interpretation of the *Youth Criminal Justice Act ("YCJA")*, the *Young Offenders Act ("YOA")*, child welfare legislation, income maintenance legislation, criminal proceedings involving children as witnesses and victims (e.g. assault charges arising from the use of corporal punishment), and sexual assault matters where young persons are complainants/victims, the application of the *Canadian Charter of Rights and Freedoms ("Charter")*, and regarding the *United Nations Convention on the Rights of the Child ("Convention")*.

8. In addition to litigation, JFCY engages in consultations, public legal education and policy development with respect to the issues affecting young people. It was consulted by immigration officials for a staff training manual on implementation of the best interests

test for children in affected by deportation/removal processes. JFCY has consulted directly with the federal government on issues relating to the YCJA and the YOA.

9. JFCY has appeared before Senate and Standing Committees with respect to the various amendments and proposed amendments to the YOA, and before the Standing Committee on Justice and Legal Affairs with respect to the YCJA. JFCY was most recently invited by the Standing Senate Committee on Human Rights to consult on Canada's international obligations in respect of the rights and freedoms of children.

10. In cases where the young person has capacity to instruct counsel, the clinic represents individual young people, taking instructions from the young person and not the parent. The clinic represented affected minors in the *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and *Francis (Litigation Guardian of) v. Canada (Minister of Citizenship and Immigration)* (1999), 49 O.R. (3d) 136 (Ont. C.A.). On an ongoing basis, the clinic provides representation primarily for young people whose legal issues involve the intersection of multiple systems such as child-welfare, education, criminal justice, family law, removal from Canada, and health or mental health concerns.

11. In education cases, we generally represent individual young people; however in cases where the affected young person is not capable of instructing counsel, we have represented parents on behalf of their children. Almost every day, we are asked for and give advice about school suspensions, expulsions, exclusions, the appropriateness of special education, a student's right to privacy with respect to personal information, health issues, the search power of school administration or police, the right of

immigrants and students living independently of their parents to attend school, and the right of students to free expression, freedom of religion, or freedom from discrimination.

12. In child protection cases, we always represent the affected child. We have represented children who have brought third party applications to come into the care of a Children's Aid Society, in sibling access cases and in cases where children have sought to be in their own custody in order to leave the Society's care.

13. In deportation cases, we have always represented Canadian-born and immigrant children to express their wishes and plans when a parent is threatened with deportation and Canadian officials propose to send the children out of Canada with the parent.

14. We have represented unaccompanied minors who were permanently living in Canada and wished to challenge the special welfare requirements imposed on social assistance applicants under 18.

15. On numerous occasions, JFCY has presented legal arguments on behalf of children and youth before the Supreme Court of Canada that have brought a child and youth rights based perspective to important public interest issues. JFCY is uniquely positioned to provide this Honourable Court with a perspective on access to justice that is fully informed by the knowledge and experiences of children and youth. JFCY has intervened in, among other cases:

- *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44
- *R. v. J.Z.S.*, [2010] 1 S.C.R. 3
- *A.C. et al. v. Manitoba (Director of Child and Family Services)* [2009] 2 S.C.R. 181

- *R. v. S.A.C.* [2008] 2 S.C.R. 675
- *R. v. A.M.* [2008] 1 S.C.R. 569
- *R. v. D. B.* [2008] 2 S.C.R. 3
- *R. v. L.T. H.* [2008] 2 S.C.R. 739
- *R. v. B.W.P.; R. v. B.V.N.*, [2006] 1 S.C.R. 941
- *R. v. C.D.; R. v. C.D.K.*, [2005] 3 S.C.R. 668
- *R. v. R.C* [2005] 3 S.C.R. 99
- *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 S.C.R. 76
- *F.N. (Re)* [2000] 1 S.C.R. 880
- *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817
- *Eaton v. Brant County Board of Education*, [1997] 2 S.C.R. 241
- *R. v. O'Connor*, [1995] 4 S.C.R. 411
- *L.L.A. v. B.* [1995] 4 S.C.R. 536

JFCY'S INTEREST IN THIS APPEAL

16. As a legal clinic serving children and youth and as the name suggests, JFCY has a mandate to further access to justice for this group. In the constitutional context, JFCY views public interest standing as an important vehicle through which justice for children and youth who often face significant barriers in engaging in litigation can be increased. In addition, JFCY's public interest litigation has ensured that the fundamental rights and freedoms of Canadian children as well as the duties they are owed under international law have been central considerations in constitutional litigation affecting them either individually or as a group. JFCY has made legal submissions which deal with the issue of children's rights to have standing in the cases described below.

17. In the context of applications by defendants for the production of the medical and counselling records of complainants in criminal prosecutions, JFCY argued that young complainants enjoy a constitutional right to privacy in personal information and records relating to them; and that complainants have a right to standing, including the right to appeal an order for production of their records (*R. v. O'Connor* and *L.L.A. v. B.*). The position taken by JFCY attempted to balance the interests of both the accused young person and the young complainants.

18. In the immigration context, JFCY's arguments pertained to the standing, wishes and best interests of the affected children who are threatened with being compelled to leave Canada without any procedural protection. These arguments were based on the obligations of governments to children and youth in light of the *Charter and Convention (Hawthorne v. Canada (Minister of Citizenship and Immigration), (2002) F.C.A. 475*, in representing the Canadian children of potential deportees, and *Baker*).

19. In disposition reviews under the YOA, JFCY made submissions, based on the *Convention* as it operates alone and in relation to the *Charter* with respect to the relief being sought as a result of the alleged brutal treatment of the young persons in jail (*J. W. and K. C.*). In *Canadian Foundation for Children Youth and the Law v. Attorney General in Right of Canada*, JFCY argued that the defence to corporal punishment in section 43 of the *Criminal Code of Canada* violated both the *Charter* rights of children, as well as their rights under the *Convention*. Significantly, JFCY in the capacity of a not-for-profit legal clinic advocating on behalf of children's rights and not directly instructed by a child client; was granted public interest standing in that case by virtue of the same legal test at issue in the present appeal.

20. In a series of cases following the declaration of the YCJA, JFCY as a public interest litigant sought to ensure that this honourable Court was mindful of Canada's international law obligations under the *Convention* when interpreting the then new legislation. (*R. v. L.T. H.*, *R. v. B.W.P.*; *R. v. B.V.N.*, *R. v. C.D.*; *R. v. C.D.K.*, and *R v. D.B.*). In *A.C. et al. v. Manitoba (Director of Child and Family Services)*, JFCY argued that Canada's international obligations, as manifest in the *Convention* together with the domestic law and the *Charter*, constitute legal recognition of the right of young persons to make medical decisions for themselves once they are capable.

21. JFCY jointly with the Canadian Coalition for the Rights of Children, argued, *inter alia*, that the *Optional Protocol to the Convention* pertaining to children in armed conflict should be taken into account when interpreting rights under section 7 of the *Charter* and that Canada's obligations must be determined within the overarching framework of the best interests of the child (*Canada (Prime Minister) v. Khadr*).

GROUND FOR INTERVENTION

22. The expertise of JFCY in legal representation, advocacy, and policy and community development on behalf of children and youth in the justice and legal aid systems, would assist this Honourable Court. JFCY has considerable expertise with respect to intervening and representing a vulnerable group within society.

23. JFCY believes that the issues before the court have national importance and the court's decision will affect the capacity of public interest groups to give voice to Canada's most vulnerable youth. JFCY believes the court's decision will affect the

confidence of young people in their access to justice and their rights to challenge the constitutionality of various laws.

24. JFCY's considerable expertise with respect to the capacity of a vulnerable group to instruct counsel and to participate helpfully in legal proceedings will be of value in the matters in issue in these appeals.

25. JFCY believes that without its expertise as advocates for children and youth, and its considerable experience in arguing from the perspective of children, generally, the Court will not have the benefit of a more fully developed argument on the extent to which public interest groups are essential to participation of and confidence in legal proceedings by vulnerable peoples in Canada.

26. JFCY believes it has a broader perspective with respect to the impact on not only the affected parties to the appeal, but on the other young people who will be affected by the decision in this case.

JFCY'S PROPOSED INTERVENTION

27. If permitted to intervene, I anticipate that JFCY, in coalition with the West Coast Women's Legal Education and Action Fund and ARCH Disability Law Centre will advance the following arguments (subject to further consideration).

28. JFCY will argue in support of a broad and purposive interpretation of the test for public standing in a manner that allows vulnerable parties equal and expansive access to the courts, to enforce their equality rights. This requires courts to turn their minds to

apply the constitutionally-mandated equality lens as an integral part of each of the three steps of the test.

29. Courts should make a full inquiry into the direct or genuine interest of the public interest plaintiff, consider that the ability to act collectively and seek standing as a group is important for vulnerable groups who face obstacles in accessing justice; and assess the reasonable likelihood that effective claims will be brought directly affected persons with regard to the Charter value of substantive equality.

30. In the particular case of children, this includes allowing them to be heard in proceedings affecting them. This interpretation is essential if the Court is to provide meaningful access to justice compatible with the Charter value of equality, international human rights treaties including the Convention and the fundamental constitutional guarantee of access to justice. Specifically, Article 12 of the Convention provides that “the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

31. Without a broad and purposive interpretation, it is neither reasonable, nor realistic, to expect that children and youth will have the material and emotional resources to mount a Charter challenge. Children and youth encounter systemic barriers when moving within a justice system that is designed for adults. Children are often presumed to lack capacity to conduct litigation on their own behalf. Their status in litigation, therefore, is not one of a full and equal participant. They are often spoken for through adult intermediaries.

32. As pointed out in Jeffery Wilson *et al.*, *Wilson on Children and the Law*, looseleaf (Toronto: Butterworths Lexis Nexis, 1996) at paragraph 6-4:“(e)very province has statutes concerned with such matters as vital to the child as her protection from neglect or abuse, where she will live and with whom, through orders of custody and access, or her financial security as a function of orders of child support. However, none of these statutes expressly enable the child to participate in the judicial process and be heard by the judge. In no jurisdiction within Canada is the child a party to provincial child protection legislation. Even where the child has legal representation in a protection hearing she is nevertheless not considered to be a party.”

33. Moreover, “(c)hildren are classified as persons *non sui juris*, individuals who do not possess in the eyes of the law full social and civil rights, who are unable to manage their own affairs or act for themselves because of a disability and who therefore require the power and guardianship of another, which for the purposes of seeking or responding to legal redress, has meant the necessary involvement of a “next friend” or “*guardian ad litem*” and the restraint against litigating in their own right ... Of particular concern, given the deemed incompetence of the child, is the thought of that person initiating litigation in the absence of any “proper person” to pay the costs of unwise or foolish actions, and therefore the need for a next friend to be held responsible for the indemnification of the other party’s legal expense . In either case the child can not discharge her litigation entity” *Ibid at para 6.5.*

34. Even for those children able to break down the systemic and legal barriers that prevent them from fully participating in proceedings affecting them, financial constraints are often a serious challenge. According to the 2010 Report Card on Child and Family

Poverty in Canada, *Reduced Poverty = Better Health for All*, one in 10 children still lives in poverty in Canada, and in First Nations communities: one in four grow up in poverty. The 2010 United Nations Children's Fund report card, *The Children Left Behind: A League Table of Inequality in Child Well-being in the World's Rich Countries*, shows that Canada has slipped to 17th place out of 24 high-income countries evaluated by UNICEF when it comes to the material well being of its children. This place of socio-economic disadvantage translates into serious challenges for children attempting to access the justice system given the costs associated with mounting or defending litigation.

35. The third branch of the test for public interest standing asks "is there no other reasonable and effective manner to bring the issue before the Court?" JFCY will take the position that it is not reasonable to expect children and youth to overcome the systemic, legal and financial barriers they face in order to commit themselves to the often onerous process of a constitutional challenge. The mere possibility that a directly affected child would bring such a claim should not result in the denial of public interest standing for an organization that represents children and youth. An application of the test for public interest standing that did not fully consider the lived reality of affected individuals would have an adverse effect on the ability of children and youth to assert their constitutional rights, and submit government action to appropriate judicial oversight.

CONCLUSION

36. JFCY respectfully seeks leave to apply for standing in coalition with the West Coast Women's Legal Education and Action Fund and ARCH Disability Law Centre as

interveners in this appeal. The coalition will be represented by joint counsel and will file a joint legal argument.


37. The Coalition's request for leave to intervene in this appeal is limited to making written and oral submissions on the questions of law upon which leave to appeal has been sought. The Applicants are not seeking leave to adduce fresh evidence.

38. This affidavit is made in support of Justice for Children and Youth's application for leave to intervene in coalition with the West Coast Women's Legal Education and Action Fund and ARCH Disability Law Centre.

SWORN before me at the City of
Toronto, in the Province of Ontario,
this 23rd day of September, 2011.

} 

JEFFREY ROSEKAT



A Commissioner for taking affidavits.
"Terry Reid"

S.C.C. Court File No. 33981

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

**APPELLANT
(Respondent)**

AND:

**DOWNTOWN EASTSIDE SEX WORKERS UNITED AGAINST VIOLENCE
SOCIETY and SHERYL KISELBACH.**

**RESPONDENTS
(Appellants)**

**AFFIDAVIT OF IVANA PETRICONE
(In support of the Coalition's Application for Leave to Intervene)
(Pursuant to Rules 47, 55, 56(b) and 57(1) of the *Rules of the Supreme
Court of Canada*)**

I, Ivana Petricone, of the City of Toronto, in the Province of Ontario, Barrister and Solicitor, AFFIRM:

1. I am Executive Director of ARCH Disability Law Centre ("ARCH") and as such have knowledge of the matters to which I depose or have received the information from others, in which case I verily believe it to be true.

I. NATURE OF THE MOTION

2. In this application for leave to intervene, ARCH applies in coalition with Justice for Children and Youth and West Coast Legal Education and Action Fund Association ("West Coast LEAF").
3. This Appeal raises important questions about the definition and application of the test for public interest standing. ARCH, as a member of the Coalition, seeks leave to intervene, in order to make submissions in support of a broad and purposive application of the test for public interest standing in a manner that promotes substantive equality.
4. ARCH has a direct and genuine interest in the issues raised in this Appeal. The role of public interest standing is an important tool to facilitate access to equal and meaningful justice for people with disabilities living in poverty, one of the most marginalized and historically disadvantaged groups in Canadian communities.
5. As counsel for both community members and disability advocacy groups, ARCH is uniquely positioned to provide this Honourable Court with a perspective regarding barriers to justice that is fully informed by the knowledge and experience of people with disabilities.
6. The Coalition seeks leave to intervene to make written and oral arguments regarding the interpretation of the test for the grant of public interest standing which is the subject of this Appeal. The Coalition takes no position on the substantive legal issue in the case in chief.

II. BACKGROUND INFORMATION REGARDING ARCH

7. ARCH is a specialty legal aid clinic dedicated to defending and advancing the rights, entitlements, fundamental freedoms and inclusion of people with disabilities in our communities.
8. ARCH was founded over thirty years ago as a charitable organization with an Ontario wide mandate. ARCH was first incorporated in 1980 as the "Advocacy Resource Centre for the Handicapped". By the mid-1990's ARCH used the name "ARCH: Advocacy and Resource Centre for People with Disabilities". On November 15, 2005, amended letters patent were issued which changed ARCH's name to "ARCH Disability Law Centre".
9. From its inception, ARCH has been funded pursuant to Ontario's legal aid legislation. ARCH is currently funded principally by Legal Aid Ontario ("LAO") pursuant to the *Legal Aid Services Act, 1998*.
10. ARCH is governed by a community-based board of directors the majority of whom must be people with disabilities. ARCH works with over sixty Community Partners who are organizations that represent the interests of people with disabilities and endorse the goals and objectives of ARCH. Each year, ARCH holds a meeting to inform our Community Partners about current priorities and activities and to receive feedback about work for the coming year. ARCH's community partners include:
 - Arthritis Society
 - Alliance for Equality of Blind Canadians
 - Canadian Hearing Society
 - Canadian National Institute for the Blind
 - Community Living Ontario
 - Down Syndrome Association Toronto
 - Epilepsy Association Ontario
 - Frontier College

- Hemophilia Ontario
- Houselink Community Homes
- Integration Action for Inclusion
- Multiple Sclerosis Society of Canada
- Muscular Dystrophy Association of Ontario
- Ontario Association for the Deaf
- Ontario March of Dimes
- People First of Ontario
- Sound Times Support Services

11. ARCH is guided by the following set of core values as incorporated into its Vision and Mission Statement:

- The dignity and worth of all people with disabilities must be respected;
- People with disabilities have the right to life, self-determination, and full participation in a society free from barriers to their inclusion and integration;
- People with disabilities themselves are in the best position to determine their own priorities;
- All people have a common responsibility to create communities accessible to all people with disabilities

12. ARCH fulfills its provincial mandate with these values in mind. Its staff engages in the provision of summary advice and referrals, law reform initiatives, test case litigation, community development and public legal education.

13. ARCH provides legal advice and legal and non-legal referrals to people with disabilities in Ontario. ARCH provides advice to people with disabilities in such areas as abuse, attendant services, capacity, disability-specific funding, education, employment, home care, human rights, mental health, disabled people' parking permits, privacy, policing, taxation, and transportation. This service is also extended to lawyers calling on behalf of clients with disabilities who wish to discuss the disability rights implications of their cases.

14. ARCH engages in law reform activities. On some occasions, these are conducted with other disability groups, members of the community and legal clinics. In particular, ARCH analyses and comments upon the impact of current and proposed laws and practices from a disability perspective.
15. ARCH also engages in test case litigation on behalf of both individuals with disabilities and organizations that represent their interests. Importantly, ARCH's test case litigation aims to bring a disability analysis to a case before an appellate level Court.
16. Throughout its history, ARCH has presented legal arguments on behalf of organizations representing people with disabilities before the Supreme Court of Canada that have brought the perspective of people with disabilities to important public interest issues. This advocacy includes representation of interveners before the Supreme Court of Canada in the following cases:
- *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37
 - *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 SCR 362
 - *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 SCR 650
 - *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161
 - *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 51
 - *Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57
 - *Nova Scotia (Minister of Health) v. J.J.*, [2005] 1 S.C.R. 177, 2005 SCC 12
 - *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66
 - *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, 2004 SCC 78
 - *Martin v. Nova Scotia (WCB)* [2003] 2 S.C.R. 504
 - *R. v. LePage*, [1999] 2 S.C.R. 744
 - *Orlowski v. British Columbia (Forensic Psychiatric Inst.)*, [1999] 2 S.C.R. 733
 - *Bese v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 722

- *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625
- *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241
- *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624
- *Gibbs v. Battlefords and District Cooperative*, [1996] 3 S.C.R. 566
- *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519
- *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872
- *Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970
- *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236
- *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143
- *Bhinder v. Canadian National Railway*, [1985] 2 S.C.R. 561
- *Ontario (Human Rights Commission) v. Simpsons-Sears*, [1985] 2 S.C.R. 536

III. INTEREST OF ARCH DISABILITY LAW CENTRE IN THIS APPEAL

14. ARCH has a direct and genuine interest in ensuring that the test for public interest standing is interpreted in a broad and purposive manner. As a legal clinic for people with disabilities, ARCH has a mandate pursuant to the *Legal Aid Services Act, 1998* to further access to justice for the communities it serves. The grant of public interest standing is an important tool to facilitate access to justice for constitutional claimants with disabilities. Public interest standing is an assurance that government action will not be immune from *Charter* scrutiny, where an individual claimant with a disability lacks the capacity or resources to engage in resource intensive *Charter* litigation.

15. In *Canadian Council of Churches v. Canada*, ARCH represented the interveners the Coalition of Provincial Organizations of the Handicapped. That case was a significant decision by this Honourable Court on the law of standing. ARCH made submissions on the criteria that a public interest group must meet in order to bring a *Charter* challenge.

16. More recently, ARCH demonstrated its commitment to and expertise in access to justice through its law reform efforts. In 2009, ARCH received

support from the Law Foundation of Ontario to prepare an in-depth report concerning access to administrative justice for people with disabilities. During the preparation of that report, ARCH consulted with decision makers, tribunal members, lawyers, community legal workers, disability organizations, people with disabilities and their advocates. The report outlined the challenges individuals with capacity issues face when appearing before and communicating with tribunals. The report offered concrete steps tribunals can take to improve accessibility. ARCH also used the research to produce a practical guide for lawyers of clients with capacity issues.

17. Access to justice is a serious concern for people with disabilities, especially those living in poverty. This is particularly so in the administrative law context, where the lives of marginalized and vulnerable people are subject to significant regulation, complex procedures and lack of resources. The Human Rights Tribunal of Ontario (HRTO) is one administrative setting on which people with disabilities rely. ARCH has intervened at the HRTO on two matters with respect to accessibility of HRTO processes for Applicants who are not capable of bringing and conducting litigation. These interventions uniquely position ARCH to speak to accessibility of administrative fora for people with disabilities who seek remedy for their experience of discrimination.

18. In *Yuill v. Canadian Union of Public Employees*, ARCH intervened on the question of the HRTO's jurisdiction to appoint litigation guardians. ARCH argued that the HRTO has the jurisdiction to appoint a litigation guardian on behalf of an individual claimant who does not have the legal capacity to conduct litigation on her or his own behalf. In an interim decision dated January 18, 2011, the Associate Chair of the HRTO found that the HRTO has the jurisdiction to appoint a litigation guardian, and that the HRTO's powers must be interpreted in a way that facilitates access to justice for people with disabilities on an equal basis with others.

Yuill v. Canadian Union of Public Employees 2011 HRTO 126, online: CanLII, <
<http://www.canlii.org/en/on/onhrt/doc/2011/2011hrto126/2011hrto126.html>
>.

19. In *Barber v. South East Community Care Access Centre*, ARCH intervened on the question of the non-appointment or removal of a proposed litigation guardian. In that case, the Claimant was found to be incapable of making personal care decisions. The Respondent alleged that her mother could not act as a litigation guardian, since she was not indifferent as to the outcome of the litigation at the HRTO. As intervener, ARCH proposed principles and processes to safeguard against misuse or abuse of the litigation guardian role, while also ensuring access to justice for persons with capacity issues.

Barber v. South East Community Care Access Centre, 2011 HRTO 404, online: CanLII <
<http://www.canlii.org/en/on/onhrt/doc/2011/2011hrto404/2011hrto404.html>
>.

20. ARCH represents an organization of persons with disabilities, who has sought intervener status in an HRTO matter concerning the interpretation of s. 34(5) of Ontario's *Human Rights Code*. The question before the HRTO is the discriminatory impact of municipal zoning provisions which limit, among other things, the number of people with disabilities allowed to live in a given community. That application has been brought from by a group of psychiatric consumer/survivors. Section 34(5) permits an organization to act on behalf of another person, where that person would have been entitled to bring that application and consents to the bringing of that that application. Both this case and the Appeal at bar address the standing of an organization to bring a claim on behalf of the community or individuals it serves.

Human Rights Code, R.S.O. 1990 c. H.19, s. 34(5)

21. ARCH is uniquely positioned to provide this Honourable Court with a perspective on the definition and application of the test for public interest standing that is fully informed by the knowledge and experiences of people with disabilities.

IV. ARCH DISABILITY LAW CENTRE'S PROPOSED LEGAL POSITION

19. If granted leave to intervene, ARCH, in coalition with Justice for Children and Youth and West Coast LEAF, will argue in support of a broad and purposive interpretation of the test for the grant of public interest standing.

20. The Coalition will argue that the third step of the public interest standing test, whether there is another reasonable or effective means to bring the matter to Court other than through the proposed plaintiff, must be applied in a broad and purposive manner. Such an interpretation is essential if the Court is to provide equal and meaningful access to justice compatible with the common law, the *Canadian Charter of Rights and Freedoms, 1982* (the "Charter"), values of substantive equality and Canada's international law commitments.

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, Tab A.

21. ARCH, as a member of the Coalition, will argue that absent a broad and purposive interpretation, it is neither reasonable, nor realistic, to expect that a person with a disability will have the material and supportive resources necessary to mount a *Charter* challenge. The test for public interest standing must be applied in a contextualized manner, with regard to the particular barriers to accessing justice for people with disabilities.

22. A broad and purposive interpretation of the test is also supported by the persuasive authority of Canada's international commitments, including the *Convention on the Rights of People with Disabilities* (the "CRPD"). The CRPD requires that state parties to establish accessible mechanisms through which vulnerable individuals can exercise and defend their rights. Articles 12 and 13 are of particular significance to access to justice concerns as they protect the legal rights of people with disabilities. Article 12(3) requires States Parties to "take appropriate measures to provide access by people with disabilities to the support they may require in exercising their legal capacity." Article 13 (1) provides that:

States Parties shall ensure effective access to justice for people with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

United Nations Convention on the Rights of People with Disabilities, UN GAOR, 61 st. Session., 76th Mtg., UN Doc. GA/10554 (2006), Art. 12 and 13.

31. Canada ratified the *CRPD* on March 11, 2010. Ratification of the *CRPD* was a significant step in confirming Canada's commitment to the principles and obligations set out in the *CRPD*, namely to promote, protect and ensure the full enjoyment of equality rights by people with disabilities. In order to meet these international obligations, this Honourable Court must consider the economic, environmental and systemic barriers that inhibit private interest litigants with disabilities from mounting a *Charter* challenge.

23. People with disabilities continue to face a myriad of barriers that force them to the margins of both the justice system and the societies of which they are a part. As this Court stated in *Eldridge v. British Columbia (Attorney General)*, "the history of disabled people in Canada is largely one of exclusion and

marginalization.” Unfortunately, these conditions persist. People with disabilities are subject to invidious stereotyping; they have been relegated to institutions; they have been subjected to paternalistic attitudes of pity and charity; their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms; they face barriers in educational institutions; they have too often been excluded from, and are more likely to be outside of, the labour force; they face much higher unemployment rates; and when employed, they are concentrated at the lower end of the pay scale. Because socio-economic disadvantage translates into limited financial resources, many people with disabilities face challenges accessing the justice system given the costs associated with mounting or defending litigation. As such, people with disabilities often have limited access to supports and services that would help them assert their rights.

Eldridge v. British Columbia (Attorney General) [1997] 2 S.C.R. 624 at para. 56.

24. There are strong links between disability and poverty. Disability increases the risk of poverty and poverty increases the risk of disability and often increases the impact of a disability upon an individual. People with disabilities represent a significant percentage of Canada’s population. In 2006, 14.3% of the population in Canada, or 4.4 million individuals, reported having some degree of physical or mental disability. People with disabilities are more likely to be poor than people without disabilities. The average annual earnings of adults with disabilities in Canada in 2005 were about \$9,000 lower than people without disabilities. People with disabilities experience worse educational and labour market outcomes. Overall in Canada in 2006 people with disabilities had an employment rate 22% lower than that of people who did not have a disability.

Statistics Canada, *Participation and Activity Limitation Survey, 2006, Analytical Report* (Ottawa: Social and Aboriginal Statistics Division, 2006),

online: Statistics Canada < <http://www.statcan.gc.ca/pub/89-628-x/89-628-x2007002-eng.pdf>>.

Statistics Canada, *Participation and Activity Limitation Survey, 2006, Tables* (Ottawa: Social and Aboriginal Statistics Division, 2006), online: Statistics Canada < <http://www40.statcan.gc.ca/l01/cst01/health71a-eng.htm>>.

Statistics Canada, *Participation and Activity Limitation Survey, 2006: Tables (Part V)*, online: Statistics Canada, <<http://www.statcan.gc.ca/pub/89-628-x/89-628-x2008011-eng.pdf>>.

Statistics Canada, *Participation and Activity Limitation Survey, 2006, Labour Force Experience of People with Disabilities in Canada* (Ottawa: Social and Aboriginal Statistics Division, 2006), online: Statistics Canada <http://dsp-psd.pwgsc.gc.ca/collection_2008/statcan/89-628-X/89-628-XIE2008007.pdf>.

25. Disability is often accompanied by poverty, low education, lack of supports and access to services that might assist them in asserting their rights. The World Health Organization's *World Report on Disability* confirms that people with disabilities and their families are more likely to experience economic and social disadvantage than people without a disability. This is often because people with disabilities are more likely to be unemployed, generally earn less when employed, and have less access to resources to promote self-employment and livelihood activities. People with disabilities also generally have extra costs related to their disability, such as medical expenses, the purchase and maintenance of assistance devices, special dietary needs, laundry services or personal assistance, so even when people with disabilities have similar incomes to others, their standard of living remains lower.

World Health Organization (2011) *World Report on Disability*, online: <http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf> at 39 and 43.

26. For many individuals with disabilities, economic marginalization is further aggravated by the physical, environmental and systemic barriers they face within the justice system. In 2008, ARCH surveyed the accessibility of various

administrative boards found that people with disabilities can, among many other barriers, find it difficult or impossible to sit for the duration of the hearing, to follow the pace of the tribunal proceedings, or understand the complex language in tribunal correspondence. Persistent stereotypes about people with disabilities can also make individuals reluctant to disclose their disability in order to request accommodation.

ARCH Disability Law Centre (2009), "Access to Administrative Justice for People with Disability – Addressing the Capacity of Parties before Ontario's Administrative Tribunals: Promoting Autonomy and Preserving Fairness", online: ARCH < <http://www.archdisabilitylaw.ca/?q=addressing-capacity-parties-ontario%E2%80%99s-administrative-tribunals-respecting-autonomy-protecting-fairne> >.

27. One response to the persistence of these barriers has been to amend the *Human Rights Code* to allow organizations and individuals to advance claims on behalf of the claimant, with the claimant's consent. In *Kacan v. Ontario Public Service Employees Union*, the HRTO recently found that the purpose of s. 34(5) of the *Code* is "to promote the accessibility of the Code's processes."

Kacan v. Ontario Public Service Employees Union, 2010 HRTO 795 at para 12, online: CanLII < <http://www.canlii.org/en/on/onhrt/doc/2010/2010hrto795/2010hrto795.html> >.

28. Many people with disabilities are unwilling or unable to come forward as personal plaintiffs. In some cases, vulnerable people with disabilities may fear reprisal and the withdrawal of vital services, if they attempt to assert their rights or complain about inadequate services.
29. Requiring a person with a disability to initiate the enforcement of her or his rights leaves that person at a fundamental disadvantage. People with disabilities must overcome significant economic, environmental, physical and

systemic barriers in order to commit themselves to the lengthy process of a constitutional challenge. A definition and application of the test for public interest standing that did not fully consider these barriers would have adverse effect on the ability of the community of people with disabilities to assert their constitutional rights, and submit government action to *Charter* scrutiny.

32. The decision in this Appeal regarding the interpretation of the public interest standing test will have profound implications for people with disabilities. If public interest standing is given a narrow and exclusive application, people with disabilities will have even less access to the Courts to assert their *Charter* rights. ARCH, as a member of this Coalition, will argue that this Honourable Court should interpret the test through the lens of the lived experience of the would-be private interest claimants with disabilities.

V. CONCLUSION

ARCH seeks leave to intervene in this Appeal, in coalition with Justice for Children and Youth and West Coast LEAF. The Coalition will have joint counsel and will make joint submissions.

33. The Coalition's request for leave to intervene in this appeal is limited to making written and oral submissions on the questions of law upon which leave to appeal has been sought. The Coalition is not seeking leave to adduce fresh evidence.
34. The Coalition will not seek costs against any party and it asks that it not to be liable to any party for costs.

35. I make this affidavit in support of the Coalition's motion seeking leave to intervene in this Appeal, and for no other or improper purpose.

AFFIRMED BEFORE ME at the City of Toronto, in the Province of Ontario, this 27th day of September, 2011.



Ivana Petricone
Ivana Petricone

Laurie Letheren
Laurie Letheren
Commissioner for Taking Affidavits
In Ontario

S.C.C. Court File No. 33981

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

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

APPELLANT
(Respondent)

AND:

**DOWNTOWN EASTSIDE SEX WORKERS UNITED
AGAINST VIOLENCE SOCIETY and SHERYL KISELBACH**

RESPONDENTS
(Appellants)

ORDER

The Honourable Justice

Date

THIS MOTION, made by the moving party, the Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth and ARCH Disability Law Centre for an order granting them leave to intervene in the present appeal, pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, was considered this day at Ottawa.

ON READING the affidavits of Catalina Rodriguez, Jeffrey Rosekat, and Ivana Petricone, sworn/affirmed and filed, and upon reviewing the motion record filed by the moving party,

1. THIS COURT ORDERS that the moving party, the Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth (JFCY) and ARCH Disability Law Centre (ARCH), is hereby granted leave to intervene in this appeal.
2. THIS COURT ORDERS that the moving party, the Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth (JFCY) and ARCH Disability Law Centre (ARCH), is hereby granted leave to file a factum of up to 20 pages.
3. THIS COURT ORDERS that the moving party, the Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth (JFCY) and ARCH Disability Law Centre (ARCH), is hereby granted leave to participate in oral argument and make submissions to the Court for up to 15 minutes.
4. THIS COURT ORDERS that there will be no order as to costs.

The Honourable Justice

Attorney General of Canada
APPELLANT

v **Downtown Eastside Sex Workers United Against Violence**
Society, et al.
RESPONDENT

Court File No. 33981

SUPREME COURT OF CANADA

ORDER

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Attorney General of Canada
APPELLANT

v
*Downtown Eastside Sex Workers United Against Violence
Society, et al.*
RESPONDENTS

Court File No. 33981

IN THE SUPREME COURT OF CANADA

**MOTION RECORD OF THE MOVING PARTY, COALITION OF
WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION
FUND, JUSTICE FOR CHILDREN AND YOUTH AND ARCH
DISABILITY LAW CENTRE**

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