

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

The *Constitutional Question Act*, R.S.B.C. 1996, c.68

AND IN THE MATTER OF:

The *Canadian Charter of Rights and Freedoms*

AND IN THE MATTER OF:

A Reference by the Lieutenant Governor in Council set out in Order in Council No.553 dated October 22, 2009 concerning the constitutionality of s.293 of the *Criminal Code of Canada*, R.S.C. 1985, c.C-46

AFFIDAVIT OF ALISON BREWIN

I, Alison Brewin, of 555 – 409 Granville Street, in the City of Vancouver, in the Province of British Columbia, SOLEMNLY AFFIRM AND SAY AS FOLLOWS:

1. I am the Executive Director of West Coast Women's Legal Education and Action Fund ("West Coast LEAF") 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.
2. I have been the Executive Director of West Coast LEAF since 2005. I was the Program Director at West Coast LEAF from September 2001 to September 2005.

3. I received my LL.B. from the University of Victoria in 1991, and was called to the bar of British Columbia in 1992. I am no longer a practicing or licensed member of the bar.

4. This reference requires the Court to determine whether s.293 of the *Criminal Code* (the “Polygamy Provision”) is constitutional, including whether the provision can be interpreted to ensure that it is constitutionally valid. West Coast LEAF has a demonstrable historical and current interest in the practice of polygamy, in particular, in Bountiful, British Columbia, and in the impact of that practice on the equality rights of women and children. West Coast LEAF seeks leave to intervene on that basis.

A. Description of West Coast LEAF

5. 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 British Columbia based equality rights litigation, law reform and public legal education.

6. 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.

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

8. West Coast LEAF seeks to represent the equality interests of all British Columbian women, regardless of race, religion, national origin, immigration

status, sexual preference or identity, family or marital status, disability or ability, age, socio-economic status or any other personal characteristic.

9. Central to West Coast LEAF's mandate 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 maintains its accountability and legitimacy.

10. 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 caliber possible.

11. 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 those rights and think critically about the law. West Coast LEAF recognizes that if women are informed about their equality rights, they will be more able to actively assert their rights and 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.

12. Public legal education initiatives include these workshops: *Transforming Our Future*, which is aimed at educating adults and community organizations about *Charter* rights and the strategies that can be used to enforce those rights; *No Means No*, which is aimed at educating children and youth about their rights and obligations under the law regarding consent to sexual activity; and *Rights in*

the Workplace, which is aimed at educating youth about their rights as employees.

13. Another key project area 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 women pursuant to both s.15 of the *Charter* 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 sharing West Coast LEAF's legal analysis of certain legislation or bills with the Attorney General of British Columbia and other key law-makers, making submissions to standing committees, and drafting a report card on British Columbia's compliance with the 2008 concluding comments on Canada from the UN CEDAW Committee.

14. The third key project area is litigation. 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.

15. 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.

16. 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.

17. West Coast LEAF has also intervened in its own name at the British Columbia Court of Appeal in the appeal of *SWUAV v. Canada*, 2008 BCSC 1726 (appeal decision pending). As a result of recent agreements between LEAF and West Coast LEAF, it is anticipated that West Coast LEAF will seek to intervene in British Columbia in the name of West Coast LEAF more frequently.

18. 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 the Polygamy Provision

19. West Coast LEAF has also developed expertise in the area of substantive equality for women, in particular, the meaning of the equality rights in s.15(1) of the *Charter* as they inform the interpretation and assessment of legislation, common law, and state action. Further, West Coast LEAF has developed expertise in the human rights implications for women of the practice of polygamy.

20. West Coast LEAF seeks leave to intervene in this case because of the importance of the reference questions to West Coast LEAF's constituents, and because its expertise in the area of women's substantive equality offers a unique and important perspective that would be of assistance to this Court in the resolution of the issues raised in this case.

21. As part of its Women's Equality and Religious Freedom Project ("WERF Project"), West Coast LEAF conducted a national consultation in December 2004

that brought together academics, lawyers and community organizations to discuss two issues: the situation in Bountiful and the potential inclusion of Muslim personal law in the *Family Arbitration Act* in Ontario. As the second phase of the WERF project, in 2005, West Coast LEAF formed a multi-faith advisory committee that considered a variety of questions related to women's equality and religion. In the final stage of the WERF project, in 2007 and 2008, West Coast LEAF conducted consultations with Vancouver Area faith based communities of women about their experiences of the relationship between religious practice and women's equality. West Coast LEAF produced a report at each stage of the WERF project.

22. West Coast LEAF's views on the practice of polygamy in Bountiful have been cited by print, online, radio and television media 11 times since August 2007. Print and online media outlets that have referred to the views of West Coast LEAF on this issue include the Vancouver Sun, Lawyers Weekly, The Canadian Press, Xtra National and Metro Vancouver. In July 2004, I wrote an op-ed article for the Vancouver Sun on the practice of polygamy in Bountiful, British Columbia and its impact upon women's equality in that community. In 2009, West Coast LEAF's Legal Director Kasari Govender was interviewed about this subject by both CKNW Radio in Victoria, British Columbia and CBC Television.

23. In my positions at West Coast LEAF, I have spoken on polygamy and the situation in Bountiful at a number of community events. For example, in April 2005, I made a speech at a Canadian Federation of University Women event and presented legal strategies and approaches to the human rights problems in Bountiful. In addition, on November 10 and 11, 2006, I presented at the British Columbia Teacher's Federation Status of Women Conference in Creston, British Columbia, entitled *Remembering Our Rights*, in a workshop on the *Charter* and equality rights and on a panel on Bountiful and human rights.

24. In addition, volunteers have spoken on behalf of West Coast LEAF at community events on polygamy and the situation in Bountiful. For example, on September 30, 2009 West Coast LEAF was invited to send two volunteers to speak on these issues at the North Shore Women's Centre's Annual General Meeting, and on November 18, 2009, two volunteers were similarly invited to present and spoke to the Vancouver Association of Law Librarians.

C. West Coast LEAF's Proposed Legal Arguments

25. If granted leave to intervene, West Coast LEAF will argue that, read down to include as a necessary element of the offense one or more of: involvement of a minor, exploitation, coercion, abuse of authority, a gross imbalance of power or undue influence, the Polygamy Provision is consistent with the *Charter*.

26. West Coast LEAF expects the evidence at the hearing to show that polygamy, as practiced in communities like Bountiful, British Columbia, has been directly connected with the abuse and exploitation of women and children, in violation of their fundamental rights to autonomy and equality. West Coast LEAF will argue that there is a sufficient historical connection between the practice of polygamy and these harms to justify the legislative prohibition of polygamy.

27. In interpreting the scope of the *Charter* rights invoked by those attacking the constitutional validity of the Polygamy Provision, appropriate weight must be given to women's and children's competing constitutional interests in equality and autonomy.

28. In particular, West Coast LEAF will submit that the scope of freedom of religion as protected by s.2(a) of the *Charter* must incorporate the equality protections of women and girls, including women and girls of faith, in ss.15 and 28, and the protections for autonomy of the individual in s. 7. The scope of the rights to life, liberty and security of the person contained in s.7 must similarly incorporate equality protections.

29. Alternatively, the legislative prohibition on polygamy can be justified under s.1 of the *Charter*. Parliament is entitled to legislate to affirmatively protect the constitutional interests of vulnerable groups. The Polygamy Provision prevents the practice of polygamy where such practice is exploitative or abusive of the women and children involved. The Polygamy Provision is justifiable to the extent that it prohibits unacceptably harmful conduct.

D. West Coast LEAF's Proposed Involvement in the Hearing

30. The Applicant's request for leave to intervene in this case is limited to making written and oral submissions on the questions of law before the Court on this Reference. The Applicant is not seeking leave to adduce evidence.

AFFIRMED BEFORE ME at the City of)
Vancouver, in the Province of)
British Columbia, this 25 day)
January, 2010.)
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Kasari Govender
A Commissioner for taking Oaths
in British Columbia

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