

COURT OF APPEAL  
ON APPEAL FROM the Order of the Honourable Mr. Justice Bernard, of the  
British Columbia Supreme Court, Pronounced August 24, 2011

BETWEEN:

John Friedmann

Respondent  
(Petitioner)

AND:

Noemi MacGarvie

Appellant  
(Respondent)

AND:

The British Columbia Human Rights Tribunal

Respondent  
(Respondent)

AND:

West Coast Women's Legal Education and Action Fund

Proposed Intervenor

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**MEMORANDUM OF ARGUMENT ON AN APPLICATION  
FOR LEAVE TO INTERVENE**

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**THE BRITISH COLUMBIA**

**HUMAN RIGHTS TRIBUNAL**

Denise Paluck, solicitor for  
the Respondent  
BC Human Rights Tribunal  
Suite 1170 – 605 Robson Street  
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1. In this application, West Coast Women’s Legal Education and Action Fund (“West Coast LEAF”) requests that it be granted leave to intervene in the present appeal and that it be granted leave to make written and oral submissions at the hearing of the appeal.

2. West Coast LEAF respectfully submits that it should be granted leave to intervene because it has an indirect but substantial interest in the outcome of the appeal, it is able to make a unique contribution to the issues on appeal without taking the litigation away from the parties, and the case raises important questions about women’s equality and discrimination on the basis of sex to which the applicant can bring a useful perspective.

**A. The Intervenor and its Interest in the Appeal**

3. 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.

*Affidavit of Catalina Rodriguez sworn December 20, 2011 at para. 5*

4. The primary focus of West Coast LEAF’s program work is eliminating discrimination against women on the basis of sex. West Coast LEAF has significant expertise in the area of substantive equality for women, with particular regard to s. 15(1) of the *Canadian Charter of Rights and Freedoms*, and in applying these principles to legislation, common law and state action involving women’s equality.

*Affidavit of Catalina Rodriguez at para. 18.*

5. West Coast LEAF has intervened in three legal matters in its own name, including at the British Columbia Supreme Court in the trial of *A Reference Re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, and at the British Columbia Court of Appeal in *SWUAV v. Canada*, 2010 BCCA 439. West Coast LEAF was recently granted leave to intervene at the Supreme Court of Canada in *SWUAV v. Canada*, which will be heard in January 2012. West Coast LEAF has also worked closely with the Women’s Legal Education and Action Fund (“LEAF”), its national

affiliate, to intervene in 12 cases, including cases at the BC Court of Appeal, the Ontario Court of Appeal and the Supreme Court of Canada

*Affidavit of Catalina Rodriguez* at para. 14.

6. 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.

*Affidavit of Catalina Rodriguez* at para. 15.

7. 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.

*Affidavit of Catalina Rodriguez* at para. 16.

8. 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 equality rights jurisprudence and the meaning of substantive equality in Canada and in British Columbia.

*Affidavit of Catalina Rodriguez at para. 17.*

9. West Coast LEAF has extensive experience working to ensure that provincial human rights law develops in accordance with a standard of equality that is substantive and accessible. West Coast LEAF's litigation program is focussed entirely on cases emerging from both human rights legislation and the *Charter*, as can be seen from the above list of cases. In addition, West Coast LEAF has developed and delivers a workshop entitled Transforming Our Future, which is aimed at educating advocates on how to use the principles of anti-discrimination law in making social and legal change. West Coast LEAF has developed extensive expertise in statutory human rights law and the application of this law to women and marginalized populations.

*Affidavit of Catalina Rodriguez at para. 19.*

10. West Coast LEAF has made submissions to the British Columbia Law Institute (BCLI) regarding the fate of the BC Human Rights Tribunal, submitting that the elimination of the Human Rights Tribunal – the only specialized human rights administrative body in BC – could have a profoundly negative impact upon individuals who experience discrimination and individuals who are vulnerable to discrimination, including people living in poverty and other marginalized groups. West Coast LEAF was also invited to make submissions to the BC Human Rights Tribunal's review of its policies and procedures and submitted that access to a competent and effective tribunal with the ability to order meaningful remedies for human rights violations is a vital component of women's equality and ability to participate in the public life of this province.

*Affidavit of Catalina Rodriguez at paras. 20 and 21.*

11. West Coast LEAF worked closely with LEAF to intervene in one of the most significant human rights cases emerging from BC, known as the *Meiorin* case ([1999] 3 S.C.R. 3). West Coast LEAF has recently submitted an application for leave to intervene to the Supreme Court

of Canada in *British Columbia (Ministry of Education) v. Moore*, 2010 BCCA 428, and proposes to make arguments on the development of the test for discrimination under human rights legislation.

*Affidavit of Catalina Rodriguez* at para. 22.

12. The issue of sexual harassment as a form of sex discrimination and a matter of women's equality falls directly within West Coast LEAF's mandate and area of expertise.

13. West Coast LEAF's national affiliate, LEAF, intervened in the case of *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 [*Janzen*], the key authority on sexual harassment law from the Supreme Court of Canada. LEAF's factum was quoted by the Chief Justice in the course of his reasons affirming that sexual harassment is a form of sex discrimination.

*Affidavit of Catalina Rodriguez* at para. 24.

14. West Coast LEAF recently published an Op-Ed in the November 25, 2011 edition of *The Vancouver Sun* regarding allegations of systemic patterns of sexual harassment within the RCMP against its female members, and the implications on the RCMP's conduct of investigations into the disappearances and murders of marginalized women.

*Affidavit of Catalina Rodriguez* at para. 25.

15. West Coast LEAF also has a significant expertise and interest in applying a substantive equality lens to issues of housing and tenancy.

16. West Coast LEAF recently undertook research and community consultations to prepare and publish an Equality Impact Statement analyzing the actual and potential impacts on women of the *Residential Tenancy Act*, S.B.C. 2002, c. 78. The project was motivated in part by the significant power imbalance that exists between landlords and tenants, and was designed to explore the ways in which this power imbalance may serve to undermine women's equality in a tenancy context. In carrying out the project, West Coast LEAF developed significant expertise in tenancy law and its impacts on vulnerable women. In particular, West Coast LEAF concluded

that women, especially single mothers and senior women, face disproportionate adverse impacts as a result of a number of the Act's provisions.

*Affidavit of Catalina Rodriguez at para. 27-29.*

17. West Coast LEAF is currently developing a project specifically to investigate discrimination against women and other vulnerable groups in the tenancy context. West Coast LEAF researchers have been reviewing online rental advertisements and documenting discriminatory and exclusive language contained therein. In preliminary results, researchers have noted a surprising number of rental ads containing language that seeks to exclude single mothers from rental accommodations. Researchers have also noted that online rental advertisement sites do not contain guidance for landlords on how to ensure their ads comply with human rights law. West Coast LEAF hopes to develop this preliminary research into a broader project pertaining to discrimination in tenancy in the spring of 2012.

*Affidavit of Catalina Rodriguez at para. 30.*

18. Other work West Coast LEAF has undertaken in the housing context includes a complaint to the BC Ombudsperson regarding a discriminatory government policy of reducing monthly shelter allowance payments to parents whose children were apprehended by the Ministry of Children and Families; assessing the provincial government's compliance with its housing obligations under the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) through an annual Report Card; working in collaboration with other equality-seeking groups to prepare "shadow reports" to the UN CEDAW Committee, which have addressed discrimination against women in the housing context and women's lack of access to suitable housing; and participating in community consultations to respond to a number of sexual assaults against women in homeless shelters in Vancouver.

*Affidavit of Catalina Rodriguez at paras. 31-34.*

## **B. The Intervenor's Position on the Appeal**

19. West Coast LEAF will respectfully submit that the reviewing Justice erred in ruling that sexual harassment does not necessarily constitute discrimination on the basis of sex contrary to s. 10 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the "*Code*"). West Coast LEAF will submit that once sexual harassment of a tenant by a landlord has been proved, discrimination in tenancy on the basis of sex contrary to s. 10 of the *Code* has also been proved.

## **C. Summary of the Intervenor's Submissions on the Appeal**

20. If granted leave to intervene, West Coast LEAF will argue that *Janzen* and a line of cases decided both before and subsequent to it all stand for the proposition that sexual harassment constitutes sex discrimination and is a violation of women's substantive equality rights. West Coast LEAF will argue that the Supreme Court of Canada's ruling in *Janzen* means that sexual harassment is sexual discrimination in and of itself, and does not require further proof of differential treatment between the sexes.

21. West Coast LEAF will argue that the statutory right to be free from discrimination must be interpreted in a broad and purposive way that works to eliminate patterns of inequality associated with discrimination, and fosters a society in which there are no impediments to full and equal participation in the economic, social, political and cultural life of the province. Sexual harassment undermines women's equality and women's ability to participate in Canadian society.

22. The Supreme Court of Canada in *Janzen* recognized sexual harassment as "an abuse of economic and sexual power" and a "profound affront to human dignity". The Supreme Court of Canada found as a matter of law that sexual harassment is an abuse of power and is therefore sex discrimination. If granted leave to intervene, West Coast LEAF will argue that sexual harassment both mirrors and reinforces a fundamental imbalance of power between men and women. The victims of sexual harassment are largely female, and the perpetrators are largely male, which is a result of sex inequality in society. West Coast LEAF will argue that men's

economic and sexual dominance over women permits and perpetuates the practice of sexual harassment.

*Janzen* at para 56.

23. According to the reasoning of the Court below in this case, there are circumstances in which sexual harassment is not a human rights infringement and is not discriminatory. The implication of these reasons is that the legal treatment of sexual harassment must vary according to circumstance because, in some circumstances, sexual harassment is merely an individual behaving badly rather than a product of systemic discrimination. This highly problematic assumption was reflected in the lower court decision in *Janzen*, where the Manitoba Court of Appeal expressed disbelief at the argument that sexual harassment is discriminatory, and was roundly rejected by the Supreme Court of Canada ruling in that case.

24. The Chief Justice in *Janzen*, on behalf of a unanimous Supreme Court of Canada, firmly rejected the argument that discrimination requires identical treatment of all members of the affected group, or that the discrimination can be separated from the victim's gender. The Chief Justice applied the reasoning in the *Brooks* case, wherein the Court held that pregnancy-related discrimination is sex discrimination, regardless of the fact that not all women become pregnant. Just as the discriminatory impacts of pregnancy-based distinctions fall on women, so too do the discriminatory impacts of sexual harassment fall on women. The experience cannot be separated from the victim's gender.

*Janzen* at paras. 63-64.

*Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

25. West Coast LEAF will also argue that the ruling in *Janzen*, which arose in an employment context, is directly applicable in the tenancy context. We will argue that to hold otherwise would be to undermine women's substantive equality and lead to a perverse inconsistency contrary to the object and purpose of the *Code*.

26. As identified in *Janzen*, the discriminatory nature of sexual harassment in the workplace is rooted in the power imbalance that exists between an employer and employee. West Coast LEAF will argue that a similar imbalance of power exists between a landlord and tenant. Landlords are in a position of unique authority over their tenants; they set rents, control important aspects of the tenant's home life and have the power to evict tenants from their home. The unequal power dynamics inherent in a landlord-tenant relationship are intensified by sex inequalities when the landlord is male and the tenant is female. Given this imbalance of power, enduring the harassing behaviour of a landlord may be perceived by tenants, especially female tenants, as an implicit condition of their tenancy.

*Janzen* at para. 49.

27. Access to safe, dignified housing is essential to women's equality and is a fundamental human right. The threat and impact on women of sexual harassment in tenancy is all the more marked for women who experience multiple and overlapping forms of discrimination. Low income women, single mothers, women of colour, Aboriginal women, women with disabilities, and lesbian and transgendered women may be particularly vulnerable to harassment based on an intersection between their gender and other grounds. West Coast LEAF will argue that to deny that sexual harassment of female tenants is discriminatory based upon sex is to deny marginalized women, who already face many barriers to affordable housing, protection from landlords who would take advantage of their vulnerable positions.

**D. West Coast LEAF's submissions will be useful to the Court and different from those of the other parties**

28. West Coast LEAF has an indirect but substantial interest in this case, and in the development of the law pertaining to sex discrimination generally and sexual harassment in particular.

29. Where the applicant does not have a direct interest in the litigation, the Court must consider the nature of the issue before the court (particularly whether it is a 'public' law issue); whether the case legitimately engages the interests of the proposed intervenor; the

representativeness of the applicant of a particular point of view or perspective that may be of assistance to the court; and whether that viewpoint will assist the court in the resolution of the issues without taking the litigation away from those directly affected by it. Where the case raises issues of public interest or constitutional law, the court is more likely to grant intervenor status to a public interest group who can make a useful contribution to the case at bar.

*R. v. Watson*, 2006 BCCA 234 as cited in *Gehring v. Chevron Canada Ltd.*, 2007 BCCA 557 at para.7.

*MacMillan Bloedel Ltd. v. Mullin* (1985), 66 B.C.L.R. 207 (C.A.) as cited in *R. v. Kapp*, 2005 BCCA 247 at para. 11.

30. This case raises issues of significant public interest and importance, and will have profound implications for future human rights complainants alleging sex discrimination arising from sexual harassment. As a public interest organization, West Coast LEAF is uniquely situated to provide this Honourable Court with insight into the ways in which sexual harassment is a clear violation of women's right to be free from discrimination.

31. West Coast LEAF will assist the court to understand how gendered power dynamics, particularly in a tenancy context, serve to perpetuate sex discrimination, including sexual harassment. While the individual Appellant's argument will provide the Court with an understanding of her own experience, West Coast LEAF is uniquely able to provide the Court with a systemic perspective on these issues and their broader societal impact.

32. Through its affiliation with LEAF and on its own, West Coast LEAF has extensive experience intervening in cases before the courts and making arguments about how substantive equality principles apply in a variety of legal contexts. West Coast LEAF is particularly well-situated to make a substantial contribution to this case given its long-standing and close relationship with LEAF, an experienced and influential intervenor before the courts, including in the *Janzen* case, a precedent-setting case for the very issues relevant to the case at bar.

33. The issue of discrimination on the basis of sex is a matter of public interest and fundamental importance to West Coast LEAF and its members. As a legal organization with a mandate to ameliorate historic patterns of discrimination against women, the proposed intervenor has a significant interest in offering its perspective and expertise to this Honourable Court. West Coast LEAF seeks only to contribute to the Court's understanding and analysis of the legal issues at play in this case, and will neither prejudice the parties, nor take the litigation away from those directly affected by it.

*Affidavit of Catalina Rodriguez, paras. 5 and 39.*

**E. Order Requested**

34. West Coast LEAF respectfully requests that it be granted leave to intervene in this appeal on the following terms:

- a) That it file a factum of not more than 20 pages on or before a date to be specified by this Honourable Court;
- b) That it may present oral argument at the hearing of the appeal not to exceed twenty minutes in length;
- c) That it not be awarded costs or have costs awarded against it.

35. West Coast LEAF respectfully requests that there be no costs of this application.

All of which is respectfully submitted.

Dated: December 22, 2011

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