

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

BETWEEN:

British Columbia Teachers' Federation
and
Surrey Teachers' Association

APPELLANTS
(RESPONDENTS)

- and -

British Columbia Public School Employers' Association
and
Board of Education of School District No. 36 (Surrey)

RESPONDENT
(APPELLANT)

**MOTION RECORD FOR LEAVE TO INTERVENE OF THE PROPOSED
INTERVENER, WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND**
(Pursuant to Rules 47 and 55-59 of the Rules of the Supreme Court of Canada)

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TABLE OF CONTENTS

TAB		PAGE
1.	Notice of Motion for Leave to Intervene of the Proposed Intervener West Coast Women's Legal Education and Action Fund (West Coast LEAF)	1
2.	Affidavit of Laura Track, sworn August 5, 2014	5
3.	Memorandum of Argument	12
	PART I - CONCISE STATEMENT OF FACTS	12
	A. The Proposed Intervener	
	PART II – CONCISE STATEMENT OF THE QUESTIONS IN ISSUE	12
	PART III – CONCISE STATEMENT OF ARGUMENT	12
	B. West Coast LEAF's Past Involvement in Public Interest and Charter Litigation	12
	C. West Coast LEAF has a clear interest in the subject matter of the Appeal	14
	PART IV – SUBMISSIONS ON COSTS	19
	PART V - ORDER REQUESTED	19
	PART VI – List of authorities	21
	PART VII – Legislation	23

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British Columbia Public School Employers' Association
and
Board of Education of School District No. 36 (Surrey)

RESPONDENT
(APPELLANT)

NOTICE OF MOTION TO A JUDGE OR THE REGISTRAR
FOR LEAVE TO INTERVENE FILED BY THE PROPOSED INTERVENER, WEST
COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND
(Pursuant to Rules 47 and 55-59 of the Rules of the Supreme Court of Canada)

TAKE NOTICE that West Coast Women's Legal Education and Action Fund Association (West Coast LEAF) hereby applies to a Judge of this Court, at a date fixed by the Registrar of this Court pursuant to Rules 47, 55-59 of the *Rules of the Supreme Court of Canada*, for an order:

1. Granting West Coast LEAF leave to intervene in this appeal;
2. Permitting West Coast LEAF to file a factum of not more than ten (10) pages;
3. Permitting West Coast LEAF to present oral arguments at the hearing of this appeal of such length as this Court deems appropriate;
4. Providing that no order of costs of this motion and this appeal may be made for or against West Coast LEAF; and
5. Any such further or other Order that this Court may deem appropriate.

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


1. West Coast LEAF has a substantial interest in this appeal;
2. West Coast LEAF has established expertise and experience in relation to issues raised in this appeal, namely public interest and Charter litigation;
3. West Coast LEAF will advance submissions to the Court that are relevant to this appeal, useful to the Court, and different from those of other parties;
4. West Coast LEAF and its members would suffer prejudice if leave to intervene in this appeal is denied;
5. Rules 47 and 55 to 59 of the *Rules of the Supreme Court of Canada*; and
6. Such further and other grounds as counsel may advise and this Honourable Court may permit.

AND FURTHER TAKE NOTICE that the following documents are relied on by West Coast LEAF in support of this motion:

1. Affidavit of Laura Track, sworn August 5 2014;
2. The Memorandum of Argument of West Coast LEAF; and
3. Such further and other material as counsel for West Coast LEAF may advise and this Honourable Court may permit.

Dated at Ottawa, Ontario this 7th day of August, 2014.

SIGNED BY:



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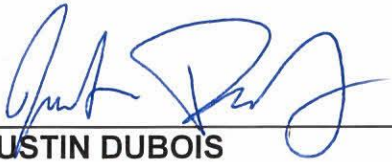
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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to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

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

BETWEEN:

British Columbia Teachers' Federation
And
Surrey Teachers' Association

APPELLANTS
(RESPONDENTS)

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British Columbia Public School Employers' Association
And
Board of Education of School District No. 36 (Surrey)

RESPONDENT
(APPELLANT)

West Coast Women's Legal Education and Action Fund

PROPOSED INTERVENERS

AFFIDAVIT OF LAURA TRACK

(In support of West Coast LEAF'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, Laura Track, of the City of Vancouver, in the Province of British Columbia,
AFFIRM AS FOLLOWS:

2. I am the Legal Director of the West Coast Women's Legal Education and Action
Fund Association ("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.

3. I was called to the bar in British Columbia in 2008. I have been on the staff of
West Coast LEAF since 2011.

4. This appeal involves a claim by birth mothers that the employer's benefit plan and practice with respect to that plan, which forces them to choose between accessing pregnancy benefits and parental benefits, is discriminatory. The case engages issues of pregnancy discrimination and the ways in which the costs of reproduction and child care are inequitably borne by women.

5. West Coast LEAF has a demonstrable historical and current interest in maternity and parental benefits for new parents and in the evolution of substantive equality for women, particularly in the context of the family. The issues raised in this appeal fall squarely within West Coast LEAF's area of expertise.

A. Background and Expertise of West Coast LEAF

6. West Coast LEAF is a non-profit society incorporated in British Columbia and registered federally as a charity. West Coast LEAF's mission 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.

7. West Coast LEAF was created in April 1985, when the equality provisions of the *Canadian Charter of Rights and Freedoms* ("Charter") came into force. West Coast LEAF is an affiliate of a national organization, Women's Legal Education and Action Fund (LEAF). Both LEAF and West Coast LEAF grew out of the efforts of a group of women who, starting in the early 1980s, worked to ensure that ss.15 and 28 of the Charter would be effective in guaranteeing women substantive equality.

8. West Coast LEAF currently has approximately 330 members, approximately 130 volunteers, and five full-time and three part-time staff.

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

10. West Coast LEAF is committed to working on a consultative and collaborative basis with other equality-seeking groups to ensure that West Coast LEAF's legal arguments, education programs and law reform activities are informed by and inclusive of the diversity of women's experiences. West Coast LEAF also consults and collaborates with leading equality rights academics and practitioners to ensure the consistently high calibre of its work.

11. Litigation is one of West Coast LEAF's three program areas. West Coast LEAF has intervened, or is intervening, in its own name in nine legal proceedings: *SWUAV v. Canada*, 2010 BCCA 439; *Reference re: Criminal Code of Canada (B.C.)*, 2011 BCSC 1588 (the Polygamy Reference); *British Columbia (Ministry of Education) v. Moore*, 2012 SCC 61; *Friedmann v. MacGarvie*, 2012 BCCA 445; *Inglis v. Ministry of Public Safety and Solicitor General of BC*, 2013 BCSC 2309; *Villardell v. Dunham*, 2013 BCCA 65 (Supreme Court of Canada decision in appeal pending); and *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association* (judicial review pending). West Coast LEAF also intervened in coalition with two other organizations in *SWUAV v. Canada*, 2012 SCC 45.

12. Together with LEAF, West Coast LEAF has intervened in an additional 14 cases, including cases at the BC Court of Appeal, the Ontario Court of Appeal, and the Supreme Court of Canada.

13. In the following cases in which LEAF intervened, LEAF had primary conduct of the intervention and West Coast LEAF provided 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; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; and *Blackwater v. Plint*, [2005] 3 S.C.R. 3.

14. In the following cases in which LEAF intervened, West Coast LEAF took the leading role in the intervention: *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; *R. v. Watson*, 2008 BCCA 340; and *Rick v. Brandsema*, 2009 SCC 10.

15. In all of these cases, West Coast LEAF and LEAF have focused 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 British Columbia and in Canada.

16. Public legal education is West Coast LEAF's second major program area. West Coast LEAF's public legal education program aims to help British Columbians learn what their legal equality rights are, how to access those rights, and to think critically about the law as it affects them. West Coast LEAF believes that with such education, women will be able to take an active role in asserting their rights and shaping the laws that affect 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 collaboration with other groups and complement its litigation and law reform activities, based on the premise that the first step toward asserting rights is understanding them.

17. West Coast LEAF's third major program area is law reform. West Coast LEAF's law reform initiatives seek to ensure 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. West Coast LEAF's law reform work consists of conducting comprehensive research

projects, drafting best practices and recommendations on legal reform, and making submissions to government and key decision makers.

B. West Coast LEAF's Expertise and Interest in Maternity and Parental Benefits

18. West Coast LEAF has significant expertise in the area of substantive equality for women, with 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.

19. In particular West Coast LEAF has worked towards ensuring that women do not disproportionately bear the social and economic burden of reproduction and child care, including through the following cases and projects:

- a. In 2012, West Coast LEAF published a legal information booklet aimed at women entitled "Separation Agreements: Your Right to Fairness", 2012 (updated 2013);
- b. Also in 2012, West Coast LEAF launched a workshop to educate advocates about how women can ensure economic fairness following relationship breakdown, entitled "The Four Fs: Family, Financials, Freedom and Fairness";
- c. In May 2010, together with other organizations, West Coast LEAF filed a complaint with the Ombudsperson of British Columbia regarding the reduction in shelter allowance for parents on social assistance whose children were in temporary care. West Coast LEAF argued that the reduction in shelter allowance often resulted in delays in family reunification, which had a discriminatory impact on poor and marginalized women; and
- d. West Coast LEAF is also currently working on a project entitled *Mothering With Disabilities*, examining how discrimination against mothers with disabilities interferes with their ability to parent in their children's best interests. The report will be launched in September 2014.

20. West Coast LEAF and LEAF have also engaged in litigation directly related to pregnancy and parental leave and benefits:

- a. LEAF, with the assistance of West Coast LEAF, successfully intervened in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219. LEAF argued that pregnancy discrimination is a form of sex discrimination and illegal. It also argued that bearing children benefits society as a whole and women should not be economically or socially disadvantaged due to their childbearing capacity.
- b. In 1992, in the name of LEAF, West Coast LEAF filed a human rights complaint for Barbara Godwin, a hospital worker in the Lower Mainland. Ms. Godwin's employee disability benefit plan excluded women on maternity leave. LEAF's position was that pregnancy, childbirth and recovery are legitimate medical reasons for absence from work, and excluding women from disability benefits because their inability to work is related to pregnancy is sex discrimination. Late in 1992, Ms. Godwin accepted an offer to settle from her employer.
- c. Also in 1992, LEAF intervened in *Schachter v. Canada*, [1992] 2 S.C.R. 679. At the trial level, LEAF argued that the *Unemployment Insurance Act* failed to provide a period of parenting leave for biological mothers, an omission significant in view of the trial judge's finding that the purpose of pregnancy leave was to accommodate the physiological needs of the woman.

C. West Coast LEAF's Proposed Intervention

21. I have reviewed the Memorandum of Argument included in this Motion Record, and confirm that it is an accurate reflection of the proposed submissions that West Coast LEAF intends to make should this Honourable Court grant it leave to intervene in this appeal. If granted leave to intervene, West Coast LEAF will take no position in respect of the ultimate outcome of the appeal.

22. 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 Applicant is not seeking leave to adduce fresh evidence.

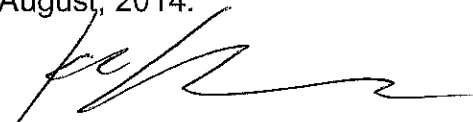
23. West Coast LEAF seeks leave to intervene in this appeal because of the importance of pregnancy and parental benefits to women’s equality. Its position is that benefits provided for pregnancy and parenting are a matter of substantive equality, and provision of those benefits without regard for the special circumstances of birth mothers has a discriminatory impact on women. West Coast LEAF will argue that the *Charter* s. 15(1) analysis set out in the decision of Abella, J. in *Quebec v. A* should be applied in this case, and that s. 15(2) does not insulate the impugned benefit scheme from review.

24. West Coast LEAF also seeks leave to intervene in this appeal to argue that the analyses of discrimination under human rights legislation and under s. 15(1) of the Charter should be kept distinct, and that the human rights analysis of pregnancy and parental benefits in *Brooks v. Safeway* should be applied here.

25. Both positions are important to women’s equality.

26. The Applicant undertakes to work in cooperation with the parties and other possible interveners, and to ensure that its presence as an intervener will not interfere with the parties’ ability to achieve determination of the issues at stake for them in this litigation.

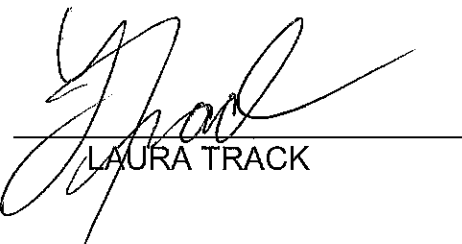
AFFIRMED BEFORE ME at the City of
Vancouver, in the Province of
British Columbia, this 5th day
August, 2014.



A Commissioner for taking Oaths
in British Columbia

Kasari Govender
Barrister & Solicitor
555 – 409 Granville Street
Vancouver, BC V6C 1T2

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LAURA TRACK

**MEMORANDUM OF ARGUMENT FOR LEAVE TO INTERVENE FILED BY
THE PROPOSED INTERVENER, WEST COAST WOMEN'S LEGAL EDUCATION
AND ACTION FUND**

PART I - CONCISE STATEMENT OF FACTS

A. The Proposed Intervener

1. West Coast Women's Legal Education and Action Fund ("West Coast LEAF") has been a non-profit society incorporated in British Columbia and registered as a federal 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 (BC) 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 *Canadian Charter of Rights and Freedoms* and the United Nations *Convention on the Elimination of all forms of Discrimination Against Women*.

Affidavit of Laura Track, sworn August 5, 2014 ("Track Affidavit"), Motion Record, Tab 2, paras.6-7; p. 6.

PART II – CONCISE STATEMENT OF THE QUESTIONS IN ISSUE

2. The question in issue in this motion is whether West Coast LEAF should be granted leave to intervene in the within appeal.

PART III – CONCISE STATEMENT OF ARGUMENT

B. West Coast LEAF's Past Involvement in Public Interest and Charter Litigation

3. West Coast LEAF has extensive experience in bringing the lived experiences of women and girls before the Court and applying this expertise to arguments concerning s. 15 of the *Charter* and British Columbia's *Human Rights Code*.

Track Affidavit, para 10, Motion Record, Tab 2, p. 7.

4. West Coast LEAF, through litigation work with LEAF and on its own, has contributed to the development of equality rights jurisprudence including the definition of substantive equality in Canada and in BC under both the *Charter* and human rights law, especially in reference to women's equality.

Track Affidavit, para 15, Motion Record, Tab 2, p. 8.

5. West Coast LEAF has intervened, or is intervening, in its own name in nine legal proceedings: *SWUAV v. Canada*, 2010 BCCA 439; *Reference re: Criminal Code of Canada (B.C.)*, 2011 BCSC 1588 (the Polygamy Reference); *British Columbia (Ministry of Education) v. Moore*, 2012 SCC 61; *Friedmann v. MacGarvie*, 2012 BCCA 445; *Inglis v. Ministry of Public Safety and Solicitor General of BC*, 2013 BCSC 2309; *Vilardell v. Dunham*, 2013 BCCA 65 (Supreme Court of Canada decision in appeal pending); and *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association* (judicial review pending). West Coast LEAF also intervened in coalition with two other organizations in *SWUAV v. Canada*, 2012 SCC 45.

Track Affidavit, para 11, Motion Record, Tab 2, p. 7.

6. Together with LEAF, West Coast LEAF has intervened in an additional 14 cases, including cases at the BC Court of Appeal, the Ontario Court of Appeal, and the Supreme Court of Canada.

Track Affidavit, para 12, Motion Record, Tab 2, p. 7.

7. West Coast LEAF provided general information and support to LEAF, which had primary conduct of the intervention, 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; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; and *Blackwater v. Plint*, [2005] 3 S.C.R. 3.

Track Affidavit, para 13, Motion Record, Tab 2, p. 7.

8. West Coast LEAF took the leading role in the following cases in which LEAF intervened: *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; *R. v. Watson*, 2008 BCCA 340; and *Rick v. Brandsema*, 2009 SCC 10.

Track Affidavit, para 14, Motion Record, Tab 2, p. 8.

C. West Coast LEAF has a clear interest in the subject matter of the Appeal.

9. This case deals with the purpose of supplementary benefits provided to birth mothers and parents under the collective agreement between the parties. Determination of the issue will require application of the test for discrimination under s. 15(1) of the *Charter* and under BC's human rights legislation. West Coast LEAF is uniquely positioned to assist this Honourable Court in applying a substantive equality analysis to this discrimination claim, and in continuing its development of the analytical framework for s. 15 of the *Charter*.

10. As detailed in the affidavit dated August 5, 2014 of Laura Track, West Coast LEAF's Legal Director, West Coast LEAF and its national affiliate LEAF have extensive experience and investment in working to ensure that women do not disproportionately bear the social and economic burden of reproduction and child-care through the operation of Canadian law. West Coast LEAF and LEAF have particular expertise with respect to the jurisprudence that surrounds the delivery of pregnancy and parental leave and related benefits regimes in Canada. They similarly have extensive experience in working to assist courts in developing an approach to equality rights that makes those rights effective in achieving their purpose. West Coast LEAF has a demonstrable interest in ensuring that the principles of substantive equality are reflected in jurisprudence concerning support for child-bearing and child-rearing. West Coast LEAF's proposed submissions will be both useful and distinct from those of the parties to this dispute and of any other proposed interveners.

Track Affidavit, paras.18-20, Motion Record, Tab 2, pp. 9-10.

11. This case concerns a grievance filed by the Appellant, the British Columbia Teacher's Federation, on behalf of its membership as a whole, alleging unequal treatment of birth mothers vis-à-vis other parents in regard to supplementary employment benefits (SEB) paid to birth mothers and other parents by the employer during pregnancy and parental leave periods. The Appellants allege that the Respondent Surrey School Board failed to separately provide SEB to birth mothers in relation to both pregnancy and parental leave, and that this is a violation of the non-discrimination provisions in s. 13(1) of the *BC Human Rights Code* and s. 15(1) of the *Charter of Rights and Freedoms*. Under the Surrey School Board plan, birth mothers are given 15 weeks of SEB plan top-up benefits to cover pregnancy, birth, post-partum recovery and care-giving, and must choose how to allocate that benefit before and after the baby is born. Other parents who qualify under the SEB plan are given 15 weeks of SEB plan benefits for caregiving alone.

12. Arbitrator Hall held that the SEB provision in the parties' collective agreement provided two types of benefits: parental leave SEB plan benefits to all adoptive parents and birth fathers, and pregnancy leave SEB plan benefits to birth mothers. He found that the provision was not intended to provide parental leave SEB plan benefits to birth mothers. He concluded that the exclusion of birth mothers from parental leave SEB benefits was a breach of the substantive equality rights of birth mothers that violated s. 15(1) of the *Charter*, and s. 13(1) of the *BC Human Rights Code*, and that could not be justified under s. 1 of the *Charter* or s. 13(4) of the *Human Rights Code*.

British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation (Supplemental Employment Benefits Grievance), [2012] B.C.C.A.A.A. No. 138 at para. 68.

13. On judicial review, the BC Court of Appeal overturned the Arbitrator's finding of discrimination. The Court did not see any material distinction between pregnancy leave and parental leave (and associated benefits) because it found the purpose of both is "to further the interests of the child who is newly arrived in the family unity" and to foster the "health of parents and children to serve an important societal interest". The Court

concluded that there was nothing discriminatory about providing the same 15 weeks of SEB plan benefits to birth mothers, birth fathers and adoptive parents.

British Columbia Public School Employers' Association v. British Columbia Teachers' Federation, 2013 BCCA 405 at para. 24 and 26.

14. West Coast LEAF seeks leave to intervene to argue that:
- a. The tests for discrimination under the legislative human rights scheme and s.15 of the *Charter of Rights and Freedoms* are doctrinally distinct in both function and law, and must remain that way in order to facilitate the promotion of substantive equality and access to justice. However, whether this case is considered from a human rights or a *Charter* perspective, a pregnancy and parental leave benefits plan that does not account for the distinction between child-bearing and child-rearing must be found to be discriminatory.
 - b. Considered from a human rights perspective, and in keeping with this Court's long-standing recognition in both human rights and *Charter* jurisprudence that discrimination on the basis of pregnancy is sex discrimination, benefit schemes for birth mothers and other parents must take into account the unique burden of pregnancy, child-birth and post-partum recovery on birth mothers, and the fact that this is important work from which everyone in society benefits. It is well-settled law in Canada that a benefit scheme that does not take this additional burden into account will be under-inclusive and discriminatory.
 - c. The substantive equality analysis under s. 15(1) of the *Charter*, most recently articulated by Abella J. in *Quebec v. A.*, rejects the notion that equality necessitates identical treatment, and holds instead that equality requires that the state take into account disadvantage flowing from the underlying differences between individuals in society. Discrimination is found where state conduct perpetuates or widens the gap between a historically disadvantaged group and the rest of society, regardless of whether the conduct was motivated by stereotyping or prejudice. The examination of motivations for discriminatory

conduct must be kept within the s.1 justificatory stage in order to remain conceptually distinct from the equality analysis.

Quebec (Attorney General) v. A, 2013 SCC 5 at paras. 325, 332 and 333.

- d. In the case at bar, the Court of Appeal erred in finding that the purpose of the SEB provisions was the same for both pregnancy and parental leaves and associated benefits and in applying a formal equality analysis to find that there is no discrimination in SEB provisions which provide everyone with the same length of benefits. Benefit schemes for pregnancy, birth, post-partum recovery, family formation and care-giving must take into account underlying differences that give rise to disadvantage. The fact of being pregnant, giving birth and recovering from birth is one such critical difference. Birth mothers have physiological demands on their bodies that arise from pregnancy and child-birth, and they experience disadvantage while recovering from pregnancy and child-birth. Without supplementary benefits for both parental leave and pregnancy leave, birthing women disproportionately bear the costs of bearing children in Canada. A benefit scheme that does not take into account the disadvantage that flows from this difference is discriminatory and contrary to s. 15(1)'s substantive equality guarantee. Once the state offers a benefit, it is obliged to do so in a non-discriminatory manner.
- e. Canada's current system of conceptualizing pregnancy and parental benefits as a replacement for employment income, and providing benefits for parental and pregnancy leave through the employment insurance scheme rather than through some other form of state-led social welfare scheme, perpetuates inequality in a variety of ways because many birth mothers and other parents do not qualify for such EI benefits. This includes a disproportionate number of parents who are historically disadvantaged by ethnicity, gender and other correlates of low income subsistence and part-time employment. However, the conceptual distinction between child-bearing and child-rearing remains critical to substantive equality for all women, regardless of whether benefits are provided by the state and/or employer through the recipient's relationship with employment, or were to be

disseminated through some other form of state-led social welfare scheme. The distinct burden of pregnancy, child-birth and post-partum recovery must be fully accounted for and recognized in any benefit plan, or the plan will widen the gap between birthing mothers, a group that has historically disproportionately borne the burden of reproduction, and other benefit recipients. The reality of the SEB plan benefits is that as a top-up they enable employees who qualify to stay at home and care for their children for a longer period of time given that the basic benefits provided through the EI system do not offer a full replacement wage. Without SEB, employees face the economic reality of not being able to take their full leave. West Coast LEAF will argue that by not permitting birth mothers to access the 15 weeks of SEB available to adoptive parents, birth fathers, and other social parents, birth mothers may have to return to work earlier than other parents. Their exclusion from this SEB disproportionately places the costs of child-birth onto the shoulders of birth mothers, and discriminates against them as a result.

- f. Taking account of the ways in which pregnancy impacts the lives of women who give birth is essential for ensuring women's equality. Similarly, taking account of the many ways in which families form and thrive is also essential to promoting the goals of substantive equality for all parents. An SEB scheme that forces birth mothers to choose between accessing pregnancy benefits and accessing parental leave benefits devalues both the important societal work of care-giving and the important societal work of pregnancy and birth, and inequitably places the burden of child-rearing on women who give birth. Benefits provided for care-giving must not be eroded by requiring pregnant and birthing mothers to use those benefits to recover from the physiological processes of pregnancy and birth while other qualifying parents are only required to use them for care-giving.
- g. A section 15(2) argument has not been raised in the case to date. However, if the employer raises s. 15(2) as a defense to the equality claims under s. 15(1), West Coast LEAF would welcome the opportunity to make submissions on the relationship between s. 15(1) and s. 15(2). In this context, West Coast LEAF's

arguments would include that s. 15(2) is intended to underline that s. 15(1) is a substantive equality guarantee and to protect governments' ability to create affirmative action plans of the type at issue in *R. v. Kapp*. West Coast LEAF will submit that s. 15(2) was not intended to insulate under-inclusive regimes from *Charter* scrutiny.

R. v. Kapp, 2008 SCC 41.

- h. With respect to remedy, the Appellant has asked that the appeal be allowed and the decision of the arbitrator restored. Arbitrator Hall's decision was to suspend the discriminatory provisions in the collective agreement and order that any new collective agreement cannot discriminate in the same way. West Coast LEAF will ask this Court to state that eliminating benefits in this circumstance for any type of parent would perpetuate or increase disadvantage, and would therefore not be consistent with the substantive equality guarantee of s. 15(1) of the *Charter*.

PART IV – SUBMISSIONS ON COSTS

15. West Coast LEAF does not seek costs in this motion and would not seek costs in its intervention if granted leave to intervene. If granted leave to intervene, West Coast LEAF will not raise new legal issues not raised by the parties. Its intervention therefore should not materially increase the costs of the parties. West Coast LEAF will ask that costs not be awarded against it, on this application or on the appeal.

PART V - ORDER REQUESTED

16. West Coast LEAF respectfully requests an order granting West Coast LEAF 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 proposed intervener will accept the record as is and will not file any additional evidence;
- b. The proposed intervener will serve and file a factum of no more than 10 pages;

- c. The proposed intervener will make oral submissions at the hearing of this appeal of such length as this Court deems appropriate; and
- d. West Coast LEAF does not seek its costs of this motion or of its intervention if granted leave, and requests that no costs be ordered against it.

All of which is respectfully submitted this 7th day of August, 2014.

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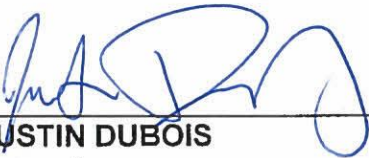
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PART VI – List of authorities

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<i>SWUAV v. Canada</i> , 2012 SCC 45.	5
<i>Vilardell v. Dunham</i> , 2013 BCCA 65.	5

PART VII – Legislation

<p><i>The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.</i></p>	<p><i>Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11.</i></p>
<p><i>Guarantee of Rights and Freedoms</i></p> <p><i>Rights and freedoms in Canada</i></p> <p>1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.</p>	<p><i>Garantie des droits et libertés</i></p> <p><i>Droits et libertés au Canada</i></p> <p>1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.</p>
<p><i>Equality Rights</i></p> <p><i>Equality before and under law and equal protection and benefit of law</i></p> <p>15. (1) 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.</p> <p><i>Affirmative action programs</i></p> <p>15 (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability</p>	<p><i>Droits à l'égalité</i></p> <p><i>Égalité devant la loi, égalité de bénéfice et protection égale de la loi</i></p> <p>15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.</p> <p><i>Programmes de promotion sociale</i></p> <p>15 (2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.</p>

<p><i>Human Rights Code, RSBC 1996, c 210</i></p> <p><i>Discrimination in employment</i></p> <p>13 (1) A person must not</p> <p>(a) refuse to employ or refuse to continue to employ a person, or</p> <p>(b) discriminate against a person regarding employment or any term or condition of employment</p> <p>because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.</p> <p>(2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).</p> <p>(3) Subsection (1) does not apply</p> <p>(a) as it relates to age, to a bona fide scheme based on seniority, or</p> <p>(b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.</p> <p>(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.</p>	
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