

MEMORANDUM OF ARGUMENT FOR LEAVE TO INTERVENE OF 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. West Coast LEAF’S mission is to achieve substantive equality by changing historic patterns of systemic discrimination against women through BC-based equality rights litigation, law reform and public legal education.¹

PART II – CONCISE STATEMENT OF THE QUESTIONS IN ISSUE

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

PART III – CONCISE STATEMENT OF ARGUMENT

B. West Coast LEAF’s Involvement in Public Interest and *Charter* Litigation

3. West Coast LEAF has extensive experience in bringing the lived experiences of women before courts and applying this expertise to arguments concerning section 15 of the *Canadian Charter of Rights and Freedoms*² and British Columbia’s *Human Rights Code*.³ West Coast LEAF has contributed to the development of constitutional law jurisprudence, especially in reference to women’s equality, and to the development of human rights jurisprudence in British Columbia, particularly in reference to the test for discrimination.⁴

4. West Coast LEAF has intervened, or is intervening, in its own name in the following appellate proceedings: *Denton v. Workers Compensation Board*, BC Court of

¹ Affidavit of Robyn Trask, affirmed February 10, 2017 (“Trask Affidavit”), Motion Record, Tab 2, paras. 4-5.

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 (“the *Charter*”).

³ RSBC 1996, c. 210 (“the *Code*”); Trask Affidavit, Motion Record, Tab 2, paras. 8, 15, 17-18.

⁴ Trask Affidavit, Motion Record, Tab 2, para. 19.

Appeal File No. CA43825 (hearing scheduled for March 7-8, 2017); *Trinity Western University and Volkenant v. Law Society of British Columbia*, 2016 BCCA 423; *Scott v. College of Massage Therapists of British Columbia*, 2016 BCCA 180; *R. v. Lloyd*, 2016 SCC 13; *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, BC Court of Appeal File No. CA072770 (heard October 5-6, 2016; judgment reserved); *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation*, 2014 SCC 59; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59; *Villardell v. Dunham*, 2013 BCCA 64; *British Columbia (Ministry of Education) v. Moore*, 2012 SCC 61; *Friedmann v. MacGarvie*, 2012 BCCA 445; *SWUAV v. Canada*, 2012 SCC 45 and 2010 BCCA 439; and *Shewchuk v. Ricard*, [1986] B.C.J. No. 335, 28 D.L.R. (4th) 429 (BCCA).⁵

5. West Coast LEAF has also intervened, been granted leave to intervene or participated in the following trial proceedings and references: *British Columbia Civil Liberties Association and John Howard Society of Canada*, BCSC File No. S-150415, Vancouver Registry (granted leave to intervene on December 15, 2016); *Trinity Western University and Volkenant v. Law Society of British Columbia*, 2015 BCSC 2326; *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, 2015 BCSC 534; *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309; and *Reference re Criminal Code of Canada (BC)*, 2011 BCSC 1588 (the Polygamy Reference).⁶ West Coast LEAF has also intervened (as part of a coalition of six organizations) in an inquiry before the Canadian Judicial Council: In the Matter of an Inquiry Pursuant to Section 63(1) of the *Judges Act* Regarding the Honourable Justice Robin Camp.⁷

6. West Coast LEAF has worked with LEAF on many interventions, either by taking a leading role in the case or by providing background information and support.⁸

⁵ Trask Affidavit, Motion Record, Tab 2, para. 9.

⁶ Trask Affidavit, Motion Record, Tab 2, para. 10.

⁷ Trask Affidavit, Motion Record, Tab 2, para. 11.

⁸ Trask Affidavit, Motion Record, Tab 2, para. 12.

7. West Coast LEAF took a leading role in the following cases where the intervention was carried out under LEAF's name: *Rick v. Brandsema*, 2009 SCC 10; *R. v. Watson*, 2008 BCCA 340; *Smith (Guardian ad litem) v. Funk*, 2003 BCCA 449; *R. v. Demers*, 2003 BCCA 28; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44; and *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. 3.⁹

8. Additionally, West Coast LEAF provided background information and support to LEAF's intervention in the following cases: *Blackwater v. Plint*, 2005 SCC 58; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66; *Canada (Attorney General) v. Lesiuk*, 2003 FCA 3; *Miller v. Canada (Attorney General)*, 2002 FCA 370; *R. v. Shearling*, 2002 SCC 58; *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*, [2002] O.J. No. 1771, 59 O.R. (3d) 481 (C.A.); *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69; and *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.¹⁰

C. West Coast LEAF has a clear and demonstrated interest in the subject matter of the appeal

9. This case concerns the scope of the protection from discrimination regarding employment found in section 13 of the *Code*. This Court will be called upon to determine whether an employee's protection from discrimination in the workplace is limited only to the actions of those with whom the complainant has a relationship of economic dependence.

10. In this appeal, West Coast LEAF is uniquely positioned to assist the Court in applying a substantive equality analysis to this issue. The proposed intervener will assist the Court in understanding the intersecting and multiple ways in which attributes giving rise to historic disadvantage may contribute to discrimination in the workplace and may reinforce present day disadvantage in employment.

⁹ Trask Affidavit, Motion Record, Tab 2, para. 13.

¹⁰ Trask Affidavit, Motion Record, Tab 2, para. 14.

11. As detailed in the affidavit of Robyn Trask dated February 10, 2017, West Coast LEAF has extensive experience and investment in working to ensure that human rights law develops in a manner that supports substantive equality. West Coast LEAF also has extensive experience in working to assist courts in interpreting and applying the law in a manner that takes into account the lived experiences of women and other marginalized and historically disadvantaged groups.

12. West Coast LEAF's work concerning the development of human rights and equality jurisprudence includes intervention in several key cases in which courts have been called upon to interpret what constitutes discrimination under the *Code*.

13. West Coast LEAF intervened (in coalition with another organization) at the trial and appellate court in British Columbia in *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association* to argue that a flexible, liberal and purposive approach is required to the types of evidence sufficient to prove *prima facie* discrimination and the nexus between personal characteristics and adverse treatment.¹¹

14. West Coast LEAF intervened before this Court in *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2014 SCC 70 to argue that a parental leave supplement employment benefits scheme that did not take account of the distinct burden of pregnancy, child-birth and post-partum recovery discriminated against birthing mothers.¹²

15. West Coast LEAF intervened before this Court in *Moore v. British Columbia (Education)*, 2012 SCC 61, to argue, among other things, that importing the requirements of section 15 *Charter* jurisprudence into the *prima facie* test for discrimination in the Code would increase the burden on equality claimants and would be contrary to the broad ameliorative purposes of human rights law.¹³

¹¹ Trask Affidavit, Motion Record, Tab 2, para. 19(a).

¹² Trask Affidavit, Motion Record, Tab 2, para. 19(e).

¹³ Trask Affidavit, Motion Record, Tab 2, para. 19(g).

16. In *Friedmann v. MacGarvie*, 2012 BCCA 445, West Coast LEAF intervened to argue that sexual discrimination is *per se* discrimination based on sex, and that once a finding of sexual harassment has been made, no further analysis is required to find *prima facie* discrimination under the Code.¹⁴

17. West Coast LEAF has also made contributions to the development of human rights law in British Columbia through its work in the areas of law reform and public legal education.

18. Since 2009, West Coast LEAF has reported annually on British Columbia's overall action to remedy discrimination against women by issuing a report card assessing the province's performance against the United Nations' Convention on the Elimination of all Forms of Discrimination against Women.¹⁵ West Coast LEAF has repeatedly called on legislators to protect the human rights of trans* persons.¹⁶ West Coast LEAF has also made submissions on the need for a competent and effective human rights tribunal in British Columbia and has offered commentary on the policies and procedures of the British Columbia Human Rights Tribunal ("the Tribunal") in remedying discrimination against vulnerable and marginalized individuals.¹⁷

19. For over a decade, West Coast LEAF has offered Youth in the Workplace workshops in the Lower Mainland, Kamloops and Nanaimo. These workshops are aimed at a young adult audience and examine employment rights, human rights and discrimination regarding employment. The program provides tools and knowledge to help young people assert their rights in the context of complex power dynamics.¹⁸

20. West Coast LEAF has a demonstrable interest in ensuring that principles of substantive equality are reflected in the application and scope of the *Code*. West Coast LEAF's proposed submissions will be useful and distinct from those of other parties to this dispute and of any other proposed interveners.

¹⁴ Trask Affidavit, Motion Record, Tab 2, para. 19(h).

¹⁵ Trask Affidavit, Motion Record, Tab 2, para. 19(b).

¹⁶ Trask Affidavit, Motion Record, Tab 2, para. 19(d).

¹⁷ Trask Affidavit, Motion Record, Tab 2, paras. 19(i), 19(j).

¹⁸ Trask Affidavit, Motion Record, Tab 2, paras. 19(k).

West Coast LEAF's Proposed Submissions

21. This case deals with a complaint to the Tribunal concerning workplace discrimination on the basis of religious affiliation, place of origin and sexual orientation. The alleged discrimination took place at a construction project where the complainant was employed by an engineering consulting firm serving as contract administrator on the project, and the individual respondent was a site foreman on the project employed by a separate construction company. While on the job, the individual respondent made repeated derogatory remarks to the complainant and others about the complainant's place of birth, religion and sexual orientation.

22. On a preliminary application to dismiss the complaint, the Tribunal found that it had jurisdiction to hear the complaint on the basis that the alleged conduct could constitute discrimination in employment contrary to s. 13 of the *Code*. The British Columbia Supreme Court upheld the Tribunal's decision. On appeal, the Court of Appeal found the Tribunal erred in concluding it had jurisdiction over the complaint, holding that the individual respondent's remarks, though offensive, did not constitute discrimination in employment because the complainant was not in a relationship of economic dependency upon the individual respondent.

23. West Coast LEAF seeks leave to intervene to make arguments concerning the Court of Appeal's requirement that a relationship of economic dependence and control be present in order for conduct affecting a complainant to be considered discriminatory. If granted leave to intervene, West Coast LEAF will argue that the objective of substantive equality, and the requirement that the *Code* be given a large and liberal interpretation as quasi-constitutional legislation, require that the *Code* be interpreted in a manner that gives full weight to the complex nature of workplaces and experiences of workers, and the many ways substantive equality in the workplace can be denied or undermined. West Coast LEAF will argue that substantive equality cannot be achieved if the *Code* is interpreted so narrowly that only the actions of those above a worker in a traditional employment hierarchy can amount to discrimination under the *Code*.

24. In particular, West Coast LEAF intends to make the following submissions.

25. Work has a primary place in most people's lives, both in terms of economic security and as a source of dignity, self-worth and self-esteem. Workplaces are not simply repositories of economic relationships, and do not only provide economic benefits. They are social environments which provide potential benefits and costs across a wide spectrum of human experience. To affect substantive equality in a workplace, the *Code* must be interpreted in a manner that fully reflects the impact of the workplace on each worker.

26. Workplaces often reflect, reproduce and reinforce the hierarchies and disadvantages present in society as a whole and remain a site of adverse treatment on the basis of protected characteristics identified in the *Code*. Adverse treatment is a particular risk for individuals with intersecting protected characteristics and for vulnerable workers with tenuous or poorly paid work. Importantly, individuals with attributes associated with historical disadvantage carry the weight of their experiences of disadvantage with them. The power imbalances associated with historical disadvantage, such as gender discrimination and sexual harassment, are not left at the workplace door.

27. The *Code* has long-recognized that discrimination on the basis of protected characteristics has wide-ranging adverse impacts on affected individuals and society as a whole. Discriminatory actions in the workplace adversely impact an individual's sense of self-worth, inherent dignity and sense of belonging regardless of whether they are taken by a co-worker, contractor, subordinate or supervisor. The potential for an adverse impact on one's economic interests is but one aspect – albeit a significant one – of the myriad harms arising from discrimination within the workplace. The *Code* itself acknowledges non-economic harms associated with discrimination by prohibiting discrimination where no economic dependency is found (e.g., some services customarily available to the public.)

28. Modern workplaces are complex, diverse, and changeable. They can involve the intersection of very diverse populations, including individuals employed by multiple employers and people present for reasons other than employment, including clients,

patients, customers and students. All of these persons contribute to the workplace environment as experienced by workers.

29. The approach taken by the Court of Appeal reflects a narrow and impoverished understanding of what a workplace is for workers. If adopted, it would leave the lived experience of diverse women in the workplace beyond the jurisdiction of the Tribunal to examine or act upon, fundamentally denying those women the promise of substantial equality in the *Code*. The Court of Appeal's narrow approach is contrary to established interpretations of the *Code*, and fundamentally inconsistent with the broad, quasi-constitutional objectives of the *Code*. To be as effective as possible, the *Code* protections must apply as broadly as possible.

30. West Coast LEAF will ensure that it provides the Court with useful and unique submissions on the constitutional issues before it, and that it does not duplicate the submissions of another party or intervener.

31. West Coast LEAF respectfully submits that the participation of public interest interveners is particularly important in appeals of human rights claims where, as here, the complainant is absent.

PART IV – SUBMISSIONS ON COSTS

32. 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

33. West Coast LEAF 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 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 13th day of February, 2017.

SIGNED BY:

 _____	 _____	 _____
for CLEA PARFITT Barrister & Solicitor 407-825 Granville Street Vancouver, BC V6Z 1K9	for RAJWANT MANGAT West Coast LEAF 555-409 Granville Street Vancouver, BC V6C 1T2	JUSTIN DUBOIS Power Law 1103 - 130 Albert Street Ottawa, ON K1P 5G4
Tel: 604.689.7778 Fax: 604.689.5572 cparfitt@axion.net	Tel: 604.684.8772 Fax: 604.684.1543 litigation@westcoastleaf.org	Tel : 613-702-5565 Fax : 613-702-5565 jdubois@powerlaw.ca
Counsel for West Coast LEAF	Counsel for West Coast LEAF	Agent for West Coast LEAF

PART VI - LIST OF AUTHORITIES

None.

PART VII – LEGISLATION

Human Rights Code, RSBC 1996, c. 210

Discrimination in employment

13 (1) A person must not

(a) refuse to employ or refuse to continue to employ a person,
or

(b) discriminate against a person regarding employment or any
term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, 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.

(2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).

(3) Subsection (1) does not apply

(a) as it relates to age, to a bona fide scheme based on seniority, or

(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.

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

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

BETWEEN:

BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL

APPELLANT
(Respondent)

and

EDWARD SCHRENK

RESPONDENT
(Appellant)

DRAFT ORDER

UPON THE MOTION by West Coast Women’s Legal Education and Action Fund (“West Coast LEAF”) requesting leave to intervene in the above-mentioned appeal;

AND HAVING READ the materials filed;

IT IS HEREBY ORDERED THAT:

1. West Coast LEAF be granted leave to intervene in this appeal, on a without costs basis;
 2. West Coast LEAF be granted leave to file a factum of no more than 10 pages;
and
 3. West Coast LEAF be granted leave to present oral argument at the hearing of the appeal of not more than 10 minutes.
-