CANADIAN JUDICIAL COUNCIL

IN THE MATTER OF AN INQUIRY PURSUANT TO S. 63(1) OF THE *JUDGES ACT* REGARDING THE HONOURABLE JUSTICE ROBIN CAMP

NOTICE OF MOTION

AVALON SEXUAL ASSAULT CENTRE
ENDING VIOLENCE ASSOCIATION OF BRITISH COLUMBIA (EVA BC)
INSTITUTE FOR THE ADVANCEMENT OF ABORIGINAL WOMEN
METROPOLITAN ACTION COMMITTEE ON VIOLENCE AGAINST WOMEN AND CHILDREN (METRAC)
WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND (WEST COAST LEAF)
WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. (LEAF)

TAKE NOTICE that Avalon Sexual Assault Centre, Ending Violence Association of British Columbia ("EVA BC"), the Institute for the Advancement of Aboriginal Women ("IAAW"), Metropolitan Action Committee on Violence Against Women and Children ("METRAC"), and West Coast Women's Legal Education and Action Fund Association ("West Coast LEAF"), and the Women's Legal Education and Action Fund Inc. ("LEAF") (the "Proposed Intervener Coalition"), pursuant to the Directions to Potential Interveners issued by the Inquiry Committee on May 4, 2016, seek an order granting leave to intervene in the present Inquiry.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of this motion:

(a) an Affidavit, affirmed by Diane O'Reggio on May 30, 2016;

(b) an Affidavit, affirmed by Kendra Milne on May 30, 2016;

(c) written submissions, dated May 31, 2016; and

(d) such further or other material as counsel may advise and may be permitted.

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

(a) this Inquiry raises important issues concerning sexual assault law and the equality rights of women in Canada;

(b) the Proposed Intervener Coalition has a unique perspective that will assist the Inquiry Committee in its consideration of the issues in this matter;

(c) Sections 63 and 65 of the *Judges Act;* and

(e) such further or other grounds as counsel may advise and may be permitted.

DATED at Toronto this 31st day of May, 2016

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Co-Counsel for Proposed Intervenor Coalition

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CANADIAN JUDICIAL COUNCIL

IN THE MATTER OF AN INQUIRY PURSUANT TO S. 63(1) OF THE *JUDGES ACT* REGARDING THE HONOURABLE JUSTICE ROBIN CAMP

MOTION FOR LEAVE TO INTERVENE
AVALON SEXUAL ASSAULT CENTRE
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WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND (WEST COAST LEAF)
WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. (LEAF)

AFFIDAVIT OF DIANE O'REGGIO

Affirmed on May 30, 2016

I, Diane O'Reggio, of the City of Toronto, in the Province of Ontario, SWEAR AND SAY THAT:

1. I am the Executive Director of the Women's Legal Education and Action Fund Inc. ("LEAF") and as such have knowledge of the matters hereinafter deposed, except where stated to be based on information and belief in which case I verily believe them to be true.

2. LEAF seeks to intervene in this Inquiry in coalition with Avalon Sexual Assault Centre ("Avalon"), Ending Violence Association of British Columbia ("EVA BC"), the Institute for the Advancement of Aboriginal Women ("IAAW"), Metropolitan Action Committee on Violence Against Women and Children ("METRAC"), and West Coast Women's Legal Education and Action Fund Association ("West Coast LEAF"), the ("Proposed Intervener Coalition").

3. My affidavit provides evidence as to the interest of four of the proposed intervener coalition partners (Avalon, IAAW, METRAC and LEAF), and the potential prejudice to them of denying the motion. The affidavit of Kendra Milne, also filed in support of this motion, provides evidence of the interest of the other two proposed intervener coalition partners (EVA and West Coast LEAF) and the potential prejudice to them of denying the motion.

Background of the Proposed Interveners

(a) Women's Legal Education and Action Fund (LEAF)

4. LEAF is a national, non-profit organization founded in April 1985 to advance the equality rights of women and girls in Canada as guaranteed by the *Charter of Rights and Freedoms*. To this end, LEAF intervenes in litigation, including human rights cases and criminal appeals, and engages in law reform and public education. LEAF is the only national organization that exists to advance the equality rights of women and girls under the law.

5. With branches across the country, including LEAF Edmonton and LEAF Calgary, and an affiliated organization, West Coast LEAF, in British Columbia, LEAF's membership is broad and includes women of all ages and backgrounds located across Canada.

6. LEAF litigates and educates to strengthen the substantive equality rights of women and girls, as guaranteed by the *Charter*. Substantive equality recognizes historically and socially-based differences and challenges systemic and structural discrimination. Since 1985, LEAF has made significant gains for women in numerous important cases, advancing women's rights in areas such as employment, housing, immigration, family law, pay equity and sexual assault law.

7. LEAF has advocated for *Criminal Code* amendments that respect and promote women's substantive equality. Of particular relevance to this Inquiry, LEAF has engaged in the development of the law of sexual assault since the 1980s, participating in most of the major

Supreme Court of Canada cases that developed the jurisprudence in this area, such as *The Queen v Canadian Newspapers Co.*, [1988] 2 SCR 122; *Seaboyer v The Queen*, [1991] 2 SCR 577; *O'Connor v The Queen*, [1995] 4 SCR 411; *R. v. Mills*, [1999] 3 SCR 668; *R. v Ewanchuk*, [1999] 1 SCR 330; and *R v Darrach,* [2000] 2 SCR 443. LEAF was an instrumental advocate with respect to the Bill C-49 amendments to the *Criminal Code* in 1992 and in defending those amendments on the basis of women's equality as an intervener in *R v Darrach,* [2000] 2 SCR 443. Through Bill C-49, Parliament defined sexual consent, listed situations in which there could be no consent in law, limited the defence of mistaken belief in consent, and brought in new provisions regarding when an accused could introduce evidence of the complainant's sexual history.

8. LEAF has also had a longstanding interest in the importance of the judicial role in the Canadian criminal justice system. For example, LEAF intervened (along with the National Organization of Immigrant and Visible Minority Women of Canada) before the Supreme Court of Canada in *R. v. S. (R.D.)*, [1997] 3 SCR 484 to consider whether the test for a reasonable apprehension of bias was applied in a manner consistent with the equality guarantees in the *Charter*.

(b) Metropolitan Action Committee on Violence Against Women and Children ("METRAC")

9. Founded in 1984, METRAC is located in Toronto and has ten full-time and five part-time staff. METRAC is governed by a volunteer Board of Directors composed of 11 members. METRAC is a community-based, not-for-profit organization funded by individuals, corporations, foundations, and three levels of government. METRAC works with individuals, communities and institutions to change ideas, actions and policies that lead to violence against women and youth. METRAC's education and training initiatives aim to protect the right of women and youth

to live free from the fear, threat and experience of violence. METRAC's programs are guided by gender-based analysis and principles of access, equity and inclusion for all women and youth, addressing their distinct realities within and among diverse communities.

10. METRAC was established in 1984 as a collaborative response by police, government, community agencies and individuals to a number of brutal assaults and murders of women that occurred in the summer of 1982. Over the past 32 years, METRAC has evolved into a highly active community catalyst for policy development and law reform in several areas related to women's right to safety and the right to live lives free from the fear, threat, and experience of violence. METRAC's work to reform the laws governing crimes perpetrated against women has been extensive.

11. METRAC works to increase access to justice for vulnerable women affected by violence. METRAC has two main program areas: the Community Justice Program, and the Community Safety Program. METRAC's legal information workshops and trainings include information about the law of sexual assault and consent, presented to a variety of organizations and communities, including: high school students and teachers; women living in shelters; and women's support groups, especially newcomer and immigrant women from various cultural backgrounds. METRAC's programs seek to ensure that women understand the full meaning of voluntary consent to sexual activity, their rights to refuse sexual advances, and their options for seeking legal redress. METRAC is aware of a widespread mistrust of the criminal justice system, and a widespread belief that it neither deters sexual assault nor provides justice for survivors of sexual assault.

(c) Avalon Sexual Assault Centre ("Avalon")

12. Avalon is a feminist, community based organization located in Halifax, Nova Scotia which provides services for those affected by sexualized violence, with primary emphasis on

support, education, counselling and leadership or advocacy services for women and trans/non gender binary people.

13. The main services offered by Avalon are:

- Community education, public awareness, legal and professional training targeting the prevention of and intervention after sexualized violence/abuse;
- Individual therapeutic counselling and group program services for women and trans/non gender binary individuals 16 and over;
- Legal support and advocacy;
- System based/social justice advocacy and legislative reform;
- The Sexual Assault Nurse Examiner ("SANE") program, which provides immediate response to sexual assault victims of all ages and genders requiring medical care and the collection of forensic evidence; provide evidence and expert testimony in court;
- Information, support, referral over the phone, resource distribution.

14. As noted above, Avalon's mandate includes individual and systemic/social justice advocacy. Some recent examples of Avalon's initiatives to advance legal system reform and social justice are:

- Partnering with the Nova Scotia Barristers' Society to develop a handbook about the legal process after sexual assault and a sexual assault training curriculum for lawyers.
- Developing and delivering a sexual assault investigation and response training for police, including part of the trauma informed policing training for the Halifax Regional Police.
- Participating in a coalition of feminist and equality seeking women's organizations that advocated for the moratorium on Restorative Justice and adult diversion being used for sexual assault/abuse and domestic violence.
- Leading a provincial wide sexual assault needs assessment in 2008 "Suffering in Silence" that outlined specific recommendations including the need for a Provincial Sexual Assault Strategy.

- Presenting case statements and consultation to Nova Scotia government on the *Limitation of Actions Act* and changes to the *Child Protection Act* as well as participating in both provincial and federal law reform consultation processes.

- Avalon Centre participated in two national sexual assault research projects - one led by the Canadian Association of Sexual Assault Centres and one commissioned by Justice Canada.

- Conducting a two-year research project evaluating the impact of the SANE program on the legal system, which involved gathering both qualitative and quantitative data pertaining to the disposition of cases through the legal process and the impacts of the criminal justice process on victims of sexual assault.

- Reforming the RCMP internal review process including by making hearings open to the public and advancing expert testimony in cases involving sexual assault or domestic violence.

15. In addition, Avalon was responsible for the first victim-focused sexual assault legal support advocacy program. Avalon's Legal Support Advocate provided information about options after sexual assault, reporting to police and the legal or court process. Avalon also provided court preparation, accompaniment, and support for victims involved in the court process after sexual assault/abuse, as well as referrals to legal professionals and system based advocacy. Avalon has not been able to offer legal support or advocacy services due to a lack of funding since March 2015.

(d) Institute for the Advancement of Aboriginal Women (IAAW)

16. IAAW is a provincially incorporated non-profit organization founded in 1994 to promote the rights of Indigenous women. It has a Chief Executive Officer, four Program Coordinators, and one part-time Financial Manager. IAAW is governed by an eight-member elected board of directors, with additional guidance by a Circle of Honour Elders. IAAW has outreach to numerous communities in Alberta, and has a current registered membership of 270.

17. IAAW supports and serves Alberta's Indigenous women by spearheading the development and delivery of programs and services for Indigenous women, including community-based human rights training, family violence workshops, mediation and advocacy training, entrepreneurial and wellness programs, and youth human rights workshops. IAAW delivers pre-employment skill development programs to Indigenous women in Alberta to assist in addressing barriers to employment or education, and to partner Indigenous women with employers to increase their access to employment. On average, the IAAW provides full-time training to approximately 90 Indigenous women every year. Additionally, approximately 200 Indigenous women participate in workshops offered at the community level every year.

18. IAAW has been invited to participate across Canada in a variety of forums on human rights, social justice and violence against Indigenous women. These include, for example, participating in a fatality inquiry into the shooting deaths of two members of the Tsuu T'ina First Nation Reserve (Judge Thomas R. Goodson, *Report to the Attorney General, Public Inquiry, The Fatality Inquiry Act (2000))*, speaking in post-secondary classes and conferences, participating in intergovernmental initiatives, presenting to the United Nation's Special Rapporteur on the Rights of Indigenous Peoples in 2013, and participating in the International Day for the Elimination of Racial Discrimination. IAAW is also a co-intervener with LEAF in *R v Barton,* ABCA Appeal No. 1503-0091-A, which highlights the effect of discriminatory beliefs, misconceptions, or biases against Indigenous women in the context of sexual assault and the acquittal of the accused in the death of Cindy Gladue, to be heard by the Alberta Court of Appeal on September 6, 2016.

19. IAAW raises public awareness of the violence perpetuated against Indigenous women. The organization has compiled related reports on crimes against Indigenous women, the impact of Indigenous cross-cultural training for city police and RCMP, the effects of the *Protection Against Family Violence Act*, RSA 2000, c P-27 on Indigenous women. It has also created action

plans for increasing community consultations and reducing the violence against marginalized Indigenous women.

LEAF's Contributions as an Intervener

20. LEAF has contributed to the development of the meaning of substantive equality and to Canadian equality rights jurisprudence. LEAF has done so in part by intervening in dozens of cases, including before the Supreme Court of Canada in such cases as: *The Queen v Canadian Newspapers Co., supra; The Law Society of British Columbia v Andrews*, [1989] 1 SCR 143; *Borowski v. The Attorney General of Canada*, [1989] 1 SCR 342; *Brooks v Canada Safeway Ltd.*, [1989] 1 SCR 1219; *Tremblay v Daigle*, [1989] 2 SCR 530; *The Queen v Keegstra*, [1990] 3 SCR 697; *Taylor v The Canadian Human Rights Commission*, [1990] 3 SCR 892; *Seaboyer v The Queen, supra; Sullivan v The Queen*, [1991] 1 SCR 489; *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236; *Butler v The Queen,* [1992] 1 SCR 452; *Norberg v Wynrib*, [1992] 2 SCR 226; *M.(K) v M (H)*, [1992] 3 SCR 6; *Moge v Moge,* [1992] 3 SCR 813; *Conway v The Queen*, [1993] 2 SCR 872; *R. v M.(M.L.),* [1994] 2 SCR 3; *R. v Whitley*, [1994] 3 SCR 830; *Thibaudeau v Canada*, [1995] 2 SCR 627; *O'Connor v The Queen, supra*; *L.L.A. v A.B.*, [1995] 4 SCR 536; *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624; *Winnipeg Child and Family Services v G.(D.F.)*, [1997] 3 SCR 925; *Vriend v Alberta,* [1998] 1 SCR 3; *R. v Ewanchuk*, [1999] 1 SCR 330; *M. v H.*, [1999] 2 SCR 3; *J.G. v Minister of Health and Community Services*, [1999] 3 SCR 46; *BCGSEU v British Columbia (Public Service Employee Relations Commission*), [1999] 3 SCR 3; *R. v Mills*, [1999] 3 SCR 668; *British Columbia Human Rights Commission v Blencoe*, [2000] 2 SCR 307; *R. v Darrach, supra*, ; *R. v Shearing*, [2002] 3 SCR 33; *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, [2004] 3 SCR 657; *Blackwater v Plint*, [2005] 3 SCR 3; *Dickie v Dickie*, [2007] 1 SCR 346; *Honda Canada Inc. v Keays,* [2008] 2 SCR 362; *R. v J.A.*, [2011] 2 SCR 440; *R. v D.A.I.,* 2012 SCC 5; *R. v N.S.*, [2012] 3 SCR 726; *Saskatchewan (Human Rights*

Commission) v Whatcott, 2013 SCC 11; *Québec (Attorney General) v A.,* 2013 SCC 5; *R. v Kokopenace,* 2015 SCC 28. At least a dozen of these interventions were in sexual assault cases.

21. LEAF has also intervened before courts of appeal including in the following cases: *R. v O'Connor* (1994), 89 CCC (3d) 109 (BCCA); *Ferrel v Ontario (Attorney General)* (1998), 168 DLR (4th) 1 (CA); *Kane (Re)*, 2001 ABQB 570; *Miller v Canada (Attorney General)*, 2002 FCA 370; *Falkiner v Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (2002), 212 DLR (4th) 633 (CA); *Lesiuk v Canada (Employment Insurance Commission)*, 2003 FCA 3; *Jean v Canada (Minister of Indian Affairs and Northern Development)*, 2009 FCA 377; *Canada (Attorney General) v Johnstone*, 2014 FCA 110; *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852; and in the upcoming appeal of *R v Barton, supra*, which focuses on the law of consent and sexual assault in the context of the acquittal of the accused in the death of Cindy Gladue, to be heard by the Alberta Court of Appeal on September 6, 2016.

22. LEAF has extensive background and experience in issues related to past and present *Criminal Code* provisions regarding the prosecution of sexual assault offences. Through its interventions in sexual assault cases, LEAF has addressed the constitutional equality standards that must be met if survivors of sexual violence are to obtain equal protection and benefit of the law, meaningful security of the person and equal access to justice. LEAF has intervened in over a dozen Supreme Court of Canada criminal and civil sexual assault appeals and has developed a contextual analysis which addresses the section 7, 15 and 28 *Charter* rights of sexual assault complainants and litigants. LEAF has played a leadership role in exposing and challenging rape mythologies, exploring the ways in which legal norms and trial processes continue to reinforce stereotypes and myths to the prejudice of complainants, and developing a nuanced understanding of a fair criminal trial process, which considers the rights and circumstances of complainants, as well as those of the accused and society at large.

23. LEAF has analyzed sexual violence as a form of sexual inequality and the ways in which the legal system maintains such inequalities. In particular, LEAF has played a leadership role in identifying and challenging rape myths and pointing out the ways in which legal norms and trial processes reinforce stereotypes and myths to the prejudice of complainants and victims. LEAF's contributions to sexual assault law are guided by the equality, security of the person and privacy rights of sexual assault complainants, sections 7, 15 and 28 of the *Charter*, and recognition of the ways in which sex inequality is compounded by other prohibited grounds of discrimination such as race, class, Aboriginal status, and/or disability (See for example*: Norberg v Wynrib*, *supra*; *O'Connor v The Queen*, *supra*; *Blackwater v Plint*, *supra*; *R v JA, supra*; *R v DAI, supra* and *R v Barton, supra*).

24. LEAF's experience is reflected in its role as an intervener in cases concerning:

- whether *Criminal Code* sexual offence provisions restricting the defence from cross-examining and leading evidence regarding a complainant's sexual conduct on other occasions, are unconstitutional: *Seaboyer v The Queen*, [1991] 2 SCR 577;

- whether, in a civil action, an addicted plaintiff, who participates in a sex-for-drugs arrangement with a defendant doctor, truly consented to the sexual conduct: *Norberg v Wynrib*, [1992] 2 SCR 226;

- whether limitations of actions legislation precludes a civil claim for historical sexual abuse having occurred when the complainant was a child: *M.(K) v M (H)*, [1992] 3 SCR 6;

- whether a minor complainant is required to provide some minimal word or gesture of objection to sexual activity and whether lack of resistance can be equated with consent: *R. v.M.(M.L.),* [1994] 2 SCR 3;

- whether the trial judge misdirected the jury on the issue of consent: *R. v Whitley*, [1994] 3 SCR 830;

- whether the defence was entitled to production of a sexual assault complainant's medical and counselling records: *O'Connor v The Queen*, [1995] 4 SCR 411 and *L.L.A. v A.B.*, [1995] 4 SCR 536;

- whether, in law, there is a defence of "implied consent" to sexual conduct: *R. v Ewanchuk*, [1999] 1 SCR 330;

- whether *Criminal Code* provisions regarding the production of records in sexual offence proceedings were unconstitutional: *R. v Mills*, [1999] 3 SCR 668;

- whether *Criminal Code* provisions restricting the admissibility of evidence of a sexual assault complaint's sexual history were unconstitutional: *R. v Darrach*, [2000] 2 SCR 443;

- whether the defence could introduce into evidence the sexual assault complainant's diary: *R. v Shearing*, [2002] 3 SCR 33;

- whether a person can consent in advance to sexual activity that will occur when she is unconscious: *R. v J.A.*, [2011] 2 SCR 440;

- whether provisions in the *Canada Evidence Act* engaged discriminatory stereotypes affecting sexual assault complainants with disabilities: *R. v D.A.I.,* 2012 SCC 5;

- whether a woman should be required to remove her niqab when testifying as the complainant in a sexual assault trial: *R v N.S.*, [2012] 3 SCR 726; and

- whether, if a woman consents to a specific sexual activity, then she is also consenting, in law, to any degree of force in the performance of that activity; and whether it is always incumbent on a trial judge to require an application to be made under s. 276 of the *Criminal Code* before allowing introduction into evidence of a sexual assault complainant's sexual history: *R v Barton*, *supra*.

25. LEAF will be able to provide a unique perspective and particular expertise on the public interest issues raised in this Inquiry based on its experience in the above cases and its expertise in:

- the criminal justice system's responses to sexual violence against women and children;

- the relationship among inequalities based on race, sex, Aboriginal status, class, disability and other grounds;

- equality rights law;

- the application of equality principles in criminal law;

- statutory interpretation consistent with *Charter* values; and
- the lived reality of women in Canada, including violence against Indigenous women, and the systemic barriers that diminish sexual assault complainants' and victims' access to justice.

26. LEAF has previously collaborated with METRAC on a submission to a Parliamentary Committee on Immigration regarding Bill C-31 in 2012, and is currently partnering with METRAC on an initiative to increase access to justice for sexual assault survivors. METRAC was part of the LEAF coalition that intervened in in *R.* v. *Canadian Newspapers, supra,* and in *R. v. Seaboyer, supra*. LEAF is currently partnered with IAAW to intervene in the appeal in *R v Barton, supra*.

The Proposed Intervener Coalition's Interest in this Inquiry

27. As is set out above, LEAF has experience and expertise in promoting and protecting women's equality in the development of sexual assault law and practice. Given this background, LEAF is interested in this Inquiry because the Statement of Allegations raises issues of public importance with respect to the administration of justice for women, and for sexual assault complainants in particular.

28. IAAW understands sexual violence to be a form of sexual inequality that is often exacerbated by prohibited grounds of discrimination such as race and class, and has experience of how the legal system can be seen to maintain and perpetuate such inequalities. IAAW plays a leadership role in promoting the rights of Indigenous women to be free from violence, exploitation, and discrimination based on race and gender. IAAW has a broad interest in ensuring that Indigenous women in Alberta are protected from discrimination and unequal treatment in their daily lives as well as in trial processes in which they may participate, including as complainants in sexual assault trials.

29. The IAAW has insight into the way in which discriminatory beliefs or biases about Indigenous women as complainants and victims influence the criminal trial process, and the way in which definitions of consent and the sexual history of a sexual assault victim can be used in court proceedings to perpetuate inequality. The IAAW has a strong interest in ensuring that consideration of the issues before this Inquiry are informed by an understanding of Indigenous women who have experienced the criminal justice system as complainants and victims.

30. As frontline organizations, METRAC and Avalon understand that women face many barriers to disclosing and formally reporting sexual violence, among them fear of victim blaming, shaming and alienation from their community. METRAC and Avalon are concerned that survivors of sexual assault will not seek the assistance of the judicial system if they do not have confidence that its decision makers will apply the law in Canada fully, fairly and with an understanding of the effects of sexual violence on survivors.

31. METRAC and Avalon seek to intervene in the Inquiry to assist the Inquiry Committee to understand the impact of behaviour and comments among the judiciary that reinforce stereotypes about women and sexual assault, which can include secondary trauma to victims and undermine public confidence in the legal system. METRAC and Avalon are concerned about the access to justice issues created by conduct such as Justice Camp's in terms of how it contributes to barriers that prevent disclosure and reporting. The impact extends further to social understanding of sexual assault, reinforces confusion about the law of consent and risks undermining the efforts of community agencies and groups working to increase access to justice for women affected by sexual violence.

Prejudice

32. The proposed Intervener Coalition will not suffer prejudice in the sense that term is ordinarily understood in legal proceedings. However, the issues before this Inquiry are of fundamental concern to the constituencies these four coalition partners represent: Indigenous

women, victims of sexual violence, and women and girls who are both potential victims of such violence and whose confidence in the protection the law affords them is essential to the integrity of the justice system. For these groups, the opportunity to participate in this public Inquiry represents an affirmation that their voices and perspectives are relevant to consideration of what constitutes "due execution of the office of judge" and, more generally the meaning of impartial adjudication.

33. I make this Affidavit in support of an order granting the Proposed Intervener Coalition leave to intervene in this Inquiry.

AFFIRMED BEFORE ME at the City of Toronto, in the Province of Ontario, this 30th day of May, 2016

Kim Stanton
LSUC #61160H
Commissioner for Oaths in and for Ontario

Diane O'Reggio

Affidavit #1 of K. Milne
Made on May 30, 2016

CANADIAN JUDICIAL COUNCIL

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WEST COAST LEAF
WOMEN'S LEGAL EDUCATION AND ACTION FUND INC (LEAF)

AFFIDAVIT OF KENDRA MILNE

I, Kendra Milne, lawyer, of #555-409 Granville Street, City of Vancouver, in the Province of British Columbia, AFFIRM AS FOLLOWS:

1. I am the Director of Law Reform at the West Coast Women's Legal Education and Action Fund Association ("West Coast LEAF") and as such have personal 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. West Coast LEAF seeks to intervene in this Inquiry in coalition with Avalon Sexual Assault Centre ("Avalon"), Ending Violence Association of BC ("EVA BC"), the Institute for the Advancement of Aboriginal Women ("IAAW"), Metropolitan Action Committee on Violence Against Women and Children ("METRAC"), and Women's Legal Education and Action Fund Inc. ("LEAF") (collectively, "Proposed Intervener Coalition").

3. My affidavit provides evidence as to the interest of two of the Proposed Intervener Coalition partners (EVA BC and West Coast LEAF), and the potential prejudice to them of denying the motion. The affidavit of Diane O'Reggio, also filed in support of this motion, provides evidence of the interest of the other four Proposed Intervener Coalition partners (Avalon, IAAW, METRAC and LEAF) and the potential prejudice to them of denying the motion.

Background of the Proposed Interveners

(a) West Coast LEAF

4. 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 further women's equality by changing historic patterns of systemic discrimination against women through three main BC-based program areas: equality rights litigation, law reform and public legal education.

5. West Coast LEAF was created in April 1985, when the equality provisions of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") came into force. Prior to 2009, West Coast LEAF was a branch office 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 sections 15 and 28 of the *Charter* would be effective in guaranteeing women's substantive equality. Since 2009, West Coast LEAF has brought litigation in its own name while continuing to work closely with LEAF.

6. West Coast LEAF currently has approximately 350 members, including both individuals and organizations. It currently employs six full-time staff, three part-time staff and approximately 165 volunteers to carry out its work.

7. West Coast LEAF acts to promote the equality interests of all British Columbian women, regardless of race, national origin, immigration status, sexual preference or identity, family or marital status, disability or ability, age, socio-economic status or any other personal characteristic. It is committed to working in consultation and collaboration 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.

8. West Coast LEAF's "No Means No" program is one of its longest running public legal education projects. No Means No is a workshop delivered to students aged 10-15 aimed at empowering youth to understand sexual assault and consent. The workshop, developed in response to the Supreme Court of Canada's decision in *R. v. Ewanchuk,* [1999] 1 SCR 330, delves into myths and stereotypes about gender and sexual assault, and explores issues pertaining to sexism, bullying and homophobia. The No Means No program has been delivered to more than 5000 youth in British Columbia over the past 15 years.

9. The second of West Coast LEAF's program areas 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 women pursuant to both section 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.

10. Examples of West Coast LEAF's law reform work in the area of sexual assault and sexual harassment include:

(a) In 1991, West Coast LEAF made submissions to the BC Ministry of the Attorney General and the Ministry of Women's Equality regarding, among other issues, judicial decisions in a number of recent sexual assualt cases in BC, including one involving a physician accused of sexually assault 12 patients.

(b) In 1997, LEAF made submissions to the Standing Committee on Justice and Legal Affairs with respect to the review of Bill C-46 (the disclosure of third party records related to sexual asault victims), highlighting the history and myths reflected in the development of sexual assualt law and the gender inequality reflected in sexual violence, among other issues.

(c) In 2007, West Coast LEAF wrote to the Minister of Children and Family Development regarding allegations that a doctor was performing breast examinations on girls housed at the Burnaby Youth Secure Custody facility as part of the psychatric assessment process. The letter focused on aspects of consent given the particular power dynamics involved between a doctor and detained girls.

11. West Coast LEAF's third program area is litigation. Through litigation work with LEAF and on its own, West Coast LEAF has contributed to the development of equality rights jurisprudence in a number of areas of substantive law. Cases in which West Coast LEAF has intervened on its own include: *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; *SWUAV v. Canada,* 2012 SCC 45, *Inglis v. Ministry of Public Safety and Solicitor General of BC*, 2013 BCSC 2309; *Vilardell v. Dunham*, 2013 BCCA 65; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* 2014 SCC 59; *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation*, 2014 SCC 59; *Scott v. College of Massage Therapists of British Columbia*, 2016 BCCA 180.

12. West Coast LEAF has also worked with LEAF on a number of cases in these areas, such as *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *R. v. O'Connor*, 29 C.R. (4th) 40 (B.C.C.A.); *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *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; *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.

13. In all of these proceedings, West Coast LEAF and LEAF's submissions have applied the principles of women's substantive equality to the issues at bar. Through its litigation work with LEAF and on its own, West Coast LEAF has contributed to the development of equality rights jurisprudence in British Columbia and in Canada.

14. West Coast LEAF has significant expertise in the area of substantive equality for women and in applying these principles of substantive equality to legislation, common law, and state action that is or has the potential to impact women's equality.

15. West Coast LEAF, through its case work, has experience and expertise working to ensure that laws related to sexual assault and harassment, and the legal system's interpretation of those laws provide meaningful protection to women. Such experience and expertise has been developed through interventions, particularly in the following cases:

    (a) *R. v. Seaboyer*, [1991] 2 S.C.R. 577. LEAF, together with a coalition, argued that courts must remember that women are disproportionately victims of sexual assault so sexual assault cannot be treated legally as a "gender neutral" crime. As such,

sexual assault trials must focus on the acts of the accused, rather than the behaviour of the women and children who have been sexually assaulted.

(b) *Norberg v. Wynrib*, [1992] 2 S.C.R. 226. LEAF argued that sexual assault is a form of sex discrimination and any assessment of consent in civil sexual assault cases must take into account instances of abuse of power arising from social inequities between the parties, which in this case involved a doctor and a female patient.

(c) *R. v. O'Connor*, 29 C.R. (4th) 40 (B.C.C.A.); *R. v. O'Connor*, [1995] 4 S.C.R. 41. LEAF, together with a coalition, argued that the scope of disclosure of sexual assault complainants' mental health records should be limited and that disclosure of therapists' records fails to take into account women's equality rights.

(d) *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. LEAF, in coalition, argued that sexual consent must be unequivocal and given freely without fear, and that the notion of "implied consent" in sexual assault cases undermines women's equality.

(e) *R. v. Shearing*, [2002] 3 S.C.R. 33. LEAF argued that the cross-examination of a sexual assault complainant on the contents of her diary reflected discriminatory myths about women that have no place in the criminal process.

(f) *Friedmann v. MacGarvie,* 2012 BCCA 445. West Coast LEAF argued that sexual harassment is *per se* discrimination on the basis of sex.

(g) *Scott v. College of Massage Therapists of British Columbia,* 2016 BCCA 180. West Coast LEAF argued that the evidence required to establish a risk to the public must not result in the complainant's evidence being assessed on the basis of myths and stereotypes about women and sexual violence.

16. West Coast LEAF will be able to provide a valuable and informed perspective on the issues raised in this Inquiry because of its experience in these cases and its expertise in:

- The criminal justice system's responses to sexual violence against women and children;
- The relationship among inequalities based on race, sex, Indigeneity, socioeconomic class, disability, and other characteristics;
- Equality rights law and the application of equality rights principles in criminal law;
- Statutory interpretation consistent with *Charter* values; and
- The lived reality of women in Canada, including their experiences of systemic barriers that diminish access to justice for sexual assault complainants and other victims of gendered violence.

(b) Ending Violence Association of BC ("EVA BC")

17. I have received information about EVA BC from the organization's Executive Director, Tracy Porteous. Each of the statements in paragraphs 18 through 21, and in paragraph 24 of this Affidavit are based on correspondence of May 29, 2016 with Ms. Porteous. I verily believe them to be true.

18. EVA BC is a community-based not-for-profit organization, located in Vancouver BC. It has 232 member programs across the province that respond to sexual assault, domestic violence, child abuse and/or criminal harassment. Created in 1992, it has a volunteer board, ten staff, three subject matter expert consultants and is funded by three levels of government, as well as corporations, foundations and individuals. EVA BC works with its member programs and with partners across all relevant sectors, cultures and communities to increase the safety of individuals, primarily women and children, from sexual and domestic violence. It has a long and successful history of assisting in the development of improved legislation, policy and practices, analyzing problems and gaps, and recommending solutions focused on increased collaboration and safety.

19. The main services offered by EVA BC are:

- Support and training of individuals working in the anti-violence sector in BC;
- Research, development and distribution of resources and tools relating to gender-based violence;
- Public and governmental education about the needs of victims of gender-based violence;
- Development and maintenance of standards for anti-violence service provision;
- Development of cross-sector programs and initiatives to increase collaboration and safety; and
- Conducting prevention education for the elimination of gender-based violence.

20. Some examples of EVA BC's initiatives in the area of gender violence are:

- Creation of the Community Coordination for Women's Safety program, which works closely with RCMP E Division, the BC Chiefs of Municipal Police, all relevant provincial government ministries, Indigenous women, immigrant and refugee women, women who live with disabilities, persons who treat assaultive men and others, on law and policy reform in the areas of sexual and domestic violence;
- Creation and management of BC's Inter-Agency Case Assessment teams that assess and manage high-risk domestic violence cases in communities across BC;
- Creation and provision of the "Be More Than a Bystander" program, a gender-based violence prevention program aimed at engaging men and boys to speak up when they observe violence and abuse; and

- Creation and management of the Indigenous Community Safety program, which works to engage Indigenous leaders in in education about laws and policy relating to gender violence.

21. EVA BC has participated in an Inquest relating to an incident of domestic violence that resulted in murder and suicide, has testified about domestic sexual violence before Parliamentary committees, and presented at a global session on issues of gender violence held by the United Nations Commission on the Status of Women.

22. West Coast LEAF and EVA BC have previously collaborated on the Missing Women Commission of Inquiry in British Columbia in 2010.

Proposed Intervener Coalition's Interest in this Inquiry

23. As is set out above, West Coast LEAF has experience and expertise in promoting and protecting women's equality in the development of sexual assault law and practice. Given this background, West Coast LEAF is interested in this Inquiry because the Statement of Allegations raises issues of public importance with respect to the administration of justice for women generally and for sexual assault complainants in particular.

24. As a frontline organization, EVA BC understands that women face many barriers to disclosing and formally reporting sexual violence, among them fear of victim blaming, shaming and alienation from their community. EVA BC is concerned that survivors of sexual assault will not seek the assistance of the judicial system if they do not have confidence that its decision makers will apply the law in Canada fully, fairly and with an understanding of the effects of sexual violence on survivors.

25. Together with their four Proposed Intervener Coalition partners, EVA BC and West Coast LEAF seek to intervene in the Inquiry to assist the inquiry panel to understand the impact of behaviour and comments among the judiciary that reinforce false stereotypes about women and sexual assault. When such discriminatory myths influence the judicial process, survivors of sexual assault are victimized again. This not only harms the particular complainant who appears before the Court, it adversely affects other survivors of violence and it contributes to barriers that prevent disclosure and reporting. Other

harmful consequences include a negative impact on public understandings of sexual assault, perpetuation of confusion about the law of consent, and undermining the efforts of community agencies and groups working to increase access to justice for women affected by sexual violence.

Prejudice

26. The proposed Intervener Coalition will not suffer prejudice in the sense that term is ordinarily understood in legal proceedings. However, the issues before this Inquiry are of fundamental concern to the constituencies the Proposed Intervenor Coalition represents: Indigenous women, victims of sexual violence, and women and girls who are both potential victims of such violence and whose confidence in the protection the law affords them is essential to the integrity of the justice system. For these groups, the opportunity to participate in this public Inquiry represents an affirmation that their voices and perspectives are relevant to consideration of what constitutes "due execution of the office of judge" and, more generally the meaning of impartial adjudication.

27. I make this Affidavit in support of an order granting the Proposed Intervener Coalition leave to intervene in this Inquiry.

AFFIRMED BEFORE)
ME at Vancouver, British Columbia,)
on May 30, 2016)
)
)
Rajwant Mangat)
A commissioner for taking affidavits)
for British Columbia)

RAJWANT MANGAT
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Kendra Milne

CANADIAN JUDICIAL COUNCIL

IN THE MATTER OF AN INQUIRY PURSUANT TO S. 63(1) OF THE *JUDGES ACT* REGARDING THE HONOURABLE JUSTICE ROBIN CAMP

SUBMISSIONS OF THE PROPOSED INTERVENER COALITION

AVALON SEXUAL ASSAULT CENTRE
ENDING VIOLENCE ASSOCIATION OF BRITISH COLUMBIA (EVA BC)
INSTITUTE FOR THE ADVANCEMENT OF ABORIGINAL WOMEN
METROPOLITAN ACTION COMMITTEE ON VIOLENCE AGAINST WOMEN AND CHILDREN (METRAC)
WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND (WEST COAST LEAF)
WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. (LEAF)

MAY 31, 2016

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I. Introduction and Position

1. Avalon Sexual Assault Centre ("Avalon"), Ending Violence Association of British Columbia ("EVA BC"), the Institute for the Advancement of Aboriginal Women ("IAAW"), Metropolitan Action Committee on Violence Against Women and Children ("METRAC"), West Coast Women's Legal Education and Action Fund Association ("West Coast LEAF"), and the Women's Legal Education and Action Fund Inc. ("LEAF"), (the "Proposed Intervener Coalition"), seek leave to intervene in the Matter of an Inquiry Pursuant to Section 63(1) of the *Judges Act* Regarding the Honourable Justice Robin Camp (the "Inquiry").

2. The members of the Proposed Intervener Coalition are feminist legal advocacy organizations and front-line service providers to victims of sexual assault, each with specialized knowledge and experience in the historical, legal and social context of the treatment of sexual assault in the criminal justice system. The Proposed Intervener Coalition seeks standing to make written and oral submissions on these issues, and submits that it can offer a unique perspective that would benefit the Inquiry Committee.

3. The Proposed Intervener Coalition's position is that the Inquiry Committee's assessment of the allegations and its interpretation of the meaning of "due execution of the office of judge" in section 65(2) of the *Judges Act*[1] in this case must be informed by an understanding of the evolution of sexual assault law and its current substantive and procedural requirements governing the conduct of sexual assault trials. Statutory and judicial reform of sexual assault law has been expressly aimed at curing the unequal treatment of victims of sexual violence and the failure of the criminal justice system to afford them equal benefit and protection of the law. A significant majority of sexual assault victims are women and girls who share multiple and intersecting forms of oppression on the basis of characteristics such as racialization, Indigeneity, socioeconomic status, age, disability, sexual orientation, and gender identity. The Proposed Intervener Coalition will take the position that because equal benefit and protection of the law is a cornerstone of the justice system, execution of the judicial function requires that legal proceedings be conducted in a manner consistent with that fundamental tenet.

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[1] *Judges Act*, RSC 1985, c J-1

II. Proposed Arguments

4. If granted leave, the Proposed Intervener Coalition will make three core submissions. First, as noted above, it will argue that the issue in this Inquiry must be approached with regard to the evolution of sexual assault law as reflected in sections 273.1, 273.2, 275 and 276 of the *Criminal Code* and an understanding of the purpose and effect of those reforms, and it will provide the Inquiry Committee with that context.

5. Second, the Proposed Intervener Coalition will argue that, while the judicial function clearly requires independent individual judgment, that judgment must be exercised with fidelity to law, including the fundamental obligation to afford all individuals equal benefit and protection of the law. This means that judges cannot flout the law, ignore it or refuse to apply it on the basis of personal opinions as to the merits of a law or legal regime. Further, where there has been express legislative and judicial recognition that particular legal doctrines operated to deny some groups equal benefit and protection of the law and the law has been reformed so as to remedy that defect, fidelity to law requires judges to respect that purpose when interpreting and applying the present law in a particular case.

6. Third, the Proposed Intervener Coalition will argue that the fact that the judge's conduct effectively reintroduces the very harms the law was reformed to correct is a relevant consideration in an inquiry under s. 63(3) of the *Judges Act*.

7. The Proposed Intervener Coalition takes no position on the particular allegations set out in the Statement of Allegations or on what recommendation the Inquiry Committee should make to the Minister at the conclusion of the Inquiry.

8. These proposed arguments are outlined in further detail below.

(a) Reform of Sexual Assault Law

9. Historically, the common law gave legal effect to prevailing discriminatory myths and stereotypes concerning women and sexual assault.[2] Among these was the myth that women

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[2] On myths and stereotypes in relation to sexual assault, see *R. v. Seaboyer*; *R. v. Gayme*, [1991] 2 SCR 577 ["*Seaboyer*"] at paras 147-151, *per* L'Heureux-Dubé J.

could not be raped against their will,[3] so that absent clear evidence of non-consent, consent was presumed. Silence or lack of physical resistance was treated as "implied consent"[4] and the defence of honest but mistaken belief in consent was interpreted expansively based on this myth. A related myth was that women who had truly experienced sexual assault would raise a "hue and cry" against their assailants at the first reasonable opportunity. This myth was expressed in law through the doctrine of "recent complaint" whereby the failure to make a timely complaint gave rise to an adverse inference against a complainant's credibility.[5] The common law also enshrined the "twin myths" that an "unchaste" woman was both more likely to have consented to the acts with which the accused was charged, and was more likely to be untruthful because of her bad moral character. These myths had particularly damaging effects on Indigenous women, who were perceived as "immoral" and "sexually available". For these reasons, the common law permitted extensive exploration of a sexual assault complainant's prior sexual history as relevant both to consent and credibility.[6]

10. The effect of these common law rules was not only to distort the trial process but also to impose disproportionate and discriminatory burdens on sexual assault complainants, who were treated as inherently more suspect and less worthy of belief than victims of other crimes. Women who had experienced sexual assault and wished to pursue prosecution of their assailants could do so only at the cost of their own privacy, dignity, and integrity. Complainants were effectively required to defend their conduct, character and their credibility: they experienced the criminal justice system as putting them, rather than the accused, on trial.

11. The law created a gulf between actual sexual assault complainants and the idealized stereotypical image of a "pure" and "feminine" woman. Only the latter could credibly claim that she was raped. In consequence, the vast majority of sexual assault complainants, especially those who faced multiple and intersecting forms of oppression based on characteristics such as racialization, Indigeneity, socioeconomic status, age, disability, sexual orientation and gender identity – in other words, those who least fit the stereotypical image of a "legitimate" sexual

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3 See *R. v. Osolin*, [1994] 4 SCR 595 at 670.

4 *R. v. Ewanchuk*, 1998 ABCA 52 *per* Fraser CJA, dissenting; see also *R. v. Ewanchuk*, [1999] 1 SCR 330 ["*Ewanchuk*"]; R. Cornaviera, "The Reform of Sexual Assault Laws" (1993) 2 *Crown's News* at 18-19.

5 See *R. v. Batte* (2000), 49 OR (3d) 321 (CA) at paras 140-141; *R. v. D.D.*, 2000 SCC 43 at paras 60-61.

6 See *e.g. Seaboyer*, *supra*, at para 23. For a more comprehensive discussion of the common law approach to prior sexual history see the Federal/Provincial Task Force on Uniform Rules of Evidence, *Report of the Federal Provincial Task Force on the Uniform Rules of Evidence* (Toronto: Carswell, 1982) at 66-67.

assault complainant – were denied equal benefit and protection of the criminal law, and access to justice.

12. In the 1980s, Parliament embarked on a series of reforms designed to remove these discriminatory myths from both the substantive law of sexual assault and the rules of evidence that apply to sexual assault trials. Section 273.1 of the *Criminal Code* changed the definition of consent in sexual assault cases to "the voluntary agreement of the complainant to engage in the sexual activity in question" and set out a non-exhaustive list of circumstances in which consent is considered *not* to have been obtained. Section 273.2 provided that an accused cannot rely on the defence of honest but mistaken belief in consent if he did not take reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting. By adopting an affirmative definition of consent, Parliament sought to dispel the myth that consent could be presumed, either by the accused *or by the court*, on the basis of the complainant's silence or lack of resistance. These provisions gave clear direction to judges that the question to be determined was not whether the complainant said "no", either through her words or her actions, but whether she said "yes".[7]

13. Section 275 of the *Criminal Code* abrogated the prejudicial and demeaning myths underlying the common law doctrine of "recent complaint":

> By repealing this judge-made rule, Parliament declared that it was wrong to suggest that complainants in sexual cases were inherently less trustworthy than complainants in other kinds of cases, and that it was wrong to assume that all victims of sexual assaults, whatever their age and whatever the circumstances of the assault, would make a timely complaint.[8]

14. Section 276 of the *Criminal Code* imposed limits on the admissibility of evidence of sexual assault complainants' prior sexual conduct intended to prevent distortion of the trial process by the "twin myths" that complainants who have engaged in prior sexual activity are more likely to have consented to the sexual activity that is the subject of the charge, and are less credible.

15. The current version of section 276 codifies guidelines provided by the Supreme Court of Canada's decision in *R. v. Seaboyer*. In that case, the Court struck down a prior version of the

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7 *See Ewanchuk, supra,* per Major J at para 47.

8 *R. v. Batte* (2000), 49 OR (3d) (CA) at para 145.

provision as overbroad, but unanimously affirmed its underlying purposes, which included protecting the integrity of the trial by excluding misleading evidence and encouraging more reporting of sexual offences by protecting the security and privacy of complainants. The extensive consultations that preceded enactment of this provision demonstrated a broad Parliamentary and societal consensus that the misuse of evidence of complainants' sexual history is a powerful disincentive for women to report sexual assault and seek redress through the criminal justice system.

16. In its 2000 decision in *R. v. Darrach*, the Supreme Court unanimously upheld the constitutionality of the current version of section 276, affirming that, in addition to protecting the accused's rights, protection of trial integrity and the security and privacy of complainants are principles of fundamental justice.[9]

17. All of these reforms were expressly intended to "promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*"[10] by changing the law to remove discriminatory myths that denied sexual assault complainants equal protection and benefit of the criminal justice system.

(b) Meaning of Fidelity to Law

18. Fidelity to the law is a cornerstone of the rule of law.[11] Fidelity to law does not mean that a judge who errs in his or her interpretation and application of the law is not acting judicially. Judges may have their decisions overturned on appeal, they may determine that a law is unconstitutional, and may question the continued soundness or validity of legal rules or doctrines on the basis of evolving understandings of fundamental legal principles. Fidelity to the law does not require either infallibility or slavish adherence to the *status quo*. It does, however, require respect. A judge must interpret and apply the relevant legal principles conscientiously, based on an objective and informed understanding of them. In this way, judges uphold the rule of law.

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[9] *R. v. Darrach*, [2000] 2 SCR 443 at paras 23-25; see also *R. v. Mills*, [1986] 1 S.C.R. 863 at para 72; *R. v. Seaboyer*, *supra* at para 27.

[10] Preamble to the 1992 amendments: *An Act to Amend the Criminal Code (Sexual Assault)* (Bill C-49) S.C. 1992, c. 38.

[11] Canadian Judicial Council, "Ethical Principles of Judges", Principle 2 "Judicial Independence", Commentary, para 3.

19. Judicial disrespect for the law undermines public confidence in the rule of law and the administration of justice. Judicial disrespect for the law does not arise from errors in the interpretation of statutory provisions or common law doctrines; it occurs when a judge demonstrates antipathy towards the law by disparaging it and refusing to apply it without providing any legal reason for doing so.

20. The Canadian Judicial Council's "Ethical Principles for Judges" state that public confidence in the judiciary depends on judicial conduct:

> The rule of law and the independence of the judiciary depend primarily upon public confidence. ...Public acceptance of and support for court decisions depends upon public confidence in the integrity and independence of the bench. This, in turn, depends upon the judiciary upholding high standards of conduct.[12]

21. Further, the Commentary for Principle 5, "Equality", states:

> Equality according to law is not only fundamental to justice, but is strongly linked to judicial impartiality. A judge who, for example, reaches a correct result but engages in stereotyping does so at the expense of the judge's impartiality, actual or perceived.[13]

22. Judicial disrespect for laws that are explicitly intended to cure the failures of the criminal justice system in responding to gendered crimes of sexual violence and to foster and promote substantive equality, will undermine confidence in judicial integrity, impartiality, and commitment to assuring equality according to law.[14] This is especially true where, as here, disrespect for the law is coupled with disrespect for and degradation of the group that law was expressly intended to protect.

23. In a number of cases, the Supreme Court of Canada has accepted that widespread racism against Indigenous peoples in Canada has translated into systemic racism within the criminal justice system.[15] Together with the Court's acknowledgement in *Ewanchuk* of the myths and

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[12] Canadian Judicial Council, "Ethical Principles for Judges", Principle 2 "Judicial Independence", Commentary, para 5.

[13] Canadian Judicial Council, "Ethical Principles for Judges", Principle 5, Commentary, para 2.

[14] See Canadian Judicial Council, "Ethical Principles for Judges", Principle 5 ("Judges should conduct themselves and proceedings before them so as to assure equality according to law").

[15] *R v Williams*, [1998] 1 SCR 1128 at para 54; *R v Gladue* [1999] 1 SCR 688 at para 65; *R v Ipeelee,* 2012 SCC 13 at paras 60, 71. Further, "violence against indigenous women and girls ... cannot be seen as separate from the history of discrimination and marginalization that has been suffered invariably by indigenous peoples": Report of the United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, "The situation of indigenous peoples in Canada." (4 July 2014) A/HRC/27/52/Add.2

stereotypes about sexual assault complainants, it is clearly incumbent upon on judges to avoid discriminatory myths and stereotypes in exercising the duties of their office.

(c) Impact of Conduct on Equal Benefit and Protection of Sexual Assault Law

24. Justice Camp's disrespect for the law of sexual assault and his conduct of the trial[16] have grave consequences not only for general public confidence in the judiciary and decisions of the court, but also specifically for confidence in the criminal justice system among victims and complainants and its ability to respond effectively to sexual assault.

25. Justice Camp's conduct and his disregard for sexual assault law reforms sends a powerful and profoundly troubling message to women who have experienced sexual assault: if they choose to seek justice through a criminal prosecution, they may still be confronted with myths and stereotypes that violate their dignity and privacy, that equate lack of resistance or "bad character" with consent, or that deem them not credible because they fail to conform to the idealized image of a legitimate complainant; in short, that the protections Parliament has enshrined, both for them and for the trial process, are not worth the paper upon which they are written. This sends an especially disturbing message to Indigenous women who face disproportionate levels of sexual violence as well as the above-mentioned discrimination within the criminal justice system.[17]

26. Sexual assault is a crime overwhelmingly perpetrated against women and girls. Not coincidentally, it is also the most under-reported offence.[18] A 2004 study by Statistics Canada found that only 8 percent of the 460,000 Canadian women who were victims of sexual assault that year reported the crime to the police.[19] This is in fact lower than the 1 in 10 reporting rate that Parliament referred to when enacting the 1992 *Criminal Code* amendments. A more recent

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[16] *R. v. Wagar* per Camp J., [2014] Alta Prov Ct (Docket: 130288731P1)

[17] See Statistics Canada. General Social Survey on Victimization. (2014) http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14241-eng.htm#a8 ["GSS"]: "Violent victimization rates were especially high among Aboriginal females. For example, they recorded a sexual assault rate of 115 incidents per 1,000 population, much higher than the rate of 35 per 1,000 recorded by their non-Aboriginal counterparts."

[18] Holly Johnson. "Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault" in Elizabeth Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) at 613: "Sexual assault is the most gendered of crimes. Only 3 percent of those charged by police with sexual assault offences in Canada in 2007 were women, yet 86 percent of those victimized were women and girls."

[19] *Ibid.*

study shows that only 5% of sexual assaults were brought to the attention of the police in 2014.[20] Clearly, women and girls continue to lack confidence in the criminal justice system and its response to crimes of sexual violence.

27. As observed by Holly Johnson, despite the major reforms to rape laws in 1983, in part intended to improve the low reporting rates, the hoped for reduction in prejudicial attitudes toward women in the criminal justice system did not transpire. Rather:

> ...widespread discriminatory attitudes toward sexual violence and the way these attitudes play out for women and for criminal justice processing of these cases continue to minimize women's experiences, exonerate violent men, and distort public understanding of this crime.[21]

28. Johnson explains that:

> ...in all three victimization surveys between 1993 and 2004, fewer than 10 percent of sexual assaults were reported to police. If improvements to the justice system response to sexual assault were indeed associated with the rise in reported sexual assaults prior to 1993, it is feasible that negative experiences with the legal process since that time may have reduced women's confidence that they will be treated with dignity, fairness, and compassion, resulting in a decline in willingness to engage with the criminal justice system.[22]

29. In other words, the success of legislative reforms intended to foster women's equality within and access to the criminal justice system has been impaired by the persistence of discriminatory attitudes in criminal justice processing of sexual assault cases.

30. Similarly, Emma Cunliffe expresses concern that "the equality reasoning that characterized legislative reforms and judicial decisions during the 1990s seems to have been marginalized within more recent trial practice and judicial decisions."[23] Her analysis of several sexual assault cases demonstrates that "substantive equality reasoning has not yet infused judicial approaches to fact determination in sexual assault cases, and that individual complainants are not yet fully protected against the operation of myths and stereotypes when consent or credibility are at stake."[24]

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[20] GSS, *supra*.
[21] *Ibid.*, at 614.
[22] *Ibid.*, at 617.
[23] Emma Cunliffe, "Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality" (2012) 57 *Sup Ct L Rev* (2d) 295, at para 11.
[24] *Ibid.*, at para 2.

31. The vital and pressing need to end judicial reliance on myths and stereotypes was recently noted by the Committee on the Elimination of Discrimination against Women (CEDAW), the body of independent experts that monitors implementation of the *Convention on the Elimination of All Forms of Discrimination against Women*, to which Canada is a signatory:

> Women should be able to rely on a justice system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. Eliminating judicial stereotyping in the justice system is a crucial step in ensuring equality and justice for victims and survivors.[25]

32. Justice Camp's conduct contributes to this chilling effect on the reporting of sexual assault offences, an effect that is magnified for individuals, such as the complainant in *Wagar*, who experience multiple and intersecting disadvantages arising from characteristics including gender, poverty, race, Indigeneity, sexual orientation, age and/or disability.

33. The Proposed Intervener Coalition submits that the conduct of Justice Camp has had an adverse impact on the legislative and social aim of rectifying the failure of the criminal justice system to extend equal protection and benefit of the law to a vulnerable group.

34. We further propose to submit that the conduct of Justice Camp sustains and reinforces harmful myths and stereotypes about women and sexual assault, which has a chilling effect on a vulnerable group, and that both of these effects of the Judge's conduct must be considered by the Inquiry Committee in its assessment of the issues in this Inquiry.

III. Relevance and Utility of the Proposed Intervention

35. We are at a moment in Canadian history in which the amount of public discussion about sexual assault and the meaning of consent is high but the confidence of sexual assault survivors in the criminal justice system is very low. Indigenous women, in particular, report little faith in the criminal justice process. The conduct of Justice Camp has exacerbated this crisis in confidence. Not only did he engage in stereotyping of the complainant, he actively disregarded the protections in the law that were specifically enacted to improve her confidence that she would testify in a courtroom free of those myths and stereotypes. His conduct and its impact on the complainant resonated far more widely than the *Wagar* trial.

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[25] CEDAW General Recommendation No 33, "General recommendation on women's access to justice", UN Doc CEDAW/C/GC/33 (2015), paragraph 28.

36. As L'Heureux-Dubé J explained in her concurring reasons in *Ewanchuk*: "Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights".[26] This is particularly so for Indigenous women who, because of historical discrimination and gender and racial inequalities, are often viewed as less valuable and treated as lacking sexual autonomy and dignity.

37. The Proposed Intervener Coalition members, Avalon, EVA BC and METRAC, are frontline organizations that regularly see the effect of such conduct on sexual assault complainants and the concomitant reluctance to report the assaults. Recognized for its expertise and leadership in promoting Indigenous women's rights to be free from violence, exploitation, and discrimination based on race and gender, IAAW is acutely aware of the failures of the criminal justice system to respectfully address the situation of Indigenous sexual assault survivors. LEAF and West Coast LEAF are able to provide their extensive experience in bringing an equality rights lens to the interpretation and application of sexual assault law.

38. This proceeding is a public inquiry. As such, it is an opportunity to show the public how seriously the judiciary takes the obligations enumerated in its Ethical Principles and that the perspectives of groups most directly affected by a judge's conduct will be heard and considered when assessing it.

39. The members of the Proposed Intervener Coalition are each uniquely positioned to provide a different and useful perspective on the issues before the Inquiry Committee. The Proposed Intervener Coalition seeks an order granting leave to intervene in this Inquiry, to file written submissions, and to make oral submissions.

All of which is respectfully submitted this 31st day of May, 2016.

for Nitya Iyer and Kim Stanton
Counsel for the Proposed Interveners

[26] *Ewanchuk, supra,* at para 69.