

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

**JENNIFER TANUDJAJA, JANICE ARSENAULT, ANSAR MAHMOOD,
BRIAN DUBOURDIEU, CENTRE FOR EQUALITY RIGHTS IN ACCOMMODATION**

**Applicants
(Appellants on Appeal)**

- and -

**ATTORNEY GENERAL OF CANADA and
ATTORNEY GENERAL OF ONTARIO**

**Respondents
(Respondents on Appeal)**

**FACTUM OF THE
WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.
(Motion for Leave to Intervene, returnable March 28, 2014)**

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PART I - OVERVIEW

1. The Women's Legal Education and Action Fund Inc. (**LEAF**) requests leave to intervene in this appeal as a friend of the Court.
2. LEAF's motion for leave to intervene should be granted. This appeal raises issues that lie at the heart of LEAF's mandate and work: the way courts should approach summary dismissal of novel claims under the *Canadian Charter of Rights and Freedoms* (the **Charter**) and the scope, interpretation and application of the *Charter's* equality guarantees.
3. LEAF is a leading national organization dedicated to the advancement of equality rights. Since 1985, LEAF has intervened in numerous cases relating to *Charter* rights and has been consistently recognized by the courts for its useful contributions, distinct

perspective, and depth of expertise, particularly with respect to substantive equality rights and procedural issues in the context of *Charter* litigation.

4. If granted leave to intervene, LEAF's submissions will focus on the following: (i) the correct approach for summary dismissal of claims raising novel arguments regarding the scope of rights and obligations under the *Charter*; and (ii) the interpretation and application of section 15 *Charter* jurisprudence in the context of a motion to strike pursuant to Rule 21 of the *Rules of Civil Procedure*. LEAF's arguments in the appeal will be rooted in LEAF's expertise in equality rights and its experience as a leader in *Charter* litigation. Moreover, LEAF will assist this Court in resolving the issues of public interest that are raised by this appeal.

PART II - THE FACTS

A. Background of LEAF

5. Founded in 1985, LEAF is a leading national organization dedicated to strengthening equality rights in Canada. LEAF has a national membership comprised of individuals who are dedicated to the advancement of equality rights. LEAF also has branches located across the country and an affiliated organization, West Coast LEAF, in British Columbia.¹

6. LEAF engages in equality and human rights litigation, research, and public education in accordance with its mandate. A primary focus of LEAF's work is advancing the protections and *Charter* rights of women and girls in Canada. In this vein, LEAF actively works to expand equality rights and to represent the interests of individuals who experience compounded and unique forms of discrimination arising from the intersection of

¹ Motion Record of LEAF (**Motion Record**) at 11-12, Tab 2, O'Reggio Affidavit at para 7.

multiple grounds of discrimination, such as sex, gender, family status, race, ethnic origin, religion, disability, marital status, sexual orientation, and socio-economic status.

7. As a result of the nature and scope of LEAF's work, it is uniquely experienced and qualified to comment on the interests of individuals and groups who experience discrimination and inequality, and in articulating the scope of rights that protect those interests.

B. LEAF's Experience in *Charter* and Equality Rights Litigation

8. LEAF is a leader in Canadian *Charter* litigation. LEAF has substantial and meaningful experience in the development of key *Charter* and human rights jurisprudence and has participated as an intervener in numerous cases dealing with human rights and discrimination.²

9. More specifically, LEAF was a key participant in some of the most significant cases through which equality rights in Canada have been developed and defined. LEAF's experience includes acting as an intervener in cases that address:

- (a) the recognition of new analogous grounds under section 15(1) of the *Charter*, such as *The Law Society of British Columbia v. Andrews*,³ *Vriend v.*

² A few examples of such cases includes: *The Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 1997 SCC 327 [*Eldridge*], Joint Book of Authorities of the Proposed Interveners [JBOA], Tab 10; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [*Vriend*], JBOA, Tab 26; *M v. H*, [1999] 2 S.C.R. 3; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78; *Withler v. Canada (Attorney General)*, 2011 SCC 12 [*Withler*], JBOA, Tab 27; *Quebec (Attorney General) v. A*, 2013 SCC 5; *Ferrell v. Ontario (Attorney General)* (1998), 42 O.R. (3d) 97 (CA); *Falkiner v. Ontario (Director of Income Maintenance, Ministry of Community & Social Services)* (2002), 59 O.R. (3d) 481 (CA) [*Falkiner*], JBOA, Tab 29; *Canada (Attorney General) v. Lesiuk*, 2003 FCA 3 [*Lesiuk*].

³ *Supra* note 2.

Alberta,⁴ and *Falkiner v. Ontario (Minister of Community and Social Services)*;⁵

- (b) the elimination of mirror comparator group analysis;⁶
- (c) issues of inequality arising from intersecting grounds of discrimination, such as *O'Connor v. The Queen*; *Eldridge v. British Columbia (Attorney General)*; *New Brunswick (Minister of Health and Community Services) v. G.(J.)*; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, *Jean v. Canada (Indian Affairs and Northern Development)*; *D.(P.) v. British Columbia*; *Falkiner v. Ontario (Director of Income Maintenance, Ministry of Community & Social Services)*; and *Canada (Attorney General) v. Lesiuk*;⁷ and
- (d) procedural and process issues arising from and related to *Charter* litigation, such as *Canadian Council of Churches v. Canada and Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*,⁸ which addressed the test for public interest standing and the test for striking portions of a claim under a section 7 challenge.⁹

⁴ *Supra* note 2, JBOA, Tab 26.

⁵ *Supra* note 2, JBOA, Tab 29.

⁶ *Withler*, *supra* note 2, JBOA, Tab 27.

⁷ *O'Connor v. The Queen*, [1995] 4 S.C.R. 411; *Eldridge*, *supra* note 2, JBOA, Tab 10; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, *supra* note 2; *Jean v. Canada (Indian Affairs and Northern Development)*, 2009 FCA 377; *D.(P.) v. British Columbia*, 2010 BCSC 290; *Falkiner*, *supra* note 2, JBOA, Tab 29; and *Lesiuk*, *supra* note 2.

⁸ *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236 and *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45 (West Coast LEAF intervened in this case).

⁹ Motion Record at 11-12, Tab 2, O'Reggio Affidavit at para 7.

10. LEAF's demonstrable breadth of experience informs its expertise and distinct perspective on the protection of equality rights under section 15(1) of the *Charter* and the role of the courts in the development of *Charter* rights.

PART III - ISSUES AND ARGUMENT

11. LEAF submits that it should be granted leave to intervene as a friend of the Court. This Court will benefit from LEAF's arguments, which are directly relevant to the issues on appeal and grounded in LEAF's expertise and distinct perspective.

A. The Test for Leave to Intervene

12. A proposed intervenor should be granted leave to intervene if it will make a useful contribution to the appeal without causing prejudice to the parties. Rule 13.02 provides that:

Any person may, with leave of a judge . . . intervene as a friend of the Court for the purpose of rendering assistance to the Court by way of argument.

13. In *Bedford et al. v. Attorney General of Canada*,¹⁰ this Court held that a proposed intervenor must meet at least one of the following criteria to be granted leave to intervene as a friend of the court:

- (a) it has a real, substantial and identifiable interest in the subject matter of the proceedings;
- (b) it has an important perspective distinct from that of the immediate parties; or
- (c) it is a well-recognized group with a special expertise and a broadly identifiable membership base.¹¹

¹⁰ 2009 ONCA 669, 98 O.R. (3d) 792 [*Bedford*], JBOA, Tab 3.

14. The decision in *Bedford* was founded on the decision in *Regional Municipality of Peel and Attorney General of Ontario v. Great Atlantic & Pacific Co. of Canada Ltd.*, which sets out the overarching principles that must be considered when determining whether to grant a proposed intervenor leave:

Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.¹²

15. This Court has also confirmed the desirability of intervenor participation in cases of public importance, such as those that raise *Charter* issues.¹³

B. LEAF Meets the Test for Leave to Intervene

16. LEAF satisfies each of the criteria set out by this Court in *Bedford*. Moreover, LEAF's proposed submissions will be of assistance to the Court's determination of the appeal and will not prejudice the parties.

i. LEAF has a real, substantial and identifiable interest in the subject matter of the proceedings

17. As noted above, this case raises important procedural and substantive issues in respect of *Charter* litigation, including the correct approach in considering summary dismissal of novel *Charter*-based claims and arguments, and how leading section 15 jurisprudence should be interpreted and applied in that context.

¹¹ *Bedford*, *supra* note 10 at para 2, JBOA, Tab 3.

¹² *Regional Municipality of Peel and Attorney General of Ontario v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (CA) at 167 [*Peel*], JBOA, Tab 23.

¹³ *Peel*, *supra* note 12, JBOA, Tab 23; *Ontario (Attorney General) v. Dieleman* (1993), [1993] O.J. No. 2587 (Gen. Div.) at 4, 16 O.R. (3d) 32, JBOA, Tab 18.

18. The question of how a court should apply the “plain and obvious” test pursuant to a Rule 21 motion to strike *Charter* claims carries wide-spread implications regarding the role of the courts and the litigation process in the development of *Charter* rights. Given its ongoing and active participation in *Charter* litigation, LEAF is clearly interested in how the courts address procedural issues in *Charter* applications.

19. Moreover, issues regarding the interpretation and application of equality rights jurisprudence are critically important to LEAF and the work it does. LEAF's interest in these issues is palpable and indisputable.

ii. LEAF has a unique and distinct perspective

20. LEAF has a national mandate for the advancement of equality. Given its experience advocating for the rights of women and girls, LEAF will be able to provide an important and distinct perspective on how apparently neutral laws and policies may adversely impact individuals and groups who already experience inequality and discrimination and how gender-based inequality may be compounded by other forms of discrimination.

iii. LEAF has special expertise and an identifiable membership base

21. LEAF's national membership is comprised of individuals who have an interest in promoting and advancing equality rights. LEAF is also a veteran intervener in human rights litigation with vast experience in advocating for expanding the scope of equality rights and protections. LEAF has significant experience and expertise in the development of key *Charter* and human rights jurisprudence; it is a recognised leader in assisting the courts in cases dealing with human rights and discrimination.

iv. **LEAF's proposed arguments will assist the Court**

22. The arguments LEAF seeks to advance in relation to the issues raised in the appeal, which are based upon its experience, expertise, and unique perspective, will assist this Court. In particular, LEAF's proposed arguments will address:

- (a) the correct approach for the summary dismissal of *Charter*-based claims:
 - (i) *Charter* cases often raise novel issues or ask the courts to consider novel applications of established jurisprudence. The inherent novelty that defines much *Charter* litigation should not serve as the basis for summary dismissal of a claim.¹⁴ The absence of determinative authority on a particular issue does not make it "plain and obvious" that the argument has no chance of success.¹⁵ A too narrow application of the motion to strike test may inhibit the ability of applicants making novel *Charter* arguments to have their cases fully heard and determined.
- (b) how section 15(1) jurisprudence should be considered in the context of a request for summary dismissal:
 - (i) In determining a claim that relies on an argument regarding analogous grounds under section 15(1) of the *Charter*, courts should consider and give effect to the constantly evolving applicable jurisprudence;¹⁶

¹⁴ *Barbra Schlifer Commemorative Clinic v. Canada*, 2012 ONSC 5271 at para 72, leave to appeal refus'd 2012 ONSC 5577 (Div. Ct.) [**Barbra Schlifer**], JBOA, Tab 28.

¹⁵ *Barbra Schlifer*, *supra* note 14 at para 72, JBOA, Tab 28.

¹⁶ See *Quebec (Attorney General) v. A*, *supra* note 2 at para 183, JBOA, Tab 31.

- (ii) The scope of obligations pursuant to section 15(1) of the *Charter* is not determined.¹⁷ This question should be considered by a court with the benefit of a complete factual record and a proper hearing; and
- (iii) In considering an argument pursuant to section 15(1) of the *Charter*, courts ought to consider complex forms of inequality. This includes the reality that apparently neutral laws and policies may adversely impact already vulnerable groups¹⁸ and that individuals who face discrimination on multiple grounds, including gender, are likely to experience unique and pronounced forms of inequality.¹⁹

23. Moreover, LEAF's participation in the appeal will not prejudice the parties. LEAF does not intend to lead new evidence or take a position on the merits at this stage.

PART IV - ORDER SOUGHT

24. LEAF requests an order:

- (a) granting LEAF leave to intervene as a friend of the Court in this proceeding on a without costs basis;
- (b) granting LEAF leave to file a factum not exceeding 30 pages in length within 45 days of the requested order being granted;
- (c) granting LEAF leave to make oral submissions not exceeding 20 minutes in length in the appeal; and

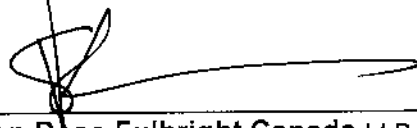
¹⁷ *Eldridge*, *supra* note 2 at para 73, JBOA, Tab 10; *Vriend*, *supra* note 2 at paras 63-64, JBOA, Tab 26.

¹⁸ *Eldridge*, *supra* note 2 at paras 60-80, JBOA, Tab 10; *Falkiner*, *supra* note 2 at paras 74-77, JBOA, Tab 29.

¹⁹ *Falkiner*, *supra* note 2 at para 88, JBOA, Tab 29; see also *Withler*, *supra* note 2 at para 58, JBOA, Tab 27.

- (d) such further and other relief as counsel may advise and this Honourable Court permits.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of March, 2014.



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TAB A

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Regional Municipality of Peel and Attorney General of Ontario v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (CA)
2. *Bedford et al. v. Attorney General of Canada*, 2009 ONCA 669, 98 O.R. (3d) 792
3. *Ontario (Attorney General) v. Dieleman* (1993), [1993] O.J. No. 2587, 16 O.R. (3d) 32 (Gen. Div.)
4. *Barbra Schlifer Commemorative Clinic v. Canada*, 2012 ONSC 5271, leave to appeal refus'd 2012 ONSC 5577 (Div. Ct.)
5. *Quebec (Attorney General) v. A*, 2013 SCC 5
6. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 1997 SCC 327
7. *Vriend v. Alberta*, [1998] 1 S.C.R. 493
8. *Falkiner v. Ontario (Director of Income Maintenance, Ministry of Community & Social Services)* (2002), 59 O.R. (3d) 481 (CA)
9. *Withler v. Canada (Attorney General)*, 2011 SCC 12

TAB B

SCHEDULE "B"
RELEVANT STATUTES

Rules of Civil Procedure, RRO 1990, Reg 194

LEAVE TO INTERVENE AS FRIEND OF THE COURT

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument. R.R.O. 1990, Reg. 194, r. 13.02; O. Reg. 186/10, s. 1.

LEAVE TO INTERVENE IN DIVISIONAL COURT OR COURT OF APPEAL

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them. R.R.O. 1990, Reg. 194, r. 13.03 (1); O. Reg. 292/99, s. 4; O. Reg. 186/10, s. 2.

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them. R.R.O. 1990, Reg. 194, r. 13.03 (2); O. Reg. 186/10, s. 2; O. Reg. 55/12, s. 1.

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

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