

FEDERAL COURT OF APPEAL

B E T W E E N:

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION and
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

Appellants
(Respondents on the Cross Appeal)

and

**THE CANADIAN COUNCIL FOR REFUGEES, AMNESTY INTERNATIONAL, THE
CANADIAN COUNCIL OF CHURCHES, DE [by her Litigation Guardian ABC], AND
FG [by her Litigation Guardian ABC], MOHAMMAD MAJD MAHER HOMSI, HALA
MAHER HOMSI, KARAM MAHER HOMSI AND REDA YASSIN AL NAHASS, AND
NEDIRA JEMAL MUSTEFA**

Respondents
(Appellants on the Cross Appeal)

**MOTION RECORD OF THE DAVID ASPER CENTRE FOR CONSTITUTIONAL
RIGHTS, WOMEN'S LEGAL EDUCATION ACTION FUND (LEAF), and WEST
COAST LEGAL EDUCATION ACTION FUND (West Coast LEAF)**

(Motion for leave to intervene, to be heard in writing)

Pursuant to Rules 109 and 369 of the Federal Court Rules

Lobat Sadrehashemi (lobat@irlc.ca)
Immigration & Refugee Legal Clinic
2610 Victoria Drive
Vancouver, BC V5N 4L2
Tel: 778-372-6583/Fax: 604-873-9889

Cheryl Milne (cheryl.milne@utoronto.ca)
David Asper Centre for Constitutional Rights
University of Toronto, 78 Queen's Park Crescent
Toronto, ON M5S 2C3
Tel: 416-978-0092/Fax: 416-978-8894

Counsel for the Proposed Intervener

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MAHER HOMSI, KARAM MAHER HOMSI AND REDA YASSIN AL NAHASS, AND
NEDIRA JEMAL MUSTEFA**

Respondents
(Appellants on Cross Appeal)

**NOTICE OF MOTION OF THE DAVID ASPER CENTRE FOR CONSTITUTIONAL
RIGHTS, WOMEN’S LEGAL EDUCATION ACTION FUND (LEAF), and WEST
COAST LEGAL EDUCATION ACTION FUND (WEST COAST LEAF)**

(Motion for leave to intervene, to be heard in writing)

Pursuant to Rules 109 and 369 of the Federal Court Rules

TAKE NOTICE THAT pursuant to Rules 109 and 369 of the *Federal Court Rules*, the Proposed Intervener will make a motion in writing at the Federal Court of Appeal.

THE MOTION IS FOR an Order that:

1. The David Asper Centre for Constitutional Rights, Women’s Legal Education and Action Fund Inc. (LEAF), and West Coast Legal Education and Action Fund (West Coast LEAF) (“the Proposed Interveners”) be granted leave to intervene, pursuant to Rule 109

of the *Federal Court Rules*, in the cross-appeal of the decision of Justice McDonald, dated July 22, 2020 on the following terms:

- (a) The Proposed Interveners may jointly file a memorandum of fact and law of no more than 15 pages, or such other length as this Court may direct (exclusive of the front cover, any table of contents, the list of authorities in Part V of the memorandum, appendices A and B, and the back cover), on or before a date to be determined;
 - (b) The Proposed Interveners may appear and make oral submissions at the hearing of this proceeding not exceeding 15 minutes, or such other duration as this Court may direct;
 - (c) The Proposed Interveners shall accept the record as adduced by the parties, and shall not seek to file any additional evidence;
 - (d) Any documents served on any party in this proceeding must also be served on the Proposed Interveners; and
 - (e) The Proposed Interveners may not seek costs or have costs awarded against it.
2. The style of cause of these proceedings be amended to add the David Asper Centre for Constitutional Rights, Women's Legal Education Action and Fund Inc. (LEAF), and West Coast Legal Education and Action Fund (West Coast LEAF) as a joint intervener, and hereinafter all documents shall be filed under the amended style of cause.
3. No costs of this motion are awarded to any party.

THE PROPOSED JOINT INTERVENERS ARE:

David Asper Centre for Constitutional Rights
University of Toronto, 78 Queen's Park Crescent
Toronto, ON M5S 2C3

Tel: 416-978-0092/Fax: 416-978-8894

Women's Legal Education and Action Fund Inc. (LEAF)

180 Dundas Street West, Suite 1420

Toronto, ON M5G 1Z8

Tel: 416-595-7170/ Fax: 416-595-7191

West Coast Legal Education and Action Fund (West Coast LEAF)

PO Box 28051 W. Pender Street

Vancouver, BC V6C 3T7

Tel: 604-684-8772

SOLICITORS ACTING FOR THE PROPOSED JOINT INTERVENERS ARE:

Lobat Sadrehashemi (lobat@irlc.ca)

Immigration & Refugee Legal Clinic

2610 Victoria Drive

Vancouver, BC V5N 4L2

Tel: 778-372-6583/Fax: 604-873-9889

Cheryl Milne (cheryl.milne@utoronto.ca)

David Asper Centre for Constitutional Rights

University of Toronto, 78 Queen's Park

Crescent

Toronto, ON M5S 2C3

Tel: 416-978-0092/Fax: 416-978-8894

THE GROUNDS FOR THE MOTION ARE:

1. The Proposed Interveners have a genuine interest in the issues under consideration in the cross appeal of the Respondent; the Proposed Interveners also have particular expertise on the issues raised by the cross appeal of the Respondent, namely: access to justice, constitutional litigation and section 15 *Charter* claims relating to gender discrimination.
2. The Proposed Interveners will apply sufficient skills and resources to make a meaningful contribution to the proceeding;
3. The participation of the Proposed Interveners will assist with the determination of a legal issue by providing different and valuable insights in relation to the Respondent's cross-appeal of the application judge's failure to decide the section 15 claim.

4. Granting leave to intervene to the Proposed Interveners will not unduly complicate, interrupt or protract the proceedings;
5. The Proposed Interveners have complied with the procedural requirements set out in Rule 109 and 359-369 of the *Federal Court Rules*.
6. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used in support of this motion:

1. The affidavit of Megan Stephens affirmed December 7, 2020;
2. The written representations in support of the Proposed Interveners' motion, dated December 7, 2020; and
3. Such further and other material that Counsel may advise and this Honourable Court permit.

Dated at Vancouver, BC this 7th day of December, 2020.



Lobat Sadrehashemi (lobat@irlc.ca)
Counsel for Proposed Intervener

Immigration & Refugee Legal Clinic
2610 Victoria Drive
Vancouver, BC V5N 4L2
Tel: 778-372-6583/Fax: 604-873-9889



Cheryl Milne (cheryl.milne@utoronto.ca)
Counsel for Proposed Intervener

David Asper Centre for Constitutional Rights
University of Toronto, 78 Queen's Park Cres.
Toronto, ON M5S 2C3
Tel: 416-978-0092/Fax: 416-978-8894

TO:

Registrar, Federal Court of Appeal
180 Queen Street West,
Toronto, ON M5V 3L6

AND TO:

The Minister of Citizenship and Immigration
The Minister of Public Safety and Emergency Preparedness
c/o Department of Justice
Ontario Regional Office
120 Adelaide Street West, Suite #400, Toronto, Ontario M5H 1T1
Tel: 647-256-0710
Fax: 647-256-1160

Counsel for the Appellants

AND TO:

Prasanna Balasundaram
Downtown Legal Services
655 Spadina Ave. Toronto, ON M5S 2H9
Tel: 416-934-4535
Fax: 416-934-4536
Email: law.dls@utoronto.ca

Counsel for the Respondents: ABC, DE and FG

Joshua Blum
Jared Will & Associates
226 Bathurst St., Suite 200, Toronto, ON M5T 2R9
Tel: 416-657-1472
Fax: 416-657-1511
Email: joshua@jwlaw.ca

Counsel for Respondents: Mohammad Majd Maher Homs, Hala Maher Homs, Karam Maher Homs, Reda Yeassin Al Nahass

AND TO:

Andrew Brouwer, Heather Neufeld, Michael Bossin,
Leigh Salsberg, Erin Simpson, Kate Webster
c/o Refugee Law Office
201-20 Dundas Street W. Toronto, ON M5G 2H1
Cell: 416-435-3269
Fax: 416-977-5567
Email: andrew.brouwer@lao.on.ca

Counsel for the Respondents: the Canadian Council for Refugees, Amnesty International and the Canadian Council of Churches

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YASSIN AL NAHASS, AND NEDIRA JEMAL MUSTEFA**

Respondents

AFFIDAVIT OF MEGAN STEPHENS

I, MEGAN STEPHENS, of the City of Toronto, in the Province of Ontario, AFFIRM AS
FOLLOWS:

1. I am the Executive Director and General Counsel of the Women's Legal Education and Action Fund Inc. ("LEAF"), and as such have personal knowledge of the matters contained in this affidavit, except where stated to be based on information and belief in which case I believe them to be true.
2. I am authorized to provide this affidavit in support of LEAF's application for leave to jointly intervene in this appeal with the West Coast Legal Education and Action Fund Association ("West Coast LEAF") and the David Asper Centre for Constitutional Rights ("the Asper Centre").

3. This appeal concerns the constitutionality of the Canada-US Safe Third Country Agreement, s. 101(1)(e) of the *Immigration and Refugee Protection Act*, and s. 159.3 of the *Immigration and Refugee Regulations*.
4. West Coast LEAF, LEAF and the Asper Centre seek to make arguments solely in relation to the claim pursuant to s. 15 of the *Canadian Charter of Rights and Freedoms* (“the *Charter*”), the basis of the Respondent’s cross appeal. At the Court below, having found that the Safe Third Country Agreement (“STCA”) as given effect by s. 101(1)(e) of the *Immigration and Refugee Protection Act*, and s.159.3 of the *Immigration and Refugee Protection Regulations* (together, the “STCA Regime”), unjustifiably infringed s. 7 of the *Charter*, Justice McDonald declined to rule on the s. 15 *Charter* claim, citing the Supreme Court of Canada’s decision in *Carter v Canada*¹ without further elaboration. There was, therefore, no determination made with respect to the claim, advanced by both the public interest parties and an individual applicant, that the STCA Regime has a disproportionate impact on women asylum seekers.
5. West Coast LEAF, LEAF and the Asper Centre will argue that such failure in this case, where a *Charter* claim was fully presented at trial, is not judicial restraint, but rather an abdication of the judicial role to decide issues that are dispositive of the litigation. West Coast LEAF, LEAF and the Asper Centre take the position that when constitutional questions are indispensably necessary to resolving the case at hand, the court must decide it.

A. Overview

6. West Coast LEAF, the Asper Centre and LEAF are three legal organizations with a longstanding history in working on and intervening in cases concerning the issues that are raised in this appeal: equality rights, gender-based discrimination, *Charter* interpretation, and access to justice.

¹ 2015 SCC 5.

B. Background of West Coast LEAF

7. I understand and believe that West Coast LEAF is a non-profit society incorporated in British Columbia and registered federally as a charity. West Coast LEAF's mandate is to use the law to create an equal and just society for all women and people who experience gender-based discrimination in British Columbia. While West Coast LEAF is focused on issues in British Columbia, it also acts in matters of national significance that are important to the equality and human rights of people in British Columbia. West Coast LEAF uses litigation, law reform, and public legal education to make change and its positions are informed by community engagement and outreach. In particular, West Coast LEAF aims to transform society by achieving access to healthcare, access to justice, economic security, freedom from gender-based violence, justice for those who are criminalized, and the right to parent.
8. West Coast LEAF was created in April 1985, when the equality provisions of the *Charter* came into force. Prior to 2014, West Coast LEAF operated either as a branch or as an affiliate of LEAF despite its status as a separately incorporated society. As of 2014, West Coast LEAF is no longer an affiliate of LEAF. Beginning in 2009, West Coast LEAF has involved itself in litigation in its own name, whereas prior to 2009 much of West Coast LEAF's litigation activities were carried out under the auspices of LEAF.
9. West Coast LEAF acts to promote the equality interests of all women and gender diverse persons in British Columbia, including where disadvantage is experienced along multiple and intersecting axes of marginalization on the basis of race, national origin, immigration status, sexual orientation, gender identity, gender expression, 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 positions, law reform activities and educational programming are informed by, and inclusive of, the diversity of human experience.
10. Through litigation, West Coast LEAF has contributed to the development of equality rights jurisprudence and the meaning of substantive equality in Canada, both in specific

challenges to discriminatory or unconstitutional laws or government actions, as well as in matters where statutory interpretation compromises the realization of substantive equality through the adverse effects of such interpretations.

11. West Coast LEAF's law reform program seek to ensure that all legislation and policies comply with guarantees of equality for all women and people experiencing gender-based discrimination pursuant to the *Charter*, human rights legislation, and relevant international instruments to which Canada is a signatory. West Coast LEAF's law reform work consists of conducting comprehensive community-based research and analysis, drafting best practices and policy recommendations, and making submissions to governmental and other decision-makers on a range of issues impacting equality-seeking groups.
12. West Coast LEAF's public legal education program aims to help residents of British Columbia understand and access their equality rights, and to think critically about the law as it affects them. The program aims to transform public legal education, collaborate with diverse equality-seeking groups, present workshops and talks to diverse audiences, and distribute public legal education materials. West Coast LEAF's public legal education projects complement and support its litigation and law reform activities, based on the premise that the first step toward asserting rights is understanding them.

C. West Coast LEAF's Contributions as an Intervener and as Plaintiff Counsel

13. West Coast LEAF has considerable intervention experience before the Supreme Court of Canada, both in its own name and through participation in interventions brought by LEAF while West Coast LEAF was operating as a branch of LEAF. West Coast LEAF has intervened in its own name in the following cases:
 - *Colucci v Colucci*, SCC File No. 38498 (jointly with LEAF) (appeal heard November 4, 2020; judgment reserved);
 - *Michel v Graydon*, 2020 SCC 24;

- *Bent v Platnick*, 2020 SCC 23, and *1704604 Ontario Ltd. v Pointes Protection Association*, 2020 SCC 22 (jointly with Atira Women’s Resource Society, B.W.S.S. Battered Women’s Support Services Association, and Women Against Violence Against Women Rape Crisis Centre);
- *Law Society of British Columbia v Trinity Western University and Volkenant*, 2018 SCC 32;
- *Schrenk v British Columbia Human Rights Tribunal*, 2017 SCC 62;
- *R v Lloyd*, 2016 SCC 13;
- *British Columbia Teachers’ Federation v British Columbia Public School Employers’ Association*, 2014 SCC 59;
- *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59;
- *British Columbia (Ministry of Education) v Moore*, 2012 SCC 61; and
- *Downtown Eastside Sex Workers United Against Violence v Canada*, 2012 SCC 45 (jointly with Justice for Children and Youth and ARCH Disability Law Centre).

14. West Coast LEAF has also intervened before the BC Court of Appeal and the BC Supreme Court in the following cases:

- *Council of Canadians with Disabilities v British Columbia (Attorney General)*, 2020 BCCA 241;
- *A.B. v C.D.*, 2020 BCCA 11;
- *British Columbia Civil Liberties Association and John Howard Society of Canada v Canada (Attorney General)*, 2019 BCCA 228 (jointly with the Native Women’s Association of Canada);
- *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2018 BCCA 132 (jointly with the Community

Legal Assistance Society) (leave to appeal to the SCC refused, SCC File No. 38157);

- *British Columbia Civil Liberties Association and John Howard Society of Canada v Canada (Attorney General)*, 2018 BCSC 62;
- *Denton v Workers Compensation Board*, 2017 BCCA 403 (jointly with the Community Legal Assistance Society);
- *Law Society of British Columbia v Trinity Western University and Volkenant*, 2016 BCCA 423;
- *Scott v College of Massage Therapists of British Columbia*, 2016 BCCA 180;
- *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;
- *Vilardell v Dunham*, 2013 BCCA 65;
- *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309; and
- *Friedmann v MacGarvie*, 2012 BCCA 445;
- *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (the *Polygamy Reference*); and
- *Downtown Eastside Sex Workers United Against Violence v Canada*, 2010 BCCA 439.

15. Additionally, West Coast LEAF has intervened or had interested party status before an administrative decision-maker or an inquiry in the following cases:

- *RR v Vancouver Aboriginal Child and Family Services Society*, BCHRT File No. 16765 (hearing ongoing);

- *Oger v Whatcott*, 2019 BCHRT 58;
- *National Inquiry into Missing and Murdered Indigenous Women and Girls* (Order dated August 17, 2017 granting participant status in Part II and Part III hearings) (final report released June 2019) and the *BC Missing Women Commission of Inquiry* headed by Hon. Wally Oppal, Q.C. (report released November 2012); and
- *In the Matter of an Inquiry Pursuant to Section 63(1) of the Judges Act Regarding the Hon. Justice Robin Camp* (Canadian Judicial Council) (report released November 29, 2016) (as part of a national coalition of six organizations).

16. Apart from its intervention work, West Coast LEAF is currently litigating a constitutional challenge to BC's family law legal aid regime before the BC Supreme Court: *Single Mothers Alliance of BC and Nicolina Bell v British Columbia* (BCSC File No. S1733843) (Notice of Civil Claim filed April 26, 2017). This case is brought under ss. 7 and 15(1) of the *Charter*, as well as s. 96 of the *Constitution Act*.
17. West Coast LEAF has wide-ranging expertise in informing courts' interpretation and application of s. 15 of the *Charter*, such that s. 15 jurisprudence reflects the substantive equality the *Charter* is aimed at protecting and promoting. It has made submissions on s. 15 in cases including *British Columbia Civil Liberties Association and John Howard Society v Canada (Attorney General)*, 2018 BCSC 62, *Trinity Western University and Volkenant v Law Society of British Columbia*, 2015 BCSC 2326, 2016 BCCA 423 and 2018 SCC 32, *BC Teachers' Federation v BC Public School Employers' Association*, 2014 SCC 70, *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, and *Reference re Section 293 of the Criminal Code of Canada (BC)*, 2011 BCSC 1588 (the *Polygamy Reference*). Further, West Coast LEAF has subject matter expertise across its program areas regarding the impacts of gender-based violence on equality rights under s. 15, including where gender-based violence intersects with other axes of marginalization such as race, immigration status, refugee status, and disability.

18. West Coast LEAF has also played a leadership role in supporting access to justice, including in the context of constitutional litigation. In addition to its work across program areas on the right to legal aid, it helped to inform the constitutionally protected right to access to justice in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, and a broad and purposive interpretation of public interest standing in *Downtown Eastside Sex Workers United Against Violence v Canada*, 2012 SCC 45, and *Council of Canadians with Disabilities v British Columbia (Attorney General)*, 2020 BCCA 241.

D. Background of the Women's Legal Education and Action Fund (LEAF)

19. LEAF is a national, non-profit organization committed to advancing the equality rights of women and girls in Canada as guaranteed by s. 15 of the *Charter*. To this end, LEAF has contributed extensively to the development of substantive equality rights under s. 15 of the *Charter* through litigation, law reform initiatives and public education.
20. Since its inception in April 1985, LEAF has made significant gains for women by intervening in over 100 cases relevant to women's and girls' equality, advancing women's rights in areas such as immigration and refugee law, employment, housing, reproductive justice, Indigenous women's status rights, family law, pay equity, and criminal cases involving violence against women, including sexual assault.
21. LEAF has also engaged in extensive law reform initiatives to advocate for legal and policy changes to advance women's substantive equality. LEAF has significant expertise in identifying and addressing the legal and constitutional considerations involved in advancing such initiatives. LEAF regularly makes invited submissions to parliamentary committees to improve legislation implicating the equality of women and girls. Through this work, LEAF has gained national and international recognition for its expertise in advancing the substantive equality rights of women and girls.
22. As a result of the breadth of its activities, LEAF has considerable expertise in analysing the impact of laws and policies on substantive equality and access to justice for women and girls, including, and often especially, those who confront discrimination on

multiple and intersecting grounds such as sex, gender, national or ethnic origin, marital or family status, race, sexual orientation, disability, and socio-economic status.

23. LEAF develops its positions through a unique, consultative process that engages the expertise of legal practitioners, feminist legal academics and other experts, and engaged citizens across Canada. With branches across the country from Edmonton to Halifax to Thunder Bay, LEAF's membership is broad and includes women of all ages and backgrounds located across Canada.

E. LEAF's Contributions as an Intervener

24. LEAF has contributed extensively to the development of equality rights jurisprudence, legislation and policy in Canada. Canadian courts have consistently recognized LEAF for its useful contributions, distinct perspective and depth of expertise. LEAF has done so in part by intervening in over 100 cases relating to equality rights, including more than 50 appearances before the Supreme Court of Canada, such as:

- *Colucci v Colucci*, SCC File No. 38498 (jointly with West Coast LEAF) (appeal heard November 4, 2020; judgment reserved);
- *R v Slatter*, 2020 SCC 36.
- *Fraser v Canada (Attorney General)*, 2020 SCC 28;
- *R v Jarvis*, 2019 SCC 10;
- *Canadian Human Rights Commission v Attorney General of Canada*, 2018 SCC 31;
- *Centrale des syndicats du Québec v Québec (Attorney General)*, 2018 SCC 18;
- *Québec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17;
- *R v Borowiec*, 2016 SCC 11;
- *R v Kokopenace*, 2015 SCC 28;
- *Saskatchewan (Human Rights Commission) v Whatcott*, [2013] 1 SCR 467;

- *R v DAI*, [2012] 1 SCR 149;
- *Withler v Canada (Attorney General)*, [2011] 1 SCR 396;
- *Caron v Alberta*, [2015] 3 SCR 511;
- *R v JA*, [2011] 2 SCR 440;
- *LMP v LS*, [2011] 3 SCR 775;
- *Quebec (Attorney General) v A*, [2013] 1 SCR 61;
- *R v NS*, [2012] 3 SCR 726;
- *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, [2011] 2 SCR 670;
- *Honda Canada Inc v Keays*, [2008] 2 SCR 362;
- *Dickie v Dickie*, [2007] 1 SCR 346;
- *DBS v SRG*, 2006 SCC 37;
- *Blackwater v Plint*, 2005 SCC 58;
- *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, [2004] 3 SCR 657;
- *Newfoundland (Treasury Board) v NAPE*, [2004] 3 SCR 381;
- *R v Shearing*, [2002] 3 SCR 33;
- *Boston v Boston*, [2001] 2 SCR 413;
- *R v Darrach*, 2000 SCC 46;
- *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307;
- *Little Sisters Book & Art Emporium v Minister of Justice*, [2000] 2 SCR 1120;
- *R v Mills*, [1999] 3 SCR 668;
- *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46;
- *M v H*, [1999] 2 SCR 3;

- *R v Ewanchuk*, [1999] 1 SCR 330;
- *BCGSEU v British Columbia (Public Service Employee Relations Commission)*, [1999] 3 SCR 3;
- *Vriend v Alberta*, [1998] 1 SCR 493;
- *R v RDS*, [1997] 3 SCR 484;
- *Winnipeg Child and Family Services v G (DF)*, [1997] 3 SCR 925;
- *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624;
- *Goertz v Gordon*, [1996] 2 SCR 27;
- *A(LL) v B(A)*, [1995] 4 SCR 536;
- *The Queen v O'Connor*, [1995] 4 SCR 411;
- *Thibault v Canada*, [1995] 2 SCR 627;
- *R v Whitley and Mowers*, [1994] 3 SCR 830;
- *R v M (ML)*, [1994] 2 SCR 3;
- *Weatherall v Canada*, [1993] 2 SCR 872;
- *Canadian Council of Churches v Her Majesty the Queen and the Minister of Employment and Immigration*, [1992] 1 SCR 236;
- *R v Butler*, [1992] 1 SCR 452;
- *Schachter v The Queen*, [1992] 2 SCR 679;
- *Norberg v Wynrib*, [1992] 2 SCR 226;
- *M (K) v M (H)*, [1992] 3 SCR 6;
- *Moge v Moge*, [1992] 3 SCR 813;
- *R v Sullivan and Lemay*, [1991] 1 SCR 489;
- *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577;
- *R v Andrews and Smith*, [1990] 3 SCR 870;
- *R v Keegstra*, [1990] 3 SCR 697;

- *Taylor v Canadian Human Rights Commission and the Attorney General of Canada*, [1990] 3 SCR 892;
- *Borowski v The Attorney General for Canada*, [1989] 1 SCR 342;
- *Brooks v Canada Safeway Limited*, [1989] 1 SCR 1219;
- *Janzen and Govereau v Platy Enterprises Ltd.*, [1989] 1 SCR 1252;
- *Tremblay v Daigle*, [1989] 2 SCR 530;
- *Andrews v The Law Society of British Columbia*, [1989] 1 SCR 143; and
- *Canadian Newspaper Co v Canada (Attorney General)*, [1988] 2 SCR 122.

25. LEAF has also appeared in appellate courts across Canada, including numerous interventions before the Ontario Court of Appeal, the Alberta Court of Appeal, the Nova Scotia Court of Appeal, and the Federal Court of Appeal, such as:

- *R v Sharma*, 2020 ONCA 478;
- *R v Sullivan*, 2020 ONCA 333;
- *Christian Medical and Dental Society et al v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393;
- *R v Al-Rawi*, 2018 NSCA 10;
- *R v Barton*, 2017 ABCA 216;
- *Gehl v Canada (Attorney General)*, 2017 ONCA 319;
- *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852;
- *Canada (Attorney General) v. Johnstone*, 2014 FCA 110
- *Jean v Canada*, 2009 FCA 377;
- *R v LB*, 2011 ONCA 153;
- *R v NS*, 2010 ONCA 670;
- *Canada (Attorney General) v Lesiuk*, 2003 FCA 3;
- *Miller v Canada (Attorney General)*, 2002 FCA 370;

- *Ferrel v Ontario (Attorney General)* (1998), 168 DLR (4th) 1 (Ont CA); and
- *Schachter v Canada*, [1990] 2 FC 129 (CA).

26. LEAF's submissions in these interventions have considered and applied *Charter* rights and values in the interpretation, application and development of Canadian law.

27. LEAF has also engaged in legal challenges on behalf of refugees in the past, from our early intervention in *Canada Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, to our 2012 joint submission with the Barbra Schlifer Commemorative Clinic and METRAC to the Parliamentary Committee on Immigration on the damaging impact on refugee women of Bill C-31, *Protecting Canada's Immigration System Act*.

F. Background of The David Asper Centre for Constitutional Rights (Asper Centre)

28. I understand and believe that the Asper Centre is a part of the University of Toronto, Faculty of Law ("the Faculty of Law"). With the assistance of an endowment from alumnus David Asper, the Asper Centre was established in 2008 to promote "greater awareness, understanding and acceptance of constitutional rights in Canada" and to realize constitutional rights through advocacy, research and education. The Asper Centre seeks to promote access to constitutional justice and human rights for vulnerable individuals and groups. As part of an academic institution, the Asper Centre is committed to high quality research, intellectual engagement and scholarly rigor in its advocacy work.

29. The Asper Centre furthers its objectives in the following ways:

- (a) It appears at various levels of court as an intervener in legal matters that raise constitutional and access to justice issues;

- (b) It prepares position papers and makes written submissions to various governmental bodies, concerning the advancement of constitutional rights in Canada;
- (c) It engages in professional, academic and public education, including organizing and hosting conferences and symposia to explore cutting-edge constitutional ideas;
- (d) It maintains working groups of volunteer law students focused on constitutional rights projects. Students work with faculty members and the executive director to research and draft position statements on draft legislation and other constitutional issues of concern; and
- (e) It operates a constitutional rights legal clinic, allowing law students to work with practitioners for academic credit on files involving innovative constitutional advocacy.

30. The Asper Centre is able to draw upon the extensive constitutional expertise and litigation experience of its Advisory Group. The Asper Centre's Advisory Group includes Professor Roach, current Chair of the Asper Centre's Advisory Group and the Prichard-Wilson Chair of Law and Public Policy at the Faculty of Law; Professor Vincent Chiao, who researches and teaches primarily in the area of criminal law and criminal justice; Professor Yasmin Dawood, an Associate Professor at the Faculty of Law and the Canada Research Chair for Democracy, Constitutionalism, and Electoral Law; Nader R. Hasan, a partner with the Toronto law firm Stockwoods LLP and currently the Asper Centre's Constitutional Litigator in Residence; Professor Patrick Macklem whose teaching interests include constitutional law, international human rights law, indigenous peoples, ethnic and cultural minorities, and labour law and policy; Professor David Schneiderman, author of numerous articles on Canadian federalism, the *Charter of Rights*, Canadian constitutional history, and

constitutionalism and globalization; and Professor Hamish Stewart, who teaches criminal law and the law of evidence and whose most recent book is *Fundamental Justice*, 2d ed. (Toronto: IrwinLaw, 2019), a treatise on s. 7 of the *Charter of Rights and Freedoms*.

G. Asper Centre's Contributions as an Intervener

31. The Asper Centre has been granted leave to intervene in a number of cases before the Supreme Court of Canada on a range of issues pertaining to constitutional law including the constitutional jurisdiction of tribunals, remedies in constitutional cases, equality rights and the role of interveners:

- *Chouhan v Her Majesty the Queen*, SCC No. 39062;
- *Ontario (Attorney General) v G*, 2020 SCC 38;
- *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13;
- *Barton v Her Majesty the Queen*, 2019 SCC 33;
- *Bird v Her Majesty the Queen*, 2019 SCC 7;
- *Canada (Attorney General) v Badesha et al*, 2017 SCC 34;
- *Frank v Canada (Attorney General)*, 2019 SCC 1;
- *Ernst v Alberta Energy Regulator*, 2017 SCC 1;
- *R v K.R.J.*, 2016 SCC 31;
- *B010 v Minister of Citizenship and Immigration*, 2015 SCC 58;
- *Henry v British Columbia (Attorney General)*, 2015 SCC 24;
- *R v Kokopenace*, 2015 SCC 28 (jointly with LEAF);
- *Trial Lawyers Association of British v British Columbia (Attorney General)*, [2014] 3 SCR 31;
- *R v Anderson*, [2014] 2 SCR 167;
- *Kazemi Estate v Islamic Republic of Iran*, [2014] 3 SCR 176;

- *Attorney General (Canada) v Bedford*, [2013] 3 S.C.R. 1101;
- *Canada (Minister of Justice) v Zajicek*, (Case No. 34767) [appeal quashed as moot];
- *Divito v Canada (Public Safety and Emergency Preparedness)*, [2013] 3 SCR 157;
- *R v Davey*, [2012] 3 SCR 828; *R v Yumnu*, *R v Cardoso* and *R v Duong*, [2012] 3 SCR 777; *R v Emms*, [2012] 3 SCR 810 [heard together as “the Jury Vetting Cases”];
- *Canada (AG) v Downtown Eastside Sex Workers United Against Violence*, [2012] 2 SCR 524;
- *R v Caron*, [2011] 1 SCR 78;
- *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44 (jointly with Human Rights Watch and the Faculty of Law’s International Human Rights Program);
- *Vancouver (City) v Ward*, [2010] 2 SCR 28 (jointly with the British Columbia Civil Liberties Association); and
- *R v Conway*, [2010] 1 SCR 765 (jointly with the Criminal Lawyers’ Association).

32. In addition to the above cases before the Supreme Court of Canada, the Asper Centre was granted “interested persons” standing in the *Polygamy Reference* at the British Columbia Supreme Court (with the Canadian Coalition for the Rights of Children). The Asper Centre was also granted intervener standing before the Ontario Court of Appeal in *Tanudjaja et al v Canada*, 2014 ONCA 852; *R v Kokopenace*, 2013 ONCA 389; *R v Sharma*, 2020 ONCA 478; and *R v Morris*, ONCA File No. C6577666.

33. The Asper Centre has particular expertise in constitutional litigation and has played a leadership role in the role of interveners, the conduct of social justice litigation and key constitutional arguments that have shaped the court’s approach to the Charter. In *Bedford*, the Asper Centre’s arguments on the role of *stare decisis* in Charter litigation was adopted by the Supreme Court of Canada. Most recently, the Asper Centre’s arguments pertaining to the interplay between section 24(1) and section 52 remedies under the Charter and the basis upon which the court should utilize suspended declarations was explicitly referenced by the Supreme Court of Canada in *Ontario (AG)*

v G. Additionally, the Asper Centre intervened in *Barton v Her Majesty the Queen* to address the role of interveners in the litigation. The Asper Centre has also partnered in the past with LEAF to put forward arguments respecting equality rights under the Charter (*Kokopenace* and *Sharma*, noted above).

H. West Coast LEAF, LEAF and the Asper Centre Expertise

34. West Coast LEAF, LEAF and the Asper Centre, collectively and individually, possess significant and longstanding experience and expertise in advancing access to justice as it relates to the *Charter*, and in advancing the substantive equality rights of women. Intervening in cases involving women who have experienced gender-based violence has been and remains one of the primary ways in which LEAF and West Coast LEAF fulfill their mandates to protect and promote equality rights. Intervening in cases involving equality rights, access to justice in issues of constitutional law, and *Charter* remedies is a core mandate of the Asper Centre. If granted leave to intervene, the coalition of proposed interveners will advance a perspective on the appropriate manner for courts to adjudicate these issues, focused on access to justice as it relates to equality rights under the *Charter*. The proposed interveners, each of them and together, have a real and substantial interest in ensuring that the law develops in a manner that promotes access to justice in having equality rights claims adjudicated.

I. West Coast LEAF, LEAF and the Asper Centre's Interest in the Appeal

35. West Coast LEAF, LEAF and the Asper Centre are interested in this appeal because this Court's decision will have a significant impact on access to justice – in relation to equality rights generally, and with respect to the equality rights of women fleeing gender-based violence and persecution in particular.
36. The Court has an opportunity to consider whether it is appropriate for trial courts to decline to decide s. 15 equality rights claims that are made on a well-developed evidentiary record. West Coast LEAF, LEAF and the Asper Centre are concerned that access to justice is compromised when trial courts simply choose not to adjudicate s. 15 claims that are properly within the court's purview, and that are fully canvassed and argued. The failure to address s. 15 claims means that claimants – people who are likely

to have already suffered from historic disadvantage -- effectively lose access to the adjudication of those rights, and lose the possibility of a court's remedy being fashioned in a way that addresses the unique harm of being denied equality under the law.

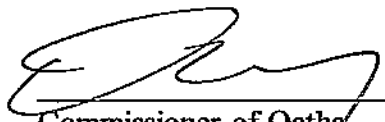
37. Before the Court below, the claimants argued that women fleeing gender-based persecution are uniquely affected by the STCA because of the operation of domestic asylum law in the United States. The Court's decision to decline to consider their section 15 claim leaves that important issue unadjudicated, and the question of remedy unaddressed.
38. A trial court declining to consider whether there has been an unjustified violation of section 15 equality rights in addition to (or in alternative to) other violations also potentially means that Parliament and the executive will lose the benefit of the court's guidance as to how to remedy any harm to equality rights that may be created by the impugned provisions, and that any solution could fail to adequately address the discrimination experienced by claimants.

J. West Coast LEAF, LEAF and the Asper Centre's Proposed Submissions as Joint Intervenors

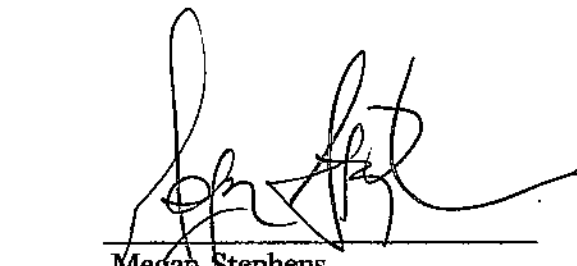
39. If granted leave to intervene, West Coast LEAF, LEAF and the Asper Centre will not introduce new facts or evidence or expand the issues beyond those identified by the parties. West Coast LEAF, LEAF and the Asper Centre will take no position on the outcome of this appeal.
40. If granted leave to intervene, West Coast LEAF, LEAF and the Asper Centre will advance the arguments set out under the heading Proposed Submissions in the written representations filed with the motion record seeking leave to intervene.
41. If granted leave to intervene jointly with the Asper Centre, West Coast LEAF and LEAF will follow their usual practice of developing their legal arguments in consultation and collaboration with leading equality rights academics, practitioners, and community leaders, to ensure that their arguments are of the highest caliber possible. A case committee composed of academics and practitioners with expertise in the relevant issues has already been struck to assist with the issues on this appeal.

40. If granted leave to intervene, West Coast LEAF, LEAF and the Asper Centre will advance the arguments set out under the heading Proposed Submissions in the written representations filed with the motion record seeking leave to intervene.
41. If granted leave to intervene jointly with the Asper Centre, West Coast LEAF and LEAF will follow their usual practice of developing their legal arguments in consultation and collaboration with leading equality rights academics, practitioners, and community leaders, to ensure that their arguments are of the highest caliber possible. A case committee composed of academics and practitioners with expertise in the relevant issues has already been struck to assist with the issues on this appeal.
42. In prior interventions, West Coast LEAF, LEAF and the Asper Centre have also consulted with parties and interveners so as to avoid duplication of submissions. West Coast LEAF, LEAF and the Asper Centre undertake to make the same effort in this appeal.
43. If granted leave to intervene, West Coast LEAF, LEAF and the Asper Centre coalition is prepared to file its factum in accordance with any timetable set by this Court and will not delay the proceeding.
44. I make this affidavit in support of LEAF's application for leave to intervene jointly with West Coast LEAF and the Asper Centre in this appeal, for leave to file a factum not exceeding 15 pages in length, for leave to make oral submissions at the hearing of this appeal, and for no other or improper purpose.

AFFIRMED BEFORE ME at the)
City of Toronto, in the Province of)
Ontario this 7th day of December, 2020)



Commissioner of Oaths
LSO 48535F



Megan Stephens

FEDERAL COURT OF APPEAL

B E T W E E N:

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION and
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

Appellants
(Respondents on the Cross Appeal)

and

**THE CANADIAN COUNCIL FOR REFUGEES, AMNESTY INTERNATIONAL, THE
CANADIAN COUNCIL OF CHURCHES, DE [by her Litigation Guardian ABC], AND
FG [by her Litigation Guardian ABC], MOHAMMAD MAJD MAHER HOMSI, HALA
MAHER HOMSI, KARAM MAHER HOMSI AND REDA YASSIN AL NAHASS, AND
NEDIRA JEMAL MUSTEFA**

Respondents
(Appellants on the Cross Appeal)

WRITTEN REPRESENTATIONS IN SUPPORT OF INTERVENTION

PART I - FACTS

A. OVERVIEW

1. The David Asper Centre for Constitutional Rights (“Asper Centre”), the Women’s Legal Education and Action Fund Inc. (“LEAF”), and West Coast Legal Education and Action Fund (“West Coast LEAF”), (“Proposed Interveners”) seek leave to intervene jointly in this appeal pursuant to Rule 109 of the *Federal Court Rules*.¹

¹ *Federal Court Rules*, SOR/98-106.

2. The Proposed Interveners seek to make arguments solely in relation to the section 15 *Charter* claim, the basis of the Respondent’s cross appeal. At the Court below, having found that the Safe Third Country Agreement (“STCA”), as given effect by s. 101(1)(e) of the *Immigration and Refugee Protection Act* and s.159.3 of the *Immigration and Refugee Protection Regulations* (together the “STCA Regime”), unjustifiably infringed section 7 of the *Charter*, Justice McDonald declined to rule on the section 15 *Charter* claim, citing the Supreme Court of Canada’s decision in *Carter* without further elaboration.² There was, therefore, no determination made with respect to the claim, advanced by both the public interest parties and an individual applicant, that the STCA Regime has a disproportionate impact on women asylum seekers.³

3. While Justice McDonald may have believed that not deciding the s. 15 claim was consistent with judicial restraint, the Proposed Interveners intend to argue that the failure to decide the equality claim of women asylum seekers is inconsistent with the broader understanding of judicial restraint. The principle of judicial restraint that often animates a court’s decision not to rule on a *Charter* claim comes from the proposition that courts should not decide issues of law, particularly constitutional issues, that are not necessary to the resolution of the matter before the court. If a case can be decided on a narrower issue of statutory interpretation or federalism rather than the more expansive *Charter* claim, the narrow issue is said to be preferred.⁴

² *Canadian Council for Refugees v. Canada*, 2020 FC 770 [“*Canadian Council for Refugees 2020*”] at para. 154.

³ Motion Record, Affidavit of Megan Stephens [“*Stephens Affidavit*”], p.7.

⁴ Peter Hogg, *Constitutional Law of Canada*, 5th Edition, (Toronto: Thomson Canada Ltd., 2007) Vol. 2, para. 59.5, p. 792.

4. The preference, however, cannot be absolute. Instead, there can be important countervailing principles implicating the rule of law at stake. Thus, as in this case, where a constitutional issue has been fully argued on the basis of an adequate factual record, it is practical to decide the issue, even if the case can be disposed of on a non-constitutional or narrower constitutional ground. Professor Hogg noted that this takes advantage of argument and evidence that would otherwise be wasted.⁵

5. The Proposed Interveners will argue that a refusal to engage with key issues in this case, where a *Charter* claim was fully presented at trial, is not justified or appropriate judicial restraint. Rather, it is an abdication of the judicial role and responsibility to decide issues that may be dispositive of the litigation. Rule of law principles central to the judicial role and the constitutional framework require that, in circumstances such as these, the Court engage with the *Charter* claims. This is a function of both the weight of the arguments at issue, and the character and context of the rights claimants themselves.

6. The Proposed Interveners intend to highlight three problems that arise from declining to determine the equality claim. First, ignoring one ground of the *Charter* claim impedes an appropriate interpretative approach to the *Charter* as a whole, impacting potential rulings on the government's justification under section 1 as well as on remedy. Second, the decision minimizes the serious impact of gender-based violence on the claimants and therefore fails to consider the pre-existing disadvantage experienced by women survivors of violence. And third, this approach has the potential to create procedural challenges that impede access to

⁵ *Ibid.*

justice for the claimants and could cause delay in urgent matters, particularly if an appellate court were to decide the issue needed to be sent back for a rehearing.

B. PROPOSED JOINT INTERVENERS

i. Background of three organizations

7. The Asper Centre, West Coast LEAF, and LEAF are three legal organizations with a longstanding history working on and intervening in cases concerning the issues raised in this appeal: equality rights, gender-based discrimination, *Charter* interpretation, and access to justice.

a. David Asper Centre for Constitutional Rights

8. The Asper Centre is a part of the University of Toronto Faculty of Law (“the Faculty of Law”). With the assistance of an endowment from alumnus David Asper, the Asper Centre was established in 2008 to promote “greater awareness, understanding and acceptance of constitutional rights in Canada” and to realize constitutional rights through advocacy, research and education. The Asper Centre seeks to promote access to constitutional justice and human rights for vulnerable individuals and groups. As part of an academic institution, the Asper Centre is committed to high quality research, intellectual engagement and scholarly rigor in its advocacy work.⁶

9. The Asper Centre furthers its objectives in the following ways:

- a) It appears at various levels of court as an intervener in legal matters that raise constitutional and access to justice issues;

⁶ Stephens Affidavit, p.18.

- b) It prepares position papers and makes written submissions to various governmental bodies, concerning the advancement of constitutional rights in Canada;
- c) It engages in professional, academic and public education, including organizing and hosting conferences and symposia to explore cutting-edge constitutional ideas;
- d) It maintains working groups of volunteer law students focused on constitutional rights projects. Students work with faculty members and the executive director to research and draft position statements on draft legislation and other constitutional issues of concern; and
- e) It operates a constitutional rights legal clinic, allowing law students to work with practitioners for academic credit on files involving innovative constitutional advocacy.⁷

10. The Asper Centre is able to draw upon the extensive constitutional expertise and litigation experience of its Advisory Group. The Asper Centre's Advisory Group includes Professor Kent Roach, current Chair of the Asper Centre's Advisory Group and the Prichard-Wilson Chair of Law and Public Policy at the Faculty of Law; Professor Vincent Chiao, who researches and teaches primarily in the area of criminal law and criminal justice; Professor Yasmin Dawood, an Associate Professor at the Faculty of Law and the Canada Research Chair for Democracy, Constitutionalism, and Electoral Law; Nader R. Hasan, a partner with the Toronto law firm Stockwoods LLP and currently the Asper Centre's Constitutional Litigator in Residence; Professor Patrick Macklem whose teaching interests include constitutional law, international human rights law, indigenous peoples, ethnic and cultural minorities, and labour law and policy; Professor David Schneiderman, author of numerous articles on Canadian federalism, the *Charter of Rights*, Canadian constitutional history, and constitutionalism and globalization; and Professor Hamish Stewart, who teaches criminal law

⁷ Stephens Affidavit, p.18-19

and the law of evidence and whose most recent book is *Fundamental Justice*, 2d ed. (Toronto: Irwin Law, 2019), a treatise on s. 7 of the *Charter of Rights and Freedoms*.⁸

11. The Asper Centre has been granted leave to intervene in a number of cases before the Supreme Court of Canada on a range of issues pertaining to constitutional law including the constitutional jurisdiction of tribunals, remedies in constitutional cases, equality rights and the role of interveners.⁹

12. In addition to the above cases before the Supreme Court of Canada, the Asper Centre was granted "interested persons" standing in the Polygamy Reference at the British Columbia Supreme Court (with the Canadian Coalition for the Rights of Children). The Asper Centre was also granted intervener standing before the Ontario Court of Appeal in *Tanudjaja et al v Canada*, 2014 ONCA 852, in *R v Kokopenace*, 2013 ONCA 389, *R v Sharma*, 2020 ONCA 478; and *R v Morris*, ONCA File No. C6577666.¹⁰

13. The Asper Centre has expertise in constitutional litigation and has played a leadership role on issues such as the role of interveners, the conduct of social justice litigation and key constitutional arguments that have shaped the court's approach to the Charter. In *Bedford*, the Asper Centre's arguments on the role of *stare decisis* in Charter litigation was adopted by the Supreme Court of Canada. Most recently, the Asper Centre's arguments pertaining to the interplay between section 24(1) and section 52 remedies under the Charter and the basis upon which the court should utilize suspended declarations was explicitly referenced by the Supreme Court of Canada in *Ontario (AG) v G*. Additionally, the Asper Centre intervened in

⁸ Stephens Affidavit, p.19-20

⁹ Stephens Affidavit, pp.20-21.

¹⁰ Stephens Affidavit, p.21

Barton v Her Majesty the Queen to address the role of interveners in the litigation. The Asper Centre has also partnered in the past with LEAF to put forward arguments respecting equality rights under the *Charter* (*Kokopenace* and *Sharma*, noted above).¹¹

b. West Coast LEAF

14. West Coast LEAF is a non-profit society incorporated in British Columbia and registered federally as a charity. West Coast LEAF's mandate is to use the law to create an equal and just society for all women and people who experience gender-based discrimination in British Columbia. While West Coast LEAF is focused on issues in British Columbia, it also acts in matters of national significance that are important to the equality and human rights of people in British Columbia. West Coast LEAF uses litigation, law reform, and public legal education to make change and its positions are informed by community engagement and outreach. In particular, West Coast LEAF aims to transform society by achieving access to healthcare, access to justice, economic security, freedom from gender-based violence, justice for those who are criminalized, and the right to parent.¹²

15. West Coast LEAF was created in April 1985, when the equality provisions of the *Charter* came into force. Prior to 2014, West Coast LEAF operated either as a branch or as an affiliate of LEAF despite its status as a separately incorporated society. As of 2014, West Coast LEAF is no longer an affiliate of LEAF. Beginning in 2009, West Coast LEAF has involved itself in

¹¹ Stephens Affidavit, p.21-22

¹² Stephens Affidavit, p.8.

litigation in its own name, whereas prior to 2009 much of West Coast LEAF's litigation activities were carried out under the auspices of LEAF.¹³

16. West Coast LEAF acts to promote the equality interests of all women and gender diverse persons in British Columbia, including where disadvantage is experienced along multiple and intersecting axes of marginalization on the basis of race, national origin, immigration status, sexual orientation, gender identity, gender expression, 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 positions, law reform activities and educational programming are informed by, and inclusive of, the diversity of human experience.¹⁴

17. Through litigation, West Coast LEAF has contributed to the development of equality rights jurisprudence and the meaning of substantive equality in Canada, both in specific challenges to discriminatory or unconstitutional laws or government actions, as well as in matters where statutory interpretation compromises the realization of substantive equality through the adverse effects of such interpretations.

18. West Coast LEAF's law reform program seek to ensure that all legislation and policies comply with guarantees of equality for all women and people experiencing gender-based discrimination pursuant to the Charter, human rights legislation, and relevant international instruments to which Canada is a signatory. West Coast LEAF's law reform work consists of conducting comprehensive community-based research and analysis, drafting best practices

¹³ Stephens Affidavit, p.8.

¹⁴ Stephens Affidavit, p.9.

and policy recommendations, and making submissions to governmental and other decision-makers on a range of issues impacting equality-seeking groups.

19. West Coast LEAF's public legal education program aims to help residents of British Columbia understand and access their equality rights, and to think critically about the law as it affects them. The program aims to transform public legal education, collaborate with diverse equality-seeking groups, present workshops and talks to diverse audiences, and distribute public legal education materials. West Coast LEAF's public legal education projects complement and support its litigation and law reform activities, based on the premise that the first step toward asserting rights is understanding them.¹⁵

20. West Coast LEAF has considerable intervention experience before the Supreme Court of Canada, both in its own name and through participation in interventions brought by LEAF while West Coast LEAF was operating as a branch of LEAF.¹⁶

21. West Coast LEAF has also intervened before the BC Court of Appeal and the BC Supreme Court numerous times.¹⁷ Additionally, West Coast LEAF has intervened or had interested party status before an administrative decision-maker or an inquiry in a number of cases.¹⁸

22. Apart from its intervention work, West Coast LEAF is currently litigating a constitutional challenge to BC's family law legal aid regime before the BC Supreme Court: *Single Mothers Alliance of BC and Nicolina Bell v British Columbia* (BCSC File No. S1733843) (Notice of

¹⁵ Stephens Affidavit, p.9.

¹⁶ Stephens Affidavit, pp. 9-10.

¹⁷ Stephens Affidavit, pp.10-11.

¹⁸ Stephens Affidavit, pp.11-12.

Civil Claim filed April 26, 2017). This case is brought under ss. 7 and 15(1) of the *Charter of Rights and Freedoms*, as well as s. 96 of the *Constitution Act*.

23. West Coast LEAF has wide-ranging expertise in informing courts' interpretation and application of s. 15 of the *Charter*, such that s. 15 jurisprudence reflects the substantive equality the *Charter* is aimed at protecting and promoting. It has made submissions on s. 15 in cases including *British Columbia Civil Liberties Association and John Howard Society v Canada (Attorney General)*, 2018 BCSC 62, *Trinity Western University and Volkenant v Law Society of British Columbia*, 2015 BCSC 2326, 2016 BCCA 423 and 2018 SCC 32, *BC Teachers' Federation v BC Public School Employers' Association*, 2014 SCC 70, *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, and *Reference re Section 293 of the Criminal Code of Canada (BC)*, 2011 BCSC 1588 (the *Polygamy Reference*). Further, West Coast LEAF has subject matter expertise across its program areas regarding the impacts of gender-based violence on equality rights under s. 15, including where gender-based violence intersects with other axes of marginalization such as race, immigration status, refugee status, and disability.¹⁹

24. West Coast LEAF has also played a leadership role in supporting access to justice, including in the context of constitutional litigation. In addition to its work across program areas on the right to legal aid, it helped to inform the constitutionally protected right to access to justice in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, and a broad and purposive interpretation of public interest standing

¹⁹ Stephens Affidavit, p.12.

in *Downtown Eastside Sex Workers United Against Violence v Canada*, 2012 SCC 45, and *Council of Canadians with Disabilities v British Columbia (AG)*, 2020 BCCA 2.²⁰

c. Women's Legal Education and Action Fund Inc. (LEAF)

25. LEAF is a national, non-profit organization committed to advancing the equality rights of women and girls in Canada as guaranteed by s 15 of the *Charter*. To this end, LEAF has contributed extensively to the development of substantive equality rights under s 15 of the *Charter* through litigation, law reform initiatives and public education.²¹

26. Since its inception in April 1985, LEAF has made significant gains for women by intervening in over 100 cases relevant to women's and girls' equality, advancing women's rights in areas such as immigration and refugee law, employment, housing, reproductive justice, Indigenous women's status rights, family law, pay equity, and criminal cases involving violence against women, including sexual assault.²²

27. LEAF has also engaged in extensive law reform initiatives to advocate for legal and policy changes to advance women's substantive equality. LEAF has significant expertise in identifying and addressing the legal and constitutional considerations involved in advancing such initiatives. LEAF regularly makes invited submissions to parliamentary committees to improve legislation implicating the equality of women and girls. Through this work, LEAF has gained national and international recognition for its expertise in advancing the substantive equality rights of women and girls.²³

²⁰ Stephens Affidavit, p.13.

²¹ Stephens Affidavit, p.13.

²² Stephens Affidavit, p.13.

²³ Stephens Affidavit, p.13.

28. As a result of the breadth of its activities, LEAF has considerable expertise in analysing the impact of laws and policies on substantive equality and access to justice for women and girls, including, and often especially, those who confront discrimination on multiple and intersecting grounds such as sex, gender, national or ethnic origin, marital or family status, race, sexual orientation, disability, and socio-economic status.²⁴

29. LEAF develops its positions through a unique, consultative process that engages the expertise of legal practitioners, feminist legal academics and other experts, and engaged citizens across Canada. With branches across the country from Edmonton to Halifax to Thunder Bay, LEAF's membership is broad and includes women of all ages and backgrounds located across Canada.²⁵

30. LEAF has contributed extensively to the development of equality rights jurisprudence, legislation and policy in Canada. Canadian courts have consistently recognized LEAF for its useful contributions, distinct perspective and depth of expertise. LEAF has done so in part by intervening in over 100 cases relating to equality rights, including more than 50 appearances before the Supreme Court of Canada.²⁶

31. LEAF has also appeared in appellate courts across Canada, including numerous interventions before the Ontario Court of Appeal, the Alberta Court of Appeal, the Nova Scotia Court of Appeal, and the Federal Court of Appeal. LEAF's submissions in these

²⁴ Stephens Affidavit, p.13.

²⁵ Stephens Affidavit, p.14.

²⁶ Stephens Affidavit, pp.14-17.

interventions have considered and applied *Charter* rights and values in the interpretation, application and development of Canadian law.²⁷

32. LEAF has also engaged in legal challenges on behalf of refugees in the past, from our early intervention in *Canada Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, to our 2012 joint submission with the Barbra Schlifer Commemorative Clinic and METRAC to the Parliamentary Committee on Immigration on the damaging impact on refugee women of Bill C-31, *Protecting Canada's Immigration System Act*.²⁸

ii. Proposed Interveners' interest in the appeal

33. The Proposed Interveners are interested in this appeal because this Court's decision will have a significant impact on access to justice and the rule of law – both in relation to equality rights generally, and with respect to the equality rights of women fleeing gender-based violence and persecution in particular.

34. The Court has an opportunity to consider whether it is appropriate for trial courts to decline to decide section 15 equality rights claims that are fully argued on the basis of an adequate evidentiary record. The Proposed Interveners are concerned that access to justice and the rule of law are compromised when trial courts simply choose not to adjudicate section 15 claims that are properly within the court's purview, and that are fully canvassed and argued. The failure to address section 15 claims means that claimants – already people who have suffered from historic disadvantage – effectively lose access to the adjudication of those

²⁷ Stephens Affidavit, pp.17-18.

²⁸ Stephens Affidavit, p.18.

rights, and lose the possibility of a court's remedy being fashioned in a way that addresses the unique harm of being denied equality under the law.

35. The Respondents/Appellants in the Cross Appeal argued at the Court below that women fleeing gender-based persecution are uniquely affected by the STCA because of the operation of domestic asylum law in the United States. The Court's decision to decline to consider their section 15 claim leaves that important issue unadjudicated, and the question of remedy unaddressed.

36. A trial court declining to consider whether there has been an unjustified violation of section 15 equality rights in addition to (or in alternative to) other violations also potentially means that Parliament and the executive will lose the benefit of the court's guidance as to how to remedy any harm to equality rights that may be created by the impugned provisions, and that any solution could fail to adequately address the discrimination experienced by claimants.²⁹

iii. Proposed Interveners' intended submissions

37. The Proposed Interveners seek to make submissions on three issues in relation to the Respondent's cross appeal on section 15: (i) a purposive *Charter* analysis requires a ruling on section 15; (ii) the failure to rule on the section 15 claim minimizes the impact of gender-based violence; and (iii) this Court ought to decide the section 15 claim due to access to justice concerns.

a) A purposive *Charter* analysis requires a ruling on section 15

²⁹ Stephens Affidavit, pp.22-23.

38. Failure to rule on a section 15 claim when it has been fully argued on an adequate factual record removes from the analysis a key animating principle of the *Charter*, which is to protect the human rights of the minority. To truly take into account all of the interests of all of the applicants in a case such as this, it is necessary to consider both section 7 and section 15 *Charter* claims. Moreover, the principle of equality underpins all of the *Charter*. Sidestepping the specific treatment of this interest under the section 15 right itself undermines the coherence of the *Charter* argument as a whole. Section 15 directly engages harms that flow from membership in disadvantaged groups, including the perpetuation of oppressive power relations, denial of access to basic goods, diminishment of self-worth, and prejudice and stereotyping. These are no less significant than the harms protected under section 7 of the *Charter*.

39. Deciding that there is a section 7 violation does not resolve the question of whether there is an equality rights breach, and therefore does not address the harms specific to discrimination. Deciding *Charter* questions is not only about the remedy (e.g. striking down the law) but also provides judicial guidance as to the nature of the harm. Practically, this failure to decide the equality claim could deny the rights holder a remedy in the event that the other ground on which they had succeeded is overturned on appeal. It also leaves Parliament without judicial guidance on the potential equality rights implications of its legislative response. Thus, the stage of rights analysis that precedes both the section 1 and remedial discussion is crucial to the substantive protections that the *Charter* provides and that the Court communicates as key to our legal systems.

40. A finding of a violation of section 15 would alter the section 1 analysis, which would render the section 1 analysis undertaken in this case potentially incomplete. Under section 1

on a section 15 claim, the government would also have to establish that the distinctions at issue were justified. Such an analysis depends on the identification of the purpose of the legislation, an exercise that should be informed by a section 15 analysis that examines whether the claimant has been denied equality before and under the law or the equal protection and benefit of the law.

41. The failure to consider section 15 can also affect the issue of remedy. The remedy ordered, or any guidance the court may give government on how to fix the law, might well be different if the law in question has been found to have a discriminatory impact on a particular group. The Supreme Court of Canada, in its recent decision in *Ontario (AG) v G*, considered the interplay between section 7 and 15, and confirmed that the nature of the *Charter* breach (i.e. whether there is more than one rights violation at play) informs the remedy.³⁰ While it declined to rule on the section 7 claim, the Court noted that the section 7 harms pertained only to the group claiming discrimination under section 15. That is not the case here, where the *Charter* claims are made on behalf of a broader group that includes those claiming discrimination.

b) The failure to rule on the section 15 claim minimizes the impact of gender-based violence.

42. Courts must engage in a full contextual analysis to appreciate indirect, adverse effects discrimination, and such an analysis in this case must begin by considering the pre-existing disadvantage experienced by women survivors of violence.³¹ This pre-existing disadvantage is directly linked to the barriers women experience in making refugee claims, and again

³⁰ *Ontario (Attorney General) v G*, 2020 SCC 38 at para. 77.

³¹ *R v. Lavalee*, [1990] 1 SCR 852; *R v. Seaboyer*, [1991] 2 SCR 577 at para. 171.

particularly so where those claims allege gender-based persecution as recognized in Canadian law.³²

43. Almost without exception, refugee claims based on gender persecution are made by women. Gender-based claims for protection are typically related to family or domestic violence, acts of sexual violence, forced marriage, punishment for transgression of social mores, coerced family planning, or female genital mutilation.³³ Canada has recognized the special difficulties faced by women asylum seekers in making their legal claims for protection.³⁴

44. By failing to address the section 15 claim, the Court ignored the circumstances of a claimant group who has experienced historic disadvantage in being able to bring their claims to court. In so doing, the court has created an additional barrier for women survivors of gender-based violence seeking asylum to have their distinct harms be addressed. The section 15 claim in this case also highlights the intersectional basis of the harms experienced by claimants. The harms of intersectional discrimination are unique and not additive, and ought to inform both the section 7 and section 1 analysis.

c) This Court ought to decide the section 15 claim

45. In this case, there was a significant burden on the claimants to amass a section 15 record that was ignored. Assembling this type of record is time-consuming and expensive, particularly for claimants with few resources. Further ignoring this record and the section 15

³² *Immigration and Refugee Board, Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* [“Gender Guidelines”].

³³ UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Statue of Refugees, May 2002.

³⁴ *Gender Guidelines*.

claim risks leaving the issue of whether women asylum seekers are disproportionately impacted by the STCA Regime unresolved. This raises concerns about fundamental fairness, access to justice, and the rule of law that militates that the Federal Court of Appeal hear and rule on the section 15 claim based on the record presented.

46. The section 15 claims were properly within the purview of the Court below. However, sending this back for a hearing would run contrary to principles of judicial economy, impede access to justice for claimants with few resources, and cause delay in a matter of urgency.

PART II – ISSUES

47. This motion raises the following issue:

- a. Should the Asper Centre, West Coast LEAF and LEAF be granted leave to intervene jointly in this appeal?

PART III – ARGUMENT

A. Criteria for Granting Intervener Status

48. In *Sport Maska*,³⁵ this Court re-affirmed that the criteria for consideration of a motion to intervene remain those set out in *Rothmans*.³⁶ *Rothmans* requires the Court to consider the following factors in deciding whether to grant leave to intervene:

- a) Is the proposed intervener directly affected by the outcome of the proceeding?
- b) Does there exist a justiciable issue and a veritable public interest?
- c) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

³⁵ *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44.

³⁶ *Rothmans, Benson & Hedges Inc. v. Canada (AG)*, [1989] F.C.J. No. 707.

- d) Is the position of the proposed intervenor adequately defended by one of the parties to the case?
- e) Can the Court hear and decide the case on its merits without the proposed intervenor?
- f) Are the interests of justice better served by the intervention of the proposed third party?

49. The criteria are flexibly applied, with the key issues being “if, in a given case, the interests of justice require that we grant or refuse intervention”³⁷ and the “salient question is whether the intervenor will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter.”³⁸

50. In *Prophet River First Nation*, a number of the *Rothmans* factors were not considered relevant. This Court held that being directly affected was required for full party status, which was not the intent of the proposed intervention. The Court held that a more relevant question was whether the proposed intervenor had a “genuine interest” in the issues on appeal. Further, this Court held that the question of other reasonable and efficient means was irrelevant as the matter would be heard with or without the proposed interveners.³⁹

51. Similarly, a number of the *Rothmans* factors are inapplicable to this intervention. The Proposed Interveners will focus on (i) its genuine interest in the appeal; (ii) the different and valuable insights that will be provided; (iii) how the interests of justice will be better served by this intervention; and (iv) consistency with Rule 3 of the *Federal Court Rules*.

³⁷ *Sport Maska* at para. 42.

³⁸ *Sport Maska* at para. 40, quoting *Canada (AG) v. Pictou Landing First Nation*, 2014 FCA 21 at para. 9.

³⁹ *Prophet River First Nation*, 2016 FCA 120 [“*Prophet River First Nation*”] at paras. 5-11.

B. Applying the relevant factors to this motion

52. As set out above, the Proposed Interveners have a genuine interest and expertise in relation to the issues raised in the Respondent's cross-appeal. The Proposed Interveners are interested in this appeal because this Court's decision could have a significant impact on access to justice in relation to equality rights generally and the equality rights of women fleeing gender-based violence and persecution in particular.

53. Collectively and individually, the Asper Centre, LEAF, and West Coast LEAF, possess significant and longstanding experience and expertise in advancing access to justice as it relates to the *Charter*, and in advancing the equality rights of women. Intervening in cases involving women who have experienced gender-based violence has been and remains one of the primary ways in which LEAF and West Coast LEAF fulfill their mandates to protect and promote equality rights. Intervening in cases involving equality rights, access to justice in issues of constitutional law, and *Charter* remedies is a core mandate of the Asper Centre. If granted leave to intervene, the coalition of Proposed Interveners will advance a perspective on the appropriate manner for courts to adjudicate these issues, focused on access to justice as it relates to equality rights under the *Charter*. The Proposed Interveners, each of them and together, have a real and substantial interest in ensuring that the law develops in a manner that promotes access to justice in having equality rights claims adjudicated.⁴⁰

54. If granted leave to intervene, the Proposed Interveners will aim to provide a different and valuable perspective on the issue raised in the Respondent's cross appeal. The Proposed Interveners' intended submissions address the broader implications of not determining a

⁴⁰ Stephens Affidavit, p.22.

Charter claim for access to justice, equality rights, and *Charter* litigation. This broader perspective will not be raised by the parties. An outline of the intended argument has been set out above. The Proposed Interveners intend to provide submissions on three issues: (i) a purposive *Charter* analysis requires a ruling on section 15; (ii) the failure to rule on the section 15 claim minimizes the impact of gender-based violence; and (iii) this Court ought to decide the section 15 claim due to access to justice concerns.

55. The interests of justice also favour granting leave to the Proposed Interveners to file an intervention. This intervention will not cause any prejudice to the parties or the Court. The Proposed Interveners have filed this motion in advance of the Respondents filing their cross appeal and the Appellants filing their response. The parties will have opportunity to respond to any issue raised in the intervention. The Proposed Interveners have agreed to follow the Court's directions with respect to timing and will not delay the appeal.⁴¹

56. The Proposed Interveners have complied with Rule 109(2) of the *Federal Court Rules*. The Proposed Interveners have set out in the proposed outline of their submissions the way in which their intervention "will assist the determination of a factual or legal issue related to the proceeding."

57. Granting this motion is consistent with Rule 3 of the *Federal Court Rules* that the Court adopt "the just, most expeditious and least expensive determination of every proceeding on its merits." In these circumstances, the Proposed Interveners have moved as expeditiously as possible to collectively secure counsel and bring forward this motion.

⁴¹ Stephens Affidavit, p.24.


58. In all the circumstances, the Proposed Interveners submit that the interests of justice favour granting leave to intervene.

PART IV - ORDER SOUGHT

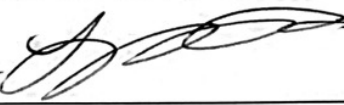
59. The Proposed Interveners be granted leave to intervene, pursuant to Rule 109 of the *Federal Court Rules*, in this appeal of the decision of Justice McDonald, dated July 22, 2020 on the following terms:

- (a) The Proposed Interveners may jointly file a memorandum of fact and law of no more than 15 pages, or such other length as this Court may direct (exclusive of the front cover, any table of contents, the list of authorities in Part V of the memorandum, appendices A and B, and the back cover), on or before a date to be determined;
- (b) The Proposed Interveners may appear and make oral submissions at the hearing of this proceeding not exceeding 15 minutes, or such other duration as this Court may direct;
- (c) The Proposed Interveners shall accept the record as adduced by the parties, and shall not seek to file any additional evidence;
- (d) Any documents served on any party in this proceeding must also be served on the Proposed Interveners; and
- (e) The Proposed Interveners may not seek costs or have costs awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of December, 2020.



Lobat Sadrehashemi (lobat@irlc.ca)
Counsel for Proposed Intervener

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Cheryl Milne (cheryl.milne@utoronto.ca)
Counsel for Proposed Intervener