

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

CANADIAN CIVIL LIBERTIES ASSOCIATION,

Applicant (Respondent on Motion)

- and -

**THE PROVINCE OF NEW BRUNSWICK, as
represented by the MINISTERS OF EDUCATION
AND EARLY CHILDHOOD DEVELOPMENT,**
Respondent (Respondent on Motion).

- and -

**WOMEN'S LEGAL EDUCATION AND ACTION
FUND INC.**

Proposed Intervener (Moving Party)

Brief on Motion

on behalf of the Proposed Intervener, Women's Legal Education and Action Fund Inc.,
for a Hearing scheduled to be heard on the ___ of _____, 202__ at ___ am/pm.

Filed by:

Lauren Ogden
McINNES COOPER
1 Germain Street, Suite 1700
P.O. Box 20095
Saint John, NB E2L 5B2

Tel: (506) 643-6537
Fax: (506) 643-6505
lauren.ogden@mcinnescooper.com
Our File: 241738

As filing agent for:

Solicitors for the Proposed Intervenor, Women's Legal Education and Action Fund Inc.

Morgan Camley and Melanie Power
DENTONS CANADA LLP
250 Howe St., 20th floor

Vancouver, BC V6C 3R8

Phone: 604 648 6545

Fax: 604 683 5214

morgan.camley@dentons.com; melanie.power@dentons.com

**THE CANADIAN CIVIL LIBERTIES
ASSOCIATION**

c/o Benjamin Perryman
Barrister and Solicitor
287 Lacewood Dr, Suite 103
Halifax NS B3M 3Y7

**THE MINISTER OF EDUCATION AND
EARLY CHILDHOOD DEVELOPMENT**

c/o Steve Hutchison, K.C.
Stewart McKelvey
Suite 1000, Brunswick House
44 Chipman Hill
Saint John, NB E2L 2A9

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OVERVIEW

1. The within application for judicial review and declaratory relief has been brought by the Canadian Civil Liberties Association (the “CCLA”) in response to the Minister of Education and Early Childhood Development’s decisions to revise the self-identification provisions in Policy 713 (Sexual Orientation and Gender Identity) dated June 8, 2023 (effective July 1, 2023) and August 23, 2023 (effective August 17, 2023) respectively (“Revised Policy 713”). CCLA seeks a declaration that the self-identification provisions in Revised Policy 713 are contrary to sections 15, 7, and 2 of the *Canadian Charter of Rights and Freedoms* (the “Charter”),¹ and a declaration that the Minister’s decisions to revise Policy 713 are ultra vires because they do not accord with either the Education Act, SNB 1997, c E-1.12 or the Human Rights Act, RSNB 2011, c 171.
2. The Women’s Legal Education and Action Fund Inc. (“LEAF”) is a national organization that uses litigation to advance the equality rights of all women, girls, trans, and non-binary people. LEAF seeks leave to intervene to offer the Court a unique and helpful perspective on how Revised Policy 713 impacts gender diverse students’ right to equality, both as a Charter value which must be considered by administrative decision-makers and as a Charter right guaranteed under section 15(1). LEAF seeks to assist the Court by making submissions informed by its extensive expertise with respect to substantive equality principles in the specific context of how gender diversity intersects with family violence and other forms of abuse (such as bullying).
3. LEAF’s special expertise will assist in resolving the issues in this proceeding without causing injustice to the parties. LEAF should be granted leave to intervene.

FACTS

a. LEAF IS A WELL-RECOGNIZED GROUP WITH A BROADLY IDENTIFIABLE MEMBERSHIP BASE

4. LEAF is a national, non-profit organization that works towards ensuring the law guarantees substantive equality for all women, girls, trans, and non-binary people. Since its founding in 1985, LEAF has gained 38 years of experience protecting and promoting gender

¹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11

equality rights through litigation, law reform, and public education. LEAF is the only national organization whose mandate is to use litigation to advance the equality rights of women, girls, trans, and non-binary people. As part of this work, LEAF has acted as an intervenor in over 130 cases relevant to advancing substantive gender equality.² It is regarded as one of the most prominent nongovernmental intervenors at the Supreme Court of Canada.³

5. LEAF's membership is broad and includes women and gender diverse people of all ages and backgrounds located across Canada. It has branches across the country.⁴

b. LEAF HAS EXPERTISE IN LITIGATION INVOLVING EQUALITY RIGHTS

6. LEAF has played a key role in assisting courts with interpreting and applying the concept of substantive equality under the *Charter*, and has made significant contributions to the development and application of s. 15 of the *Charter*⁵, including in matters arising in education settings.
7. LEAF intervened in the landmark case of *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 (“Andrews”), where it successfully argued for an interpretation of s. 15 that reflected principles of substantive equality, rather than formal equality, thereby setting the groundwork for the subsequent interpretation of s. 15(1) of the *Charter*. Since *Andrews*, LEAF has remained at the forefront of equality law, providing critical assistance to courts charged with developing the law under s. 15 of the *Charter*, including in cases such as *Eldridge v Attorney General of British Columbia* [1997] 3 SCR 624; *Withler v Canada (AG)*, 2011 SCC 12, 329 DLR (4th) 193; *Quebec (AG) v A*, 2013 SCC 5, 354 DLR (4th) 191; *Quebec (AG) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 SCR 464; *Centrale des syndicats du Québec v Québec (AG)* 2018 SCC 18, 421 DLR (4th); *Fraser v Canada (AG)*, 2020 SCC 28, 450 DLR (4th) 1; and *R v Sharma*, 2022 SCC 39.⁶
8. LEAF also intervened in the important case in *R v Jarvis*, 2019 SCC 10, a matter concerning students' reasonable expectation of privacy in schools. In its intervention,

² Affidavit of Pam Hrick affirmed November 28, 2023 (“**Hrick Affidavit**”) at paras. 5, 6 and 13.

³ Dale McNabb, “Who Intervenes in Supreme Court Cases in Canada?” (2023) Can J Pol Sci 1.

⁴ Hrick Affidavit at para 7.

⁵ Hrick Affidavit at para 15.

⁶ Hrick Affidavit at para 15.

LEAF argued that the phrase “circumstances that give rise to a reasonable expectation of privacy” in the crime of voyeurism should be read through the lens of s. 15 such that it attends to the history of restricting women and girls’ access to public life, and of treating the bodies of those women and girls who did not withdraw as public property. LEAF therefore urged the Court to endorse a broad and contextual definition of the phrase which would recognize women and girls’ reasonably held privacy expectations in both private and public places and would provide meaningful protection for women and girls’ sexual integrity in public settings such as schools. LEAF’s intervention in Jarvis further solidified its expertise in substantive equality in the education setting.

c. LEAF HAS EXPERTISE IN MATTERS INVOLVING THE RIGHTS OF TRANS AND NON-BINARY PEOPLE

9. Throughout its history, many of the legal successes achieved by LEAF – such as the recognition of workplace harassment, or a robust and affirmative definition of consent – have benefited all women, girls, trans, and non-binary people. In early 2022, LEAF formally updated its mandate to reflect a more contemporary, gender inclusive vision of gender equality that expressly includes all of these groups.⁷
10. LEAF has engaged in advocacy and law reform efforts to advance the equality rights of gender diverse people.⁸ This includes:
 - a. In December 2021, LEAF submitted a brief to the Quebec National Assembly on Bill 2, *An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status*. Many of LEAF’s submissions were driven by the imperative that gender equality includes equality rights for trans, non-binary, and intersex people.
 - b. Between December 2020 and January 2022, LEAF collaborated with the Morgane Oger Foundation, supported by Egale Canada and the Community-Based Research Centre, to provide comments to Correctional Service Canada (CSC) on the CSC’s draft Commissioner’s Directive CD-100, “Management of Offenders with Gender Identity or Expression Considerations”. LEAF strongly urged CSC not to implement the Directive as drafted, because it was rooted in transphobic views of

⁷ Hrick Affidavit at para 16.

⁸ Hrick Affidavit at para 17.

sex and gender that have caused significant harm to transgender, Two-Spirit, non-binary, and gender diverse individuals, both in penal contexts and in Canadian society more broadly.

- c. Over the past two years, LEAF has supported advocacy for gender affirming care in multiple jurisdictions across Canada, including:
 - i. as a formal community supporter of Gender Affirming Care PEI (working to improve health access and equity for the transgender, transsexual, and intersex communities);
 - ii. as a formal supporter of Gender Affirming Care Nova Scotia; and
 - iii. as an advocate for the passage of gender affirming care legislation in Ontario.⁹

d. LEAF HAS EXPERTISE IN MATTERS INVOLVING FAMILY VIOLENCE AND THE RIGHTS OF YOUTH

11. LEAF also has experience with law reform initiatives and participation in proceedings raising issues of family violence and/or the rights of youth, including:

- a. Mass Casualty Commission: As a participant with standing in the recent proceedings of the Commission, LEAF worked to ensure that the Commission's recommendations recognized and responded to the harms of gender-based violence, family violence, and sexual violence, as reflected both in the mass casualty and more broadly.
- b. *Bill C-78 (An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act)*: Between 2018 and 2019, LEAF submitted briefs on this legislation to the House of Commons Standing Committee on Justice and Human Rights and the Senate Standing Committee on Legal and Constitutional Affairs. LEAF also delivered witness testimony before the House of Commons Committee. Included in LEAF's submissions was support for the Bill's provisions that directed courts to only consider the best interests of the child when making orders regarding

⁹ Hrick Affidavit at para 17.

parenting time and decision-making responsibility; required courts to give primary consideration to the child's physical, emotional, and psychological safety and well-being; and required courts to consider any history of family violence. The Bill received Royal Assent in June 2019.¹⁰

- c. *R v Jarvis*, 2019 SCC 10: LEAF intervened in this case concerning students' reasonable expectation of privacy in their schools.
- d. *Auton v British Columbia (AG)*, 2004 SCC 78: LEAF intervened in this case concerning the rights of children with autism to receive funded therapeutic health services.
- e. *Re Blainey and Ontario Hockey Association*, 1986 CanLII 145 (ONCA): LEAF sponsored the intervention of the Canadian Association for the Advancement of Women and Sport in this case concerning a 12-year-old girl who was prohibited from playing on a boys' hockey team.¹¹

ISSUES

12. The issue on this application is whether LEAF should be granted leave to intervene in the present application under Rule 15.03 of the New Brunswick Rules of Court.¹²

LAW AND ARGUMENT

a. THE TEST FOR GRANTING LEAVE TO INTERVENE

13. LEAF seeks leave to intervene as a friend of the court under Rule 15.03.

14. Rule 15.03 provides that “[a]ny person may, with leave of the court or at the invitation of the court, 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.”¹³

15. In *United Brotherhood of Carpenters and Joiners of America v Bransen Construction Ltd.*, 2002 NBCA 27, the New Brunswick Court of Appeal discussed the application of Rule 15.03 in the context of an administrative tribunal seeking intervenor status:

¹⁰ Hrick Affidavit at para 18.

¹¹ Hrick Affidavit at para 18.

¹² N.B. Reg. 82-73, r 15.03 [*Rules of Court*] [Français].

¹³ *Ibid*, r 15.03.

I recognize that the typical “friend of the court” has no connection to the underlying dispute. In theory, this class of intervener seeks only to enrich the legal debate because of its demonstrated expertise in a limited but relevant area of the law. A true friend of the court is a disinterested non-party whose intended participation is motivated principally by the precedential significance of a case, not its temporal effect on the litigants. In theory, the true friend can offer a perspective beyond that expected of the parties.¹⁴

16. In *R v Wood*, 2006 CanLII 2750 (NBCA), the New Brunswick Court of Appeal commented that “generally speaking”, a proposed intervention “must relate to a point of law of general importance, as opposed to a case-specific issue, and seek to bring something additional to the appeal that the parties may not be able to supply”.¹⁵ Further, “there must be some prospect that the process will be advanced or improved in some way by virtue of the intervention”.¹⁶

b. LEAF SHOULD BE GRANTED LEAVE TO INTERVENE

17. LEAF should be granted leave to intervene under Rule 15.03 based on the factors in the law outlined above.

18. LEAF can provide arguments that will assist the Court in disposing of the application based on its extensive experience using litigation to advance the equality rights of women, girls, trans, and non-binary people. Given its long history and extensive experience in equality law, LEAF can offer a perspective that is different from that expected of the parties.

19. In addition, LEAF is motivated to intervene in the within application principally due to its precedential significance. This case relates to LEAF’s work regarding the equality rights of trans and non-binary people, the rights of youth, and issues of family violence as set out in paragraphs 6 to 11 above. LEAF frequently intervenes in cases throughout Canada (including before the King’s Bench of *New Brunswick in Canadian Civil Liberties*

¹⁴ *United Brotherhood of Carpenters and Joiners of America v Bransen Construction Ltd.*, 2002 NBCA 27 at para 15

¹⁵ *R v Wood*, 2006 CanLII 2750 (NBCA) at para 5.

¹⁶ *Ibid* at para 5.

Association v The Province of New Brunswick (File Number FC-9-2))¹⁷ that raise important issues of public interest – as this application does – to provide useful assistance in determining these issues. LEAF was most recently granted leave to intervene in *UR Pride Centre for Sexuality and Gender Diversity v Government of Saskatchewan et al* (File Number KBG-RG-01978-2023), a matter with similar circumstances and issues as those raised in the within application. LEAF’s proposed submissions in this application will focus on the development of the law in a manner that is consistent with the Charter values underpinning, and the equality rights entrenched in, s. 15 of the *Charter*.

i. LEAF HAS SPECIAL EXPERTISE THAT WILL ASSIST IN RESOLVING THE ISSUES IN THE PROCEEDING

20. LEAF is the leading organization in Canada using litigation to advance the equality rights of all women, girls, trans, and non-binary people. Informed by its proven expertise, LEAF will make a useful and distinct contribution to assist this Court in the resolution of the within application. If granted leave to intervene, LEAF anticipates advancing the following submissions, subject to further consideration by counsel and the need to avoid duplicative submissions:

- a. **Substantive equality animates the section 15 analysis:** The correct approach to a section 15 analysis requires a focus on substantive equality as the animating norm of the guarantee. In contrast to formal equality, substantive equality looks behind the facade of similarities and differences to the actual impact of the impugned law, taking full account of social, political, economic, and historical factors concerning the group.¹⁸ Applying substantive equality to the section 15 analysis in the present case requires the Court to consider the specific impact of the Policy on trans and non-binary students. The students who will be disproportionately and harmfully impacted by the Policy are trans and non-binary youth under the age of 16 who are not safe, are anxious and/or afraid of seeking, or are unable to obtain parental consent for the use of their chosen names or pronouns.

¹⁷ Hrick Affidavit at para 14.

¹⁸ *Withler v Canada (AG)*, 2011 SCC 12 at para 39.

- b. **The section 15 analysis must consider the best interests of the child and the prospect of family violence and other forms of abuse:** The Court’s section 15 analysis should focus on whether the impugned Policy has the effect of reinforcing, perpetuating, or exacerbating disadvantage. In this analysis, the focus must be on the harms of the impugned Policy, which must be viewed in light of any systemic or historical disadvantages faced by the claimant group. In determining whether the Policy reinforces, perpetuates, or exacerbates disadvantage, the Court must consider the best interests of the child as guaranteed under Canadian and international law and the prospect of family violence or other forms of abuse. The impugned Policy would, at least in some instances, require a teacher (who has a duty not to harm their students) to expose a student to family violence or other forms of abuse.
- c. **The section 15 analysis requires a rigorous approach to evaluating the justification for state-imposed discrimination:** A section 15 infringement should rarely be justified under section 1. A rigorous approach to evaluating the justification for state-imposed discrimination against trans and non-binary youth is consistent with established case law considering section 15 violations. If the government’s justification is based on parental control or decision-making, that objective must be considered alongside the need to minimize the abuse of, and discriminatory harms to, trans and non-binary children, and to promote the best interests of the child.
- d. **Substantive equality is a Charter value that must be considered in administrative decision-making impacting trans and non-binary students’ rights:** The Applicant raises procedural concerns with the Minister’s decision to revise Policy 713, in particular the lack of consultation. LEAF will provide further perspective on the procedural obligations in administrative decision-making when *Charter* values of substantive equality are engaged. *Charter* values are “those values that underpin each [*Charter*] right and give it meaning”.¹⁹ *In Doré v Barreau du Québec*, 2012 SCC 12 (“Doré”), the Supreme Court of Canada imposed a standalone procedural duty on administrative decision-makers to consider *Charter*

¹⁹ *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 36 [**Loyola**].

values when their decisions engage Charter protections.²⁰ While *Charter* values must be considered by the decision-maker during the decision-making process, *Charter* rights act as constraints on the lawfulness of the final decision.²¹ Where a decision-maker fails to consider *Charter* values, the decision will be struck down. In this case, the Minister must demonstrate that they were alive to the *Charter* value of substantive equality when making decisions to revise the self-identification provisions in Policy 713. As noted above, substantive equality engages consideration of the best interests of the child and the prospect of family violence and other forms of abuse against trans and non-binary youth.

- e. **Where trans and non-binary students' equality rights are engaged, a robust proportionality analysis requires consideration of the best interests of the child and the prospect of family violence or other forms of abuse:** In addition to establishing a procedural duty to consider *Charter* values when making administrative decisions, *Doré* set out a framework for judicial review of administrative decisions that infringe *Charter* rights.²² Where an administrative decision engages the protections enumerated in the *Charter*, the decision-maker is required to engage in a “robust proportionality analysis” to ensure that *Charter* protections are limited no more than is necessary to achieve the applicable statutory objectives.²³ In the context of Revised Policy 713, the reviewing court must be satisfied that the Minister’s decisions proportionately balance the *Charter* protections afforded to trans and non-binary youth with the Minister’s statutory mandate under the *Education Act*, such that the *Charter* protection is “affected as little as reasonably possible” (taking into consideration the best interests of the child and the prospect of family violence or other forms of abuse) in light of the applicable statutory objectives.²⁴

²⁰ *Doré v Barreau du Québec*, 2012 SCC 12 at para 35 [*Doré*].

²¹ Paul Daly, “The *Doré* Duty: Fundamental Rights in Public Administration” (2023) 101:2 Can B Rev 29 at 301-302 [*Daly*], citing *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 56 [*Trinity Western*].

²² *Daly*, *supra* note 21 at 300.

²³ *Loyola*, *supra* note 19 at paras 3-4; *Trinity Western*, *supra* note 21 at paras 79-80

²⁴ *Trinity Western*, *supra* note 21 at para 80; *Loyola*, *supra* note 19 at para 39

ii. LEAF WILL NOT UNDULY DELAY OR PREJUDICE THE DETERMINATION OF THE RIGHTS OF THE PARTIES TO THE PROCEEDING

21. The parties to the application will not be unduly prejudiced by adding LEAF as an intervenor. LEAF's intervention will not delay the application hearing, and LEAF has proposed reasonable terms for its written and oral participation in the hearing. Further, LEAF is not seeking costs for its intervention, nor will it take a position on the outcome of the application.

22. LEAF will draw upon its expertise to offer this Court a unique, intersectional²⁵ equality perspective, informed by feminist and rights-based approaches. LEAF has developed this expertise through assisting courts over the 38 years of its existence, as an intervenor, with interpreting and applying the concept of substantive equality guaranteed by s. 15 of the Charter.²⁶ As such, LEAF will be able to assist this Court in addressing the existing issues between the parties without increasing the number of issues. In advancing its submissions, LEAF will consult with the parties and any other intervenors to avoid duplication of submissions.²⁷

RELIEF SOUGHT

23. LEAF respectfully requests an order granting it leave to intervene in the present application under Rule 15.03, on the following terms:

- (a) LEAF is permitted to file a factum of no more than 25 pages;
- (b) LEAF is permitted to make oral submissions of no more than 30 minutes at the hearing of the application; and,
- (c) No costs shall be awarded to or against LEAF in this application.

24. LEAF seeks no costs and asks that no costs be awarded against it on this motion for leave to intervene.

²⁵ Intersectionality describes the unique forms of discrimination, oppression and marginalization that can result from the interplay of two or more identity-based grounds of discrimination: for example, age and gender identity/expression.

²⁶ Hrick Affidavit at para 20.

²⁷ Hrick Affidavit at para 27.

ALL OF WHICH is respectfully submitted this 29th day of November, 2023



Lauren Ogden
McINNES COOPER
1 Germain Street
Suite 1700, Brunswick Square
Saint John, NB E2L 4V1
Tel.: (506) 643-6537
Fax: (506) 643-6505
lauren.ogden@mcinnescooper.com
Our File: 241738

As filing agent for

DENTONS CANADA LLP
Morgan Camley / Mélanie Power
Counsel for the Proposed Intervenor, Women's
Legal Education and Action Fund

AUTHORITIES

CASE LAW

1. *Doré v Barreau du Québec*, 2012 SCC 12;
2. *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32
3. *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12
4. *R v Wood*, 2006 CanLII 2750 (NBCA), 296 NBR (2d) 139
5. *United Brotherhood of Carpenters and Joiners of America v Bransen Construction Ltd*, 2002 NBCA 27
6. *Withler v Canada (AG)*, 2011 SCC 12

STATUTES

7. *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11.
8. *Education Act*, SNB 1997, c E-1.12
9. *Human Rights Act*, RSNB 2011, c 171
10. *Rules of Court*, NB Reg 82-73

SECONDARY SOURCES

11. Dale McNabb, “Who Intervenes in Supreme Court Cases in Canada?” (2023) Can J Pol Sci 1
12. Paul Daly, “The Doré Duty: Fundamental Rights in Public Administration” (2023) 101:2 Can B Rev 29