

Asper Centre Summer Fellowship – Final Report

Organization: David Asper Centre for Constitutional Rights

Student: West Coast LEAF

Position: Legal Intern

As a legal intern, I worked on the following six projects from June through mid-August of 2017:

1. Memorandum on Damages in Public Interest Litigation

In April, West Coast LEAF (jointly with the BC Public Interest Advocacy Centre) filed a civil claim on behalf of one institutional and two individual plaintiffs challenging British Columbia's family law legal aid regime. As this is a new endeavor for West Coast LEAF, the organization wanted to understand the risk to plaintiffs of an adverse costs award if they were unsuccessful in the suit. For this memorandum, my research entailed reading both provincial and federal cases to understand what principles courts apply to costs assessments in public interest litigation, and to see whether, and to what extent, costs will be assessed against an unsuccessful plaintiff.

While there is no immunity from costs for public interest litigants, there is an understanding in the courts that some circumstances justify a special consideration of how costs should be awarded. Overall, the Supreme Court ruling in *Carter* provides the leading test for determining if a court may depart from existing costs rules and award exceptional costs to a public interest litigant.

2. Memorandum on Psychological Classification System within Prisons

As well, I prepared a memorandum researching the actuarial tools the Correctional Service of Canada uses to classify an inmate's security level. Mr. Ewert, an Indigenous man, challenged the use of these tools as culturally inappropriate. He argues that they violate his s.7 and s.15 rights. Mr. Ewert was successful at trial on the basis that his s. 7 rights were violated. The s. 15 claim was not addressed substantively. That judgment was overturned on appeal to the Federal Court of Appeal. Leave was granted by the Supreme Court of Canada. West Coast LEAF was interested in intervening in the case to ensure that the discriminatory impact of these actuarial tools is understood through an intersectional lens.

As such, I researched the ways in which these actuarial tools are biased against women, particularly Indigenous women. Overall, Indigenous adults are overrepresented in admissions to correctional services. This overrepresentation of Indigenous adults is more pronounced for women than men. And, once incarcerated, the historical disadvantage experienced by Indigenous people will further define their outcomes within the prison system. Indigenous inmates are more likely to be classified as maximum-security, spend more time in segregation, and serve more of their sentence behind bars compared to non-Indigenous inmates. This overrepresentation and over-classification of Indigenous men

and women can be linked to the actuarial tools used to establish an offender's security level. These tools were designed for, and initially tested on the much larger, predominantly white, male incarcerated population. Unfortunately, this system does not take into account gender and culture-specific issues faced by various women offenders. Because of this, Indigenous and women offenders continue to be over-classified as they possess more "risk factors" than white, male offenders. I examined these "risk factors" and the ways in which they predispose Indigenous men and women to be classified, given the demographics of Indigenous offenders compared to the white, male prison population.

3. Memorandum on Family Status as an Analogous Ground

I was tasked with determining whether family status is considered analogous ground under s.15(1) of *The Charter*. Although the Supreme Court of Canada has declared marital status an analogous ground, it has not fully addressed whether family status could also be considered one. Numerous lower courts, however, have recognized family status as a prohibited ground of discrimination. This suggests that the Supreme Court may one day extend s.15(1) protection to those with an unconventional family structure. This will, hopefully, create more routes for single mothers to seek redress for violations of their equality rights, and ensure that government programs meet their needs.

4. Litigation Archive

I created a litigation archive, in the form of an Excel spreadsheet, to provide a record of cases in which West Coast LEAF has acted as an intervener. This archive included the following information:

- Case name and style of cause,
- Level of court,
- Counsel for West Coast LEAF,
- Summary of West Coast LEAF's arguments,
- Summary of judgment,
- Whether appeal was sought and/or granted, and
- Keywords to describe the case

5. Miscellaneous Research

I also assisted members of the West Coast LEAF team with their immediate research needs. For example, I was tasked with researching whether Indigenous families are hesitant to access government funded childcare services. Indeed, Indigenous women experience distrust in the child welfare system given Canada's history of residential schools and the 'sixties scoop'. Overall, Indigenous children continue to represent an alarming percentage of the children in government care, and once in the child welfare system, Indigenous children are more likely to have a "substantiated" report of maltreatment.

As well, I assisted in the preparation of West Coast LEAF's annual CEDAW Report Card, which evaluates the government of British Columbia's commitment and steps to end gender-based discrimination. I was responsible for researching changes in provincial and federal policy that impact women's ability to access housing in the province.

6. Litigation Tracking

I was responsible for monitoring any recent cases within British Columbia that West Coast LEAF might be interested in acting as an intervener. For such, cases I was responsible for providing a brief summary that highlighted their pertinent issues.

Overall, my experience at West Coast LEAF proved extremely fulfilling. It allowed me to conduct comprehensive legal research that will hopefully yield tangible results. I was also given the opportunity to attend proceedings at the BC Supreme Court for *BCCLA and JHSC v Canada*, in which West Coast LEAF acted as an intervener. This case challenged the constitutionality of administrative segregation. Attending these proceedings sparked my current interest in litigation.