

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)**

BETWEEN:

TRIAL LAWYER'S ASSOCIATION OF BRITISH COLUMBIA and
CANADIAN BAR ASSOCIATION – BRITISH COLUMBIA BRANCH

APPELLANTS
(RESPONDENTS)

and

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(APPELLANT)

and

ATTORNEY GENERAL OF CANADA,
ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO,
ATTORNEY GENERAL OF QUEBEC and
ATTORNEY GENERAL OF ALBERTA

INTERVENERS

and

WEST COAST WOMEN'S LEGAL EDUCATION
AND ACTION FUND

PROPOSED INTERVENERS

**MOTION RECORD FOR LEAVE TO INTERVENE OF THE PROPOSED INTERVENER, WEST
COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND**

(Pursuant to Rules 47 and 55-59 of the Rules of the Supreme Court of Canada)

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TAB 1

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)**

BETWEEN:

TRIAL LAWYER'S ASSOCIATION OF BRITISH COLUMBIA and
CANADIAN BAR ASSOCIATION – BRITISH COLUMBIA BRANCH

APPELLANTS
(RESPONDENTS)

and

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(APPELLANT)

and

ATTORNEY GENERAL OF CANADA,
ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO,
ATTORNEY GENERAL OF QUEBEC and
ATTORNEY GENERAL OF ALBERTA

INTERVENERS

and

WEST COAST WOMEN'S LEGAL EDUCATION
AND ACTION FUND

PROPOSED INTERVENERS

NOTICE OF MOTION TO A JUDGE OR THE REGISTRAR
FOR LEAVE TO INTERVENE FILED BY THE PROPOSED INTERVENER, WEST
COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND
(Pursuant to Rules, 47, 55-59 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that West Coast Women's Legal Education and Action Fund Association ("West Coast LEAF") hereby applies to a Judge or the Registrar of this Court, pursuant to Rules 47, 55-59 of the *Rules of the Supreme Court of Canada*, for an order:

1. granting West Coast LEAF leave to intervene in this appeal;

2. permitting West Coast LEAF to file a Factum of not more than fifteen (15) pages;
3. permitting West Coast LEAF to present oral argument at hearing of this appeal not exceeding ten (10) minutes;
4. Providing that no order of costs of this motion and this appeal be made for or against West Coast LEAF; and
5. any such further or other Order that this Court may deem appropriate.

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

1. West Coast LEAF has a substantial interest in this appeal;
2. West Coast LEAF has established expertise and experience in relation to issues raised in this appeal, namely public interest and Charter litigation;
3. West Coast LEAF will advance submissions to the Court that are relevant to this appeal, useful to the Court, and different from those of other parties;
4. West Coast LEAF and its members would suffer prejudice if leave to intervene in this appeal is denied;
5. Rules 47, and 55 to 59 of the *Rules of the Supreme Court of Canada*;
6. Such further and other grounds as counsel may advise and this Honourable Court may permit.


AND FURTHER TAKE NOTICE that the following documents are relied upon by West Coast LEAF in support of this motion:

1. The Affidavit of Parvinder Hardwick sworn February 21st, 2014;

2. The Memorandum of Argument of West Coast LEAF; and
3. Such further and other material as counsel for West Coast LEAF may advise and this Honourable Court may permit.


Dated at Ottawa, Ontario this 25th day of February, 2014.

SIGNED BY:


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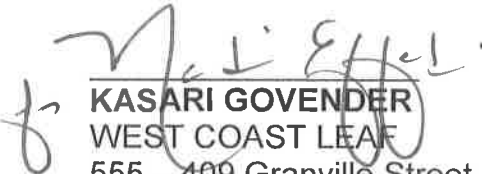
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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar as the case may be.

TAB 2

**IN THE SUPREME COURT OF CANADA
ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA**

BETWEEN:

TRIAL LAWYER'S ASSOCIATION OF BRITISH COLUMBIA and
CANADIAN BAR ASSOCIATION – BRITISH COLUMBIA BRANCH

APPELLANTS
(RESPONDENTS)

and

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(APPELLANT)

and

ATTORNEY GENERAL OF CANADA,
ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO,
ATTORNEY GENERAL OF QUEBEC and
ATTORNEY GENERAL OF ALBERTA

INTERVENERS

and

WEST COAST WOMEN'S LEGAL EDUCATION
AND ACTION FUND

PROPOSED INTERVENERS

AFFIDAVIT OF PARVINDER HARDWICK
(In support of West Coast LEAF's Application for Leave to Intervene)
(Pursuant to Rules 47, 55, 56(b) and 57(1) of the Rules of the Supreme Court of
Canada)

1. I, Parvinder Hardwick, of the City of Vancouver, in the Province of British Columbia, AFFIRM AS FOLLOWS:

2. I am a board member of the West Coast Women's Legal Education and Action Fund Association, and as such have knowledge of the matters hereinafter deposed to, except where stated to be based on information and belief in which case I verily believe them to be true.

3. I was called to the bar in British Columbia in 2007. I have been on the board of West Coast LEAF since 2011.

4. This appeal involves the determination of the constitutionality of hearing fees in a custody and access case. West Coast LEAF was an intervener at the B.C. Court of Appeal in this case, and filed the factum attached to this my Affidavit as Exhibit "A".

5. West Coast LEAF has a demonstrable historical and current interest in access to justice, particularly for women involved in family law disputes. The issues raised in this appeal fall squarely within West Coast LEAF's area of expertise.

A. Background and Expertise of West Coast LEAF

6. West Coast LEAF is an incorporated non-profit society in British Columbia and a federally-registered charity. West Coast LEAF's mission is to achieve equality by changing historic patterns of systemic discrimination against women through BC-based equality rights litigation, law reform and public legal education.

7. West Coast LEAF was created in April 1985, when the equality provisions of the *Canadian Charter of Rights and Freedoms* ("Charter") came into force. West Coast LEAF is an affiliate of a national organization, Women's Legal Education and Action Fund (LEAF). Both LEAF and West Coast LEAF grew out of the efforts of a group of women who, starting in the early 1980s, worked to ensure that ss.15 and 28 of the Charter would be effective in guaranteeing women substantive equality.

8. West Coast LEAF currently has approximately 350 members, approximately 130 volunteers, five full-time staff persons and three part-time staff persons.

9. West Coast LEAF acts to promote the equality interests of all British Columbian women, regardless of race, national origin, immigration status, sexual preference or

identity, family or marital status, disability or ability, age, socio-economic status or any other personal characteristic.

10. West Coast LEAF is committed to working on a consultative and collaborative basis with other equality-seeking groups to ensure that West Coast LEAF's legal arguments, education programs and law reform activities are informed by and inclusive of the diversity of women's experiences. West Coast LEAF also consults and collaborates with leading equality rights academics and practitioners to ensure the consistently high calibre of its work.

11. Public legal education is one of West Coast LEAF's three program areas. West Coast LEAF's public legal education program aims to help British Columbians learn what their legal equality rights are, how to access those rights, and to think critically about the law as it affects them. West Coast LEAF believes that with such education, women will be able to take an active role in asserting their rights and shaping the laws that affect them. The program aims to transform public legal education, collaborate with diverse equality seeking groups, distribute public legal education materials and build upon other West Coast LEAF initiatives. West Coast LEAF's public legal education projects are based on collaboration with other groups and complement its litigation and law reform activities, based on the premise that the first step toward asserting rights is understanding them.

12. A second program is law reform. West Coast LEAF's law reform initiatives seek to ensure that all legislation in British Columbia complies with guarantees of equality for woman pursuant to both s.15 of the *Canadian Charter of Rights and Freedoms*, and the United Nations *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW), to which Canada is a signatory. West Coast LEAF's law reform work consists of conducting comprehensive research projects, drafting best practices and recommendations on legal reform, and making submissions to government and key decision makers.

13. Litigation is the third program area. In addition to intervening in the present case at the B.C. Court of Appeal, West Coast LEAF has intervened, or is intervening, in its

own name in seven legal proceedings: *SWUAV v. Canada*, 2010 BCCA 439; *Reference re: Criminal Code of Canada (B.C.)*, 2011 BCSC 1588 (the Polygamy Reference); *British Columbia (Ministry of Education) v. Moore*, 2012 SCC 61; *Friedmann v. MacGarvie*, 2012 BCCA 445; *Inglis v. Ministry of Public Safety and Solicitor General of BC*, 2013 BCSC 2309; and *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association* (judicial review pending). West Coast LEAF also intervened in coalition with two other organizations in *SWUAV v. Canada*, 2012 SCC 45.

14. Together with LEAF, West Coast LEAF has intervened in an additional 13 cases, including cases at the BC Court of Appeal, the Ontario Court of Appeal, and the Supreme Court of Canada.

15. In the following cases, West Coast LEAF provided general information and support to LEAF, which had primary conduct of the intervention: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120; *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*, [2002] O.J. No. 1771 (C.A.); *Miller v. Canada (Attorney General)*, 2002 FCA 370; *R. v. Shearing*, [2002] 3 S.C.R. 33; *Canada (Attorney General) v. Lesiuk (C.A.)*, [2003] 2 F.C. 697 (C.A.); *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] 3 S.C.R. 381; and *Blackwater v. Plint*, [2005] 3 S.C.R. 3.

16. In the following cases, West Coast LEAF took the leading role: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307; *Smith (Guardian ad litem of) v. Funk*, 2003 BCCA 449; *R. v. Demers*, 2003 BCCA 28; *R. v. Watson*, 2008 BCCA 340; and *Rick v. Brandsema*, 2009 SCC 10.

17. In all of these cases, West Coast LEAF and LEAF have focused their submissions on the application of principles of substantive equality for women to the issue at bar. Through its litigation work with LEAF and on its own, West Coast LEAF

has contributed to the development of the meaning of substantive equality and of equality rights jurisprudence in British Columbia and in Canada.

B. West Coast LEAF's Expertise and Interest in Family Law

18. West Coast LEAF has significant expertise in the area of substantive equality for women, with particular regard to s. 15(1) of the *Charter*, and in applying these principles to legislation, common law, and state action impacting upon women's equality. In particular, West Coast LEAF has focussed its work on ensuring women's equality within the context of family law.

19. West Coast LEAF's Family Law Project is an ongoing program area, and the organization has a full time Manager of Community Outreach for this program. The organization has completed a number of projects in the last 12 years on the impact of family law on women, including publishing the following reports:

- a. "Civil Legal Rights of Abused Women: A Transformative Public Legal Education Project" 2002;
- b. "Legal Aid Denied: Women and the Cuts to Legal Services in BC", 2004;
- c. "Family Law Project: Court Watch Report 2005-2006";
- a. "Not with a ten-foot pole: Law Students' Perceptions of Family Law Practice", 2009;
- b. "Rights Based Legal Aid: Rebuilding BC's Broken System", 2010;
- c. "Mapping the Gap: A Summary of Legal Resources for Women in British Columbia", 2010;
- d. "Mapping the Gap: Linking Aboriginal Women with Legal Resources and Services", 2011;
- e. "Separation Agreements: Your Right to Fairness", 2012 (updated 2013); and

- f. "Troubling Assessments: Custody and Access Reports and their Equality Implications for BC Women", 2012.

20. West Coast LEAF is currently engaged in a three year project funded by Status of Women Canada, which includes: the development of a workshop for family law advocates on helping women navigate separation agreements; the development of a workshop for lawyers on the intersections between equality and family law; and a province-wide consultation with women-serving organizations, lawyers, judges and others on how to meet legal needs through community based legal service delivery.

21. West Coast LEAF is also currently working on a project entitled Mothering With Disabilities, examining, among other issues, the application of family law to mothers with disabilities.

C. West Coast LEAF's Expertise and Interest in Access to Justice

22. West Coast LEAF also has significant expertise and interest in applying a substantive equality lens to access to justice issues.

23. Significantly, West Coast LEAF intervened in the case at bar when it was heard by the British Columbia Court of Appeal. The intervener's submissions were focussed on ensuring equal access to justice for women, and on the unconstitutional impact of the impugned provisions on such access.

24. Additionally, West Coast LEAF intervened in *SWUAV v. Canada* at both the Court of Appeal and Supreme Court of Canada levels, the latter in coalition with ARCH Disability Law Centre and Justice for Children and Youth. The case concerned the definition and application of the test for public interest standing – and the particular issue at stake was whether a group of former and current sex workers could have access to the courts to bring an equality challenge to the prostitution provisions of the *Criminal Code*. The organization's argument at both levels focussed on the application of substantive equality principles to the test for public interest standing, and argued that s.15 of the *Charter* mandates that the test be interpreted broadly and purposively to provide access to the courts for the most marginalized women.

25. As described above, West Coast LEAF wrote and co-published (with Canadian Centre for Policy Alternatives) two papers on the crisis in the legal aid system: *Legal Aid Denied: Women and the Cuts to Legal Services in BC* in 2004, and *Rights Based Legal Aid: Rebuilding BC's Broken System* in 2010. The first paper documented the disproportionate impact of an inadequately funded legal aid system on women, and the second proposed a rights based system of legal aid that would increase access to justice and promote substantive equality. The organization also wrote and published two reports that "mapped the gap" in resources available to women seeking family law assistance in BC, the second one particularly focussing on resources used by and targeted to Aboriginal women. Most recently, West Coast LEAF published "Supporting Mothers or Shutting them Out: Results of a Court Watch" examining whether women whose children have been apprehended have effective and meaningful access to the justice system.

26. West Coast LEAF was one of the founding members of the Coalition for Public Legal Services, a coalition of direct service organizations, legal organizations, legal advocates and lawyers and unions who are working together to advocate for an adequately funded legal aid system in BC. Executive Director Kasari Govender co-chairs this Coalition, and West Coast LEAF has been instrumental in designing a background factsheet on legal aid, a list of commonly asked questions and answers and submissions to the Legal Services Society in preparation for the provincial government's White Paper on justice system reform.

27. West Coast LEAF has met with numerous public officials to push for greater access to civil legal aid for women, including the Attorney General for the province, the women's caucus for the Official Opposition, ministerial officials and Legal Services Society's management. The organization has also made submissions to provincial Finance Committees on the subject. In West Coast LEAF's CEDAW Report Cards from 2009 to 2013, the government received a failing grade on its compliance with international standards on access to justice and women's equality. West Coast LEAF also participated in the BC CEDAW Group's 2008 shadow report to the United Nations'

Committee on the Elimination of All forms of Discrimination Against Women, which noted the impact of cuts to civil legal aid on women's equality in BC.

D. West Coast LEAF's Proposed Intervention

28. West Coast LEAF has a demonstrable and historical interest in ensuring equal and fair access to justice, particularly in family law matters. West Coast LEAF has strong expertise in gender based legal analysis and applying s.7 of the *Charter* to matters of law and public policy.

29. If granted leave to intervene, West Coast LEAF will take the position that the hearing fees in family law proceedings, as imposed under Appendix C, Schedule 1 of the *Supreme Court Family Rules BC Reg 169/2009*, should be struck down in their entirety. In the event that this Court finds that reading language into the *Rules* may cure the constitutional breach, West Coast LEAF will argue that the proposed language by the Court of Appeal is insufficient and does not provide the pragmatic solution that was clearly intended, including the Court's intention to capture those who cannot pay the fees without "compromising their ability to pay for their everyday expenses".

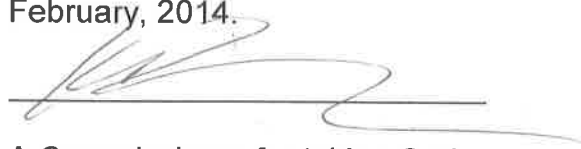
30. West Coast LEAF will argue that access to justice is mandated by the right to liberty and security of the person under s. 7 of the *Charter* and international human rights law principles.

31. The Applicant's request for leave to intervene in this appeal is limited to making written and oral submissions on the questions of law upon which leave to appeal has been sought. The Applicants are not seeking leave to adduce fresh evidence.

32. West Coast LEAF seeks leave to intervene in this appeal because of the importance of access to justice in family law proceedings to women's equality. In the submission of the proposed intervener, access to justice is a matter of substantive equality, and impediments to such access have a discriminatory impact on women.

33. The Applicant undertakes to work in cooperation with the parties and other possible interveners, and will not attempt to detract from the issues at stake in this litigation.

AFFIRMED BEFORE ME at the City of)
Vancouver, in the Province of)
British Columbia, this 21 day)
February, 2014.)



A Commissioner for taking Oaths
in British Columbia

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PARVINDER HARDWICK

TAB A

THIS IS EXHIBIT A REFERRED TO
IN THE AFFIDAVIT OF PAVINDER
HARDWICK AFFIRMED BEFORE ME
THIS 21ST DAY OF FEBRUARY, 2014
AT VANCOUVER, B.C.

Court of Appeal File No. CA39971
Registry: Vancouver

COURT OF APPEAL

A COMMISSIONER FOR TAKING
AFFIDAVITS FOR BRITISH COLUMBIA

**ON APPEAL FROM the Order of the Honourable Mr. Justice McEwan, of the
British Columbia Supreme Court, Pronounced May 22, 2012**

BETWEEN:

MONTSERRAT VILARDELL

Respondent (Plaintiff)

AND:

BRUCE DUNHAM

Respondent (Defendant)

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Appellant (Intervenor)

AND:

**CANADIAN BAR ASSOCIATION – BRITISH COLUMBIA BRANCH
TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA**

Respondents (Intervenors)

AND:

WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND

Respondents (Intervenor)

**FACTUM OF THE RESPONDENT
WEST COAST WOMENS' LEGAL EDUCATION AND ACTION FUND**

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OPENING STATEMENT

West Coast LEAF was granted leave to intervene with respect to the constitutional validity of the hearing fees as they relate to women in family law, and Canada's international human rights obligations.

Courts are not just another line item in a budget. They are a foundational institution in our democracy. In the context of family law, the courts are the locus of justice, where women can seek the application of the culmination of over 100 years in the advancement of the law as it relates to their rights in marriage and after marriage breakdown.

West Coast LEAF says that the choice to seek justice through the courts, and the benefit and protection of law in the courts, are rights protected by section 7 of the *Charter*. The state cannot impose requirements with the intent, or with the effect, of impeding women from accessing the courts, except in accordance with fundamental justice.

While some administrative restrictions on access to justice may accord with fundamental justice, hearing fees that impose an unfair and unequal barrier to access to the court for women cannot meet this test. This is particularly true in family law matters where the systemic inequality of the parties has been judicially recognized, and the benefit of the law is so readily apparent. Hearing fees cause sex discrimination in one of the most essential and foundational institutions in our democracy.

PART I STATEMENT OF FACTS

1. West Coast LEAF (WCL) relies on the following facts in the factums:
 - (i) Respondent Intervenor TLABC 's factum: paragraphs 3, 10(c), (d), 11, 14;
 - (ii) Respondent Intervenor CBABC 's factum: paragraphs 7, 11, 14-18, 20-23;
 - (iii) The Appellant AGBC: paragraphs 9 and 13; and
 - (iv) Respondent Plaintiff Vilardell: paragraphs 3-21.

2. WCL specifically relies on the following findings of fact:
 - (a) The primary intent of the hearing fees is to deter people from going to court;

Reasons for Judgment, paras.309 – 310, 392, 395. 398

 - (b) The hearing fees are “a barrier to access” the courts. They have the effect of inhibiting, deterring, and obviously impeding individuals from using the courts to resolve their disputes;

Reasons for Judgment, paras 392, 395, 396, 398, 425(3)

 - (c) The case at bar was a family law proceeding regarding the mobility of the mother of a child, custody, property division, and spousal support. The hearing fees for this 10 day trial were \$3,600, the approximate net monthly income of the family before breakup.

Reasons for Judgment, 1, 26, and 396

 - (d) In order to pay the hearing fees, Ms. Vilardell would have had to forgo food, transit and shelter;

Vilardell Affidavit paras, 27-30, Appeal Book Vol. 1 at 218
Reasons for Judgment, at 387

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- (e) The imposition of the hearing fees caused Ms. Vilardell significant anxiety in pursuing her application to move with her child.

Vilardell Affidavit paras 25-30, AB Vol 1, pp217-218

Reasons for Judgment at 421

3. In addition, WCL relies on the following facts and inferences as established by the law and in the evidence:

- (a) Women, as a group, are statistically poorer after relationship breakdown than men, and therefore less able to pay hearing fees in order to access the court in family law matters, and more likely to be deterred from the court by such fees;

Boyd Affidavit, paras 15-33, Exhibit B, AB Vol 1 39-44, 125-150

Carson Affidavit, Exhibit B, Appeal Book Vol 1, pp 254-264

Reasons for Judgment at 90, 177

Moge v Moge, [1992] 3 SCR 813

- (b) First Nations women, immigrant women, and women with disabilities are over-represented among those that are unable to pay hearing fees, or for whom the hearing fees pose a significant barrier, or deterrence, to use of the court.

Boyd Affidavit, Exhibit B, AB Vol 1 125-150,

Carson Affidavit, Exhibit B, Appeal Book Vol 1, pp 254-264

4. West Coast LEAF's intervention is focused on the hearing fees imposed under Appendix C, Schedule 1 of the *Supreme Court Family Rules* BC Reg 169/2009. The hearing fees imposed under those Rules are \$0 for the first 3 days of a court hearing, \$500 for each of the 4th to 10th days, and \$800 for each day over 10 days.

PART II WCL POSITION ON THE ISSUES

5. Hearing fees impede and prevent access to Canada's courts, and the protections and benefit of the law provided by the courts in the area of family law. They therefore deprive women of both their s. 7 rights of liberty to access the courts, and security of the person in relation to the protection of the law through the courts.

6. The deprivation is not in accordance with principles of fundamental justice, in particular the principle of equality, provided expressly in s. 15 and 28 of the *Charter*, but which informs all sections of the *Charter*, and is a key component of the rule of law. The hearing fees are unfair, and arbitrary, and have a discriminatory effect on women in family law matters, since women are disproportionately less able to pay them.

7. International human rights law, an important guide to interpreting constitutional rights protection, places on the state an obligation not to unfairly impede or prevent the ability of women, and other individuals, to submit their disputes to the courts for a fair and just resolution. A United Nations Special Rapporteur has most recently found that court fees violate human rights generally, and women's rights more particularly, and these findings directly assist in interpreting the protections of s. 7 of the *Charter*.

PART III ARGUMENT

A. The Constitutional Right at Issue

8. The constitutional right asserted in this case is not "the right of a litigant to have access to the courts in the form of a trial before a superior court justice without being required to pay hearing fees in amounts that are unreasonable in the sense that they could not be paid by a person of modest means who, however, is not truly poor or indigent," as the Province asserts at paragraphs 29, 32 and 41 of its factum.

9. Nor is the right asserted in this case a general right to counsel in all or most civil, criminal, and family law disputes as was considered in *Christie*.

British Columbia (Attorney General) v. Christie, [2007] 1 SCR 873 at 11

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10. The liberty right at issue is the right to choose to seek to justice in a court of law.

11. The security of person right at issue is the right to the protection of the law in matters that directly engage one's physical and psychological integrity.

12. The issue at bar is whether these rights are engaged or interfered with by the Province's imposition of hearing fees as a precondition to the judicial hearing of a family law dispute, and if so, whether the deprivation is in accordance with fundamental justice.

13. WCL says that the hearing fees are a direct and deliberate interference with women's rights:

- (a) to freely choose to seek a judicial resolution of their family law dispute, without interference from the state; and
- (b) to seek the benefit and protection of the law through the court in relation to matters that directly engage their physical and emotional health, safety, integrity and fundamental wellbeing.

14. In the family law context, the Province's imposition of hearing fees inhibits people's liberty and security of the person to access the courts to resolve disputes that engage issues deeply fundamental to human dignity, including the ability to parent one's children, to sustain oneself after marriage breakdown, to have the shelter of the family home, and to be safe from violence and abuse.

B. Hearing fees are state imposed interference with rights

15. The hearing fees engage s.32 of the *Charter*. The state action at issue in this case is the imposition of hearing fees under *BC Regulation 168/2009* and *169/2009* with the express purpose, and established effect, of inhibiting use of the courts for the resolution of civil and family law disputes.

16. State interference or compulsion is also an element of the s.7 infringements of liberty and security of the person. In this respect, the trial judge's factual findings that

hearing fees are both intended to create a barrier to accessing the court, and do impose such a barrier, are more than sufficient to establish the state's direct interference with both women's liberty to choose to access the courts, and women's security interest in obtaining the protection of the law in family law matters from the courts.

A New Justice System for Families and Children: Report of the Justice Reform Working Group, May 2005, pp. 69-70

C. Hearing Fees interfere with the right to liberty under s. 7 of the Charter

17. The family law hearing fees are a direct and deliberate interference with women's rights to freely choose to seek a judicial resolution of their family law dispute, without interference from the state.

18. WCL adopts the submissions of the CBA at paragraphs 73-77 generally, and says that the deprivation of liberty created by the hearing fees applies *a priori* to women and to the family law hearing fees. In this regard, WCL adds the following:

19. The right to liberty is engaged "where state compulsions or prohibitions affect important and fundamental life choices." The two key elements to determining whether liberty is infringed are therefore: 1) state compulsion, and 2) its impact on fundamental life choices.

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44 at 49- 50

20. The freedom to seek justice by submitting one's private and often difficult family law disputes to the court is a choice that is part of the "fundamental notions of human dignity, personal autonomy, privacy and choice in decisions regarding an individual's fundamental being" protected by the s. 7 right to liberty. The fundamental nature of this choice was articulated in an address by McLachlin CJ at the Law School at Thompson Rivers University, and cited by the learned trial judge: "[to] be required to accept that you cannot have justice is to give up a part of yourself as a human being."

Reasons for Judgment at 399

21. The Crown's use of choice in this case implies that the courts are a mere service provided at the whim of government and accessed at the whim of people and corporations, subject only to a cost benefit analyses. WCL says that the choice to seek a fair and just resolution in the courts is a choice of such a fundamental nature that it goes to the heart of personal freedom, and cannot be deprived by the state. It therefore falls within that group of choices inextricably tied to the concept of human dignity which the *Charter* protects from state interference.

22. This is even more so in the case in family law matters where the issues submitted to the court themselves engage the liberty interest:

I would have thought it plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent. [...] [O]ur society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children.

B (R) v Children's Aid Society of Metropolitan Toronto, [1995] 1S.C.R. 315 at 83- 85.

23. The hearing fees are intended to, and do, deter people from using the courts. In that sense they are a direct form of state compulsion. In the context of family law, this denial will frequently be in relation to a matter that is itself fundamental to a parent's sense of self, such as her ability to nurture and care for her children. Thus, her liberty right is infringed.

D. Hearing Fees interfere with security of the person under s. 7 of the *Charter*

24. The hearing fees are a direct and deliberate interference with women's rights to seek the benefit and protection of the law through the courts in relation to matters that engage their physical and emotional health, safety, integrity and well-being.

25. The right to security of the person protects both the physical and psychological integrity of the person. At paragraph 245 of *Morgentaler*, Wilson J stated the following:

245 I agree with the Chief Justice and with Beetz J. that the right to "security of the person" under s. 7 of the Charter protects both the physical and psychological integrity of the individual. State enforced medical or surgical treatment comes readily to mind as an obvious invasion of physical integrity. Lamer J. held in *Mills v. The Queen*, [1986] 1 S.C.R. 863, that the right to security of the person entitled a person to be protected against psychological trauma as well -- in that case the psychological trauma resulting from delays in the trial process under s. 11(b) of the *Charter*. He found that psychological trauma could take the form of "stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs and uncertainty as to outcome and sanction".

R v Morgentaler, [1988] 1 SCR 30 at 245 (Wilson J), see also at 19 (Dickson J), at 114, 120 (Beetz J)

26. Where the harm is not physical, the security of the person is triggered where (a) the psychological prejudice is serious, and (b) the harm results from the actions of the state.

Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44 at 57.

27. The psychological prejudice to a woman involved in a family law dispute whose access to the court is interfered with by the hearing fees is serious. Many of the same considerations that apply to trial delays considered in *Mills*, *supra*, are engaged in family law proceedings. For example, custody matters have been found to engage the psychological security of parents:

The parental interest in raising and caring for a child is, as La Forest J. held in *B. (R.)*, *supra*, at para. 83, "an individual interest of fundamental importance in our society". Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As an individual's status as a parent is often fundamental

to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.

New Brunswick (Minister of Health and Comm. Services) v G (J), [1999] 3 SCR 46 at 61
28. Similar to complex child protection proceedings, child custody proceedings also pronounce on the “parent’s fitness or parental status” and “pry into the intimacies of the relationship” between parent and child. Such relationships may only be interfered with in accordance with the best interests of the child (and indeed, may require such an interference), whether in custody disputes or child protection hearings. The seriousness of the psychological harm to the parents is of the same quality regardless of whether custody is at issue in a custody dispute or a state apprehension proceeding.

G(J) at 64

29. Outside of the context of a child protection proceeding, state interference with a custody dispute, such as through a state imposed deterrent to a judicial determination of that custody dispute, can therefore be expected to cause a serious state imposed psychological harm to both the parents and the child.

30. Hearing fees also interfere with security of the person rights by impeding access to the courts for women in violent relationships. In these cases, litigation may be the only option to resolve a family law dispute and maintain the safety and security of women and children. This has been recognized in the new *Family Law Act* (proclaimed to come into force in March 2013). The *FLA* says:

s.8(1) A family dispute resolution professional consulted by a party to a family law dispute must assess, in accordance with the regulations, whether family violence may be present, and if it appears to the family dispute resolution professional that family violence is present, the extent to which the family violence may adversely affect:

- (a) the safety of the party or a family member of that party, and
- (b) the ability of the party to negotiate a fair agreement.

Family Law Act, Bill 16.

31. State deprivation of liberty and security of the person in the family law context is not limited to the more direct state interferences of child apprehension and state medical intervention. This is not the first case where state procedures and laws that may not be a direct threat to the security of a person, but which interfere with access to protections from such threats, have been considered. The assertion that it is not the state, but external or private forces that are the source of the loss of security of the person has been argued before and rejected where the law itself is an impediment to accessing protections from the harm.

32. In *PHS*, Canada argued that it was not the cause of the deprivations of security of the person faced by the clients of Insite. Canada argued that the deprivation of health and well-being was caused by the drug use of the clients themselves and the choices they made, and was not related to the legislation that precluded Insite's services. This argument was rejected:

93 ...Where a law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out: *R. v. Morgentaler* (1988), at p. 59, per Dickson C.J., and pp. 105-106, per Beetz J.; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 589, per Sopinka J.; *Chaoulli*, at para. 43, per Deschamps J., and, at paras. 118-19, per McLachlin C.J. and Major J.; *R. v. Parker* (2000), 188 D.L.R. (4th) 385 (Ont. C.A.).

Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44 [2011] 3 SCR 134 at 93

R v Morgentaler, [1988] 1 SCR 30, at 32-33, 51, 59, 86-87, 105-106

33. This decision, and the cases that have cited it, and relied upon in it, have established that laws that prevent access to the facilities that protect individual well-being themselves will directly interfere and impair security of the person.

34. In *Adams*, the City of Victoria and the Province argued that "the prohibition on the erection of shelter is not the cause of the respondents' state of homelessness or insecurity." They argued that "s. 7 is not engaged where, as a result of the state action, the claimants merely remain in a state of insecurity." The Court rejected this argument,

relying on both *Morgentaler* and *Rodriguez* to find that it is not necessary that the impugned state action be the sole or even primary cause of the deprivations at issue. In that case, the bylaw prohibiting the use of temporary shelter in public places was found to “impair the ability of the homeless to address their need for adequate shelter.” The Court of Appeal approved the finding of the learned trial judge that this impairment “is a particular state action that is alleged to create a particular deprivation. In my view, this satisfies the need for the deprivation to have been caused by state action.”

Victoria (City) v Adams, 2009 BCCA 563; 100 B.C.L.R. (4th) 28 at 86-89

35. In *Bedford v Canada*, Canada argued that it was not the cause of the deprivations of the security of the person faced by women engaged in prostitution, and that an insufficient causal link had been established between the challenged law and the deprivation. All five judges of the panel found that an infringement of security of the person was made out because the impact of the legislation, “in the world in which it actually operates,” deprived women of their ability to avail themselves of necessary protections.

Bedford v Canada, 2012 ONCA 186, 346 DLR (4th) 385 at 108

36. In the context of family law, interference with access to the courts, and to the benefit of the law, prevents access to the very doctrines and enactments that engage the values underlying women’s security of the person.

37. In *M v H*, Gonthier J in dissent (but not on this point) stated:

164 The history of family law is, in many ways, the history of the gradual emancipation of women from legal impediments to full equality.

He went on at paragraphs 164-170 to describe the evolution of the protections of women’s security through the development of the family law in Chancery, the courts, and through legislation and law reform. This is the body of law that the hearing fees seek to deter women from accessing through the courts.

M v H, [1999] 2 SCR 3 at 164-170

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38. The benefit of family law, and access to it through the courts, is at least as essential to women's security of the person after marriage breakdown (and indeed within a marriage) as access to a harm reduction facility was to the clients of Insite in PHS, or that the shelter of a tent was to the homeless of Victoria. Equally, the Province's deliberate interference with access to those protections through the courts constitutes a state deprivation of women's security of the person in the context of marriage breakdown and family law.

E. Hearing fees do not accord with the principles of fundamental justice

39. The principles of fundamental justice can be found in the basic tenets of our legal system, and are informed by the other values and rights entrenched in the *Charter*, including the rule of law.

Reference re s. 94 (2) of the Motor Vehicle Act of BC, [1985] 2 SCR 486, at 30-31, 63-69 (Lamer J), see also at 123 (Wilson J)

The Rule of Law

40. To limit access to court to only those wealthy enough to pay for such access is a violation of the rule of law. WCL adopts the analysis of the CBA with respect to the tenets of the rule of law at paragraphs 34-59, and with respect to equal access to justice at paragraphs 60-70 of its factum.

41. WCL says that while some limitations on how and when the court may be accessed may accord with the principles of fundamental justice, limitations based on who can attend court do not. Such limitations are fundamentally unfair and arbitrary.

Christie, supra [2007] 1 SCR 873 at 16-17

British Columbia Government Employees' Union v British Columbia (Attorney General), [1988] 2 SCR 214 at 25

T Bingham; *The Rule of Law*, (London: Allen Lane, 2010) at 6-9, 55, 66, 85

Equality

42. Substantive equality is a principle of fundamental justice under s.7 because the principles of equality underlie all *Charter* guarantees. In *Andrews*, Justice McIntyre stated that “[t]he section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*.”

Andrews v Law Society of BC, [1989] 1 SCR 143 at 52
G(J), (L’Heureux-Dubé J., concurring reasons) at 112

43. The principles of fundamental justice in s. 7, read in the context of the *Charter* as a whole, including ss. 15 and 28, provides that liberty and security interests cannot be deprived in a way that discriminates on the basis of sex. The evidence establishes that hearing fees have a disproportionate and negative impact on women in family law matters, and are therefore not in accordance with the principles of fundamental justice.

44. The Supreme Court of Canada has repeatedly eschewed the “thin and impoverished vision” that is formal equality and affirmed that laws that disproportionately impact an enumerated or analogous ground are discriminatory and contrary to the substantive equality guarantees of the *Charter*. The issue is not whether the state action causes the inequality, but whether the law provides a system that is unequal in its actual effect, or is the source of further inequality. In this case, substantive sex equality under the *Charter* requires that the benefit of the court system be equally accessible to women.

Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624 at 72-73

45. West Coast LEAF submits that hearing fees disproportionately impact women in family law matters and therefore discriminate against them. The record shows that women are generally lower income than men; women are particularly lower income than men post-relationship breakdown; and women who are Aboriginal, disabled or newcomers are even more likely to be lower income.

Affidavit of Susan Boyd, Appeal Book Vol. 1, pp 15-33.

Carson Affidavit, Exhibit B, Appeal Book Vol 1, pp 254-264

46. The record is further supported by the jurisprudence. Madam Justice L'Heureux-Dubé for the majority in *Moge* takes judicial notice of the fact that "In Canada, the feminization of poverty is an entrenched social phenomenon". She cites with approval the following statement from researcher L. J. Weitzman about the economic and impacts of divorce on women:

For most women and children, divorce means precipitous downward mobility -- both economically and socially. The reduction in income brings residential moves and inferior housing, drastically diminished or nonexistent funds for recreation and leisure, and intense pressures due to inadequate time and money. Financial hardships in turn cause social dislocation and a loss of familiar networks for emotional support and social services, and intensify the psychological stress for women and children alike. On a societal level, divorce increases female and child poverty and creates an ever-widening gap between the economic well-being of divorced men, on the one hand, and their children and former wives on the other.

L J Weitzman "*The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (1985)*", as cited in *Moge v Moge*, [1992] 3 SCR 813 at 55-57.

47. The evidence in that case, taken from court records, established that two thirds of divorced women had total incomes below the poverty line, and almost three quarters fell below that line when support was excluded.

Moge at 57

48. The discriminatory effect on women of laws that affect parents who are poor has also been judicially noted: "Issues involving parents who are poor necessarily disproportionately affect women and therefore raise equality concerns and the need to consider women's perspectives."

G(J), (L'Heureux-Dubé J, concurring reasons) at 113

49. Women are disproportionately impacted by the imposition of hearing fees in the family law context because they are less likely than men to be able to afford them.

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Women will thus be disproportionately excluded from initiating family law proceedings, and exercising their right to have custody and other family law matters adjudicated by the court. Put another way, the hearing fees are more likely to have the contemplated deterrent effect on access to the courts for women than men.

50. The hearing fees therefore discriminate against women, and are not in accordance with the principles of fundamental justice.

F. International Human Rights Law

51. International law principles are a “critical influence” on the interpretation of the scope of Charter rights, including s.7. The availability of “appropriate venues for redress such as courts and tribunals or administrative mechanisms that are accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalized men and women” is a protected right of the Canadian people that falls within our core rights to liberty and security of the person under s. 7.

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at 70

52. A Report to the General Assembly of the United Nations recently came to the following conclusion regarding the imposition of fees to access the courts:

The existence of administrative and other fees disproportionately disadvantages women, who often have less financial independence or access to financial resources. Women's access to the judicial system to determine civil claims with respect to divorce, child custody and land inheritance is impeded when excessive fees are imposed.

Report of the Special Rapporteur on Extreme Poverty and Human Rights to the General Assembly of the United Nations, 9 August 2012, at 54

53. More generally, international human rights guarantees underscore the direct connection between rights and equal access to the courts and effective remedies for rights violations. Conditions that have the effect of preventing individuals from effectively exercising their rights violate the *International Convention on Civil and Political Rights*. The Committee on Economic Social and Cultural Rights has stated that

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state parties have a duty to fulfil the economic, social and cultural rights of men and women equally, which includes establishing “appropriate venues for redress such as courts and tribunals or administrative mechanisms that are *accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalized men and women.*” [emphasis added]

International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 (in force 23 March 1976), at Arts 2(2), (3).

Universal Declaration of Human Rights, GA Res 217 (III) UN GAOR, 3d Sess, Supp No 13 UN Doc A/810 (1948) 71 at 8, 10.

International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 6 ILM 368 (in force 23 March 1976), at 2(2), (3).

??rel? and N?kk?!?j?v? v. Finland, Communication No 779/1997 24 October 2001 CCPR/C/73/D/779/1997 at 7.2

UN Committee on Economic Social and Cultural Rights. *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No 16*, 34th Sess, Annex, Agenda Item 5, UN Doc E/C12/ 2005/4 (2005) at 7.

54. Canada’s international law obligations, and the principles enunciated in them, strongly support that the protection of women’s liberty and security of the person rights are engaged by access to the courts, that the imposition of hearing fees impedes that access, and that this interference is contrary to fundamental justice and equality.

PART IV NATURE OF ORDER SOUGHT

55. The appeal should be dismissed.

All of which is respectfully submitted.

Dated at Vancouver, British Columbia this 20th day of November, 2012.

Francesca Marzari
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<i>Mills v The Queen</i> , [1986] 1 SCR 863	7
<i>Moge v Moge</i> , [1992] 3 SCR 813	2, 12, 13
<i>New Brunswick (Minister of Health and Community Services) v G (J)</i> , [1999] 3 SCR	8, 12, 13
<i>R. v. Morgentaler</i> , [1988] 1 SCR 30	6, 7, 9, 10
<i>Reference re Motor Vehicle Act (British Columbia) S 94(2)</i> , [1985] 2 SCR 486	11
<i>Rodriguez v British Columbia (Attorney General)</i> , [1993] 3 SCR 519	10
<i>Victoria (City) v Adams</i> , 2009 BCCA 563; 100 BCLR (4th) 28	9, 10, 14

<u>Statutory and Secondary Sources</u>	
<i>A New Justice System for Families and Children: Report of the Justice Reform Working Group</i> , May 2005, pp. 69-70	5
<i>Family Law Act, Bill 16</i>	8
<i>T Bingham; The Rule of Law</i> , (London: Allen Lane, 2010)	11
<i>A New Justice System for Families and Children: Report of the Justice Reform Working Group</i> , May 2005	5
<u>International Covenants and Reports</u>	
<i>??rel? and N?kk?!?j?rvi v Finland</i> , Communication No. 779/1997 24 October 2001 CCPR/C/73/D/779/1997.	15
<i>International Covenant on Civil and Political Rights</i> , 19 December 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976), at 2(2), (3).	15
UN CESCR. <i>Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No 16</i> , 34 th Sess, Annex, Agenda Item 5, UN Doc E/C.12/ 2005/4 (2005)	15
<i>Universal Declaration of Human Rights</i> , GA Res 217 (III) UN GAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71 at 8, 10.	15
<i>Report of the Special Rapporteur on Extreme Poverty and Human Rights to the General Assembly of the United Nations</i> , 9 August 2012	14

TAB 3

**MEMORANDUM OF ARGUMENT FOR LEAVE TO INTERVENE FILED BY
THE PROPOSED INTERVENER, WEST COAST WOMEN'S LEGAL EDUCATION
AND ACTION FUND**

OVERVIEW

1. West Coast LEAF has been an incorporated non-profit society in British Columbia and a federally registered charity since 1985. The mission of West Coast LEAF is to achieve equality by changing historic patterns of systemic discrimination against women through British Columbia (BC) based equality rights litigation, law reform and public legal education. West Coast LEAF defines substantive equality for women in accordance with s.15 of the *Canadian Charter of Rights and Freedoms* and the United Nations *Convention on the Elimination of all forms of Discrimination Against Women*.

Affidavit of Parvinder Hardwick, sworn February 21, 2014, para. 6, *Motion Record*, Tab 2 (A), p. 7

2. West Coast LEAF was an intervener in this case at the BC Court of Appeal, filed a 20 page factum, and participated fully in oral argument.

Exhibit 1 to Hardwick Affidavit, West Coast LEAF BCCA Factum, dated November 20, 2012, *Motion Record*, Tab 2 (A), p. 15

3. At the BC Court of Appeal, West Coast LEAF argued that hearing fees impede and prevent access to Canada's courts. Women in particular are denied access to the protections and benefit of the law provided by the courts, specifically in the area of family law. The hearing fees therefore deprive women of both their s. 7 rights of liberty to access the courts, and their s. 7 rights to security of the person in relation to the protection of the law through the courts.

Hardwick Affidavit, paras. 4 and 29, *Motion Record*, Tab 2, pp. 7 and 13;
Exhibit 1 to Hardwick Affidavit, West Coast LEAF BCCA Factum; *Motion Record*, Tab 2 (A), p.15

4. West Coast LEAF argued that this deprivation is not in accordance with principles of fundamental justice, in particular, the principle of equality under the law which is a key component of the rule of law. The hearing fees are grossly

disproportionate to their purposes, and have an arbitrary and discriminatory effect on women in family law matters.

Exhibit 1 to Hardwick Affidavit, West Coast LEAF BCCA Factum, para. 6, *Motion Record* Tab 2(A), p. 21

5. West Coast LEAF also argued that international human rights law, an important guide to interpreting constitutional rights, recognizes a state obligation to not unfairly impede or prevent the ability of women, and other individuals, to submit their disputes to civil courts for a fair and just resolution. The United Nations Special Rapporteur on Extreme Poverty and Human Rights recently stated that court fees violate human rights generally, and women's rights more particularly. These findings directly inform the interpretation of s. 7 of the *Charter*.

Exhibit 1 to Hardwick Affidavit, West Coast LEAF BCCA Factum, paras. 3 and 7, *Motion Record* Tab 2(A), pp. 20 and 21

6. West Coast LEAF brought a unique and informed perspective to these issues before the BC Court of Appeal, without duplicating submissions or taking the litigation away from the parties, and proposes to take a similar approach in this appeal if granted leave to intervene.

7. West Coast LEAF seeks to file a factum of 15 pages to reflect the significant contribution it made to the argument at the BC Court of Appeal, and which it seeks to make again in this Honourable Court. At the BC Court of Appeal, West Coast LEAF filed a 20 page factum, and made the primary arguments in relation to s. 7 of the *Charter* and international human rights obligations, and the only arguments specific to the *Supreme Court Family Rules*.

8. West Coast LEAF submits that this case engages significant individual liberty and security of the person rights that are not entirely subsumed under the rule of law and division of powers analyses of the appellants. West Coast LEAF will focus on the impact of the hearing fees in the context of the historical and present development of family law, and women's liberty, security of the person and equality rights.

PART I - CONCISE STATEMENT OF FACTS

9. West Coast LEAF has extensive experience in bringing the lived experiences of women to the Court and applying this expertise to arguments concerning ss.7 and 15 of the *Charter*.

Hardwick Affidavit, para. 28, *Motion Record*, Tab 2, p. 13

10. West Coast LEAF, through litigation work with LEAF and on its own, has contributed to the development of equality rights jurisprudence and the meaning of substantive equality in Canada and in BC, in particular in reference to women's equality before and under the law.

11. In addition to the intervention of West Coast LEAF before the BC Court of Appeal in this case, West Coast LEAF has intervened, in its own name or in the name of LEAF, both on its own and in association with others, in the following proceedings:

- a. *SWUAV v. Canada*, 2012 SCC 45;
- b. *British Columbia (Ministry of Education) v. Moore*, 2012 SCC 61;
- c. *Rick v. Brandsema*, 2009 SCC 10.
- d. *Blackwater v. Plint*, [2005] 3 S.C.R. 3;
- e. *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] 3 S.C.R. 381;
- f. *R. v. Shearing*, [2002] 3 S.C.R. 33;
- g. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120;
- h. *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307;
- i. *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3;
- j. *Friedmann v. MacGarvie*, 2012 BCCA 445;
- k. *SWUAV v. Canada*, 2010 BCCA 439;

- l. *R. v. Watson*, 2008 BCCA 340; and
- m. *Smith (Guardian ad litem of) v. Funk*, 2003 BCCA 449;
- n. *R. v. Demers*, 2003 BCCA 28;
- o. *Canada (Attorney General) v. Lesiuk (C.A.)*, [2003] 2 F.C. 697 (C.A.);
- p. *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*, [2002] O.J. No. 1771 (C.A.);
- q. *Miller v. Canada (Attorney General)*, 2002 FCA 370;
- r. *Inglis v. Ministry of Public Safety and Solicitor General of BC*, 2013 BCSC 2309;
- s. *Reference re: Criminal Code of Canada (B.C.)*, 2011 BCSC 1588 (the Polygamy Reference);
- t. *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association (BCSC)*;

Hardwick Affidavit, paras. 13-16, *Motion Record*, Tab 2, pp. 8-9

PART II – CONCISE STATEMENT OF THE QUESTIONS IN ISSUE

12. The question in issue in this motion is whether West Coast LEAF should be granted leave to intervene in the within appeal.

PART III – CONCISE STATEMENT OF ARGUMENT

A. West Coast LEAF has a clear interest in the Appeal

13. West Coast LEAF is uniquely positioned to assist this Honourable Court in understanding the implications of hearing fees on women in family law matters, and the equality implications of impediments to access to justice.

14. West Coast LEAF is centrally concerned with legal issues raised by access to justice for women in family law proceedings.

15. As detailed in the affidavit dated February 21, 2014 of Parvinder Hardwick, Board Member of the West Coast LEAF, West Coast LEAF along with its national affiliate

LEAF, has extensive experience and investment in working to ensure that women have equal and effective access to family justice.

Hardwick Affidavit, paras. 22 and 23, *Motion Record*, Tab 2, p. 11

16. West Coast LEAF has a demonstrable interest in ensuring that the principles of substantive equality and women's right to security of the person are reflected in court procedure and in the rules that govern access to the justice system. West Coast LEAF's proposed submissions, with our particular focus on a substantive equality analysis of the rights to liberty and security of the person, are both useful and distinct from the other parties to this dispute.

Hardwick Affidavit, para 17, *Motion Record*, Tab 2, p. 9

B. *West Coast LEAF will bring a Useful and Different Perspective*

17. The case at bar was a family law proceeding regarding the mobility of the mother with her child, custody, property division, and spousal support. The hearing fees for this 10 day trial were \$3,600: the approximate net monthly income of Ms. Vilardell's family before separation. In order to pay these fees, Ms. Vilardell would have had to compromise provision of food, transit and shelter for herself and her child.

BCSC Reasons for Judgment at para. 1, 26, 387, and 396

18. The spectre of the payment of hearing fees for her family law proceeding caused Ms. Vilardell significant anxiety in pursuing her application to move out of the family home with her child.

BCSC Reasons for Judgment at para. 421

19. The learned trial judge found that hearing fees are "a barrier to access" and have the effect of inhibiting, deterring, and obviously impeding individuals from using the courts to resolve their disputes. The learned trial judge found that the primary intent of the hearing fees is to improperly deter people from going to court. The Court of Appeal noted that "the burden of hearing fees falls most heavily on women in family litigation, Aboriginal persons, those with disabilities and recent immigrants."

BCSC Reasons for Judgment at paras. 392, 395, 396, 398, 425(3)
BCCA Reasons for Judgment at para. 39

20. West Coast LEAF seeks leave to intervene to argue that the imposition of hearing fees in family law matters is contrary to the liberty and security of the person rights of women protected by s.7 of the *Charter*, and is not in accordance with the principles of fundamental justice, including the rule of law and equality under the law. In addition, access to justice is a right protected under international law, which is violated by the hearing fees imposed in the *Supreme Court Family Rules* in British Columbia.

21. West Coast LEAF will draw upon both domestic and international law to argue that:

- a. Women's access to civil courts is an aspect of their liberty rights, particularly in relation to family law matters;
- b. Access to family law courts is essential to women's security of the person rights, including the relief of poverty (particularly after marriage breakdown), freedom from violence, the best interests of children, and the right to care for one's children; and,
- c. These violations of liberty and security of the person are not in accordance with the tenets of fundamental justice, which include the rule of law, equality under the law, and the principle that laws not be grossly disproportionate to their purposes.

22. With respect to remedy, West Coast LEAF agrees with the CBABC and TLABC that discriminatory impediments to access to justice cannot be cured by imposing an additional impediment in the form of an indigency application on those whose constitutional rights are infringed. The pay for use model is abhorrent to the requirement of equal justice embedded in the rule of law and fundamental to our constitutional framework.

23. The economic circumstances and assets of the parties in this case are fairly typical for a family law proceeding, and the Court of Appeal granted the petitioner's indigency application. This indicates that the barrier experienced by Ms. Vilardell is neither exceptional nor unusual. Where the norm is that hearing fees cannot be charged constitutionally, requiring parties to apply for an exemption does not cure the constitutional breach.

24. In the event that this Court finds that reading language into the *Rules* can cure the constitutional breach, West Coast LEAF will argue that the language read into the *Supreme Court Family Rules* by the Court of Appeal is insufficient to provide the pragmatic solution that was clearly intended.

25. The Court of Appeal expressly found that the exemption must cover "those who could not meet their everyday expenses if they were required to pay the fees." The Court directed that the words "or in need" be read into Rule 20-5 for this purpose.

26. West Coast LEAF will submit that any exemption under Rule 20-5, if the hearing fees are to survive constitutional scrutiny, must be worded so as to clearly exempt those who cannot afford the fees without compromising their ability to afford their everyday expenses, including rent or mortgage expenses, transit or car costs, healthy food, and other family expenses, all of which was implicit in the Court of Appeal's decision in this case, but not clearly captured by the words "or in need."

PART IV – SUBMISSIONS ON COSTS

27. West Coast LEAF does not seek costs in this motion and would not seek costs in its intervention if granted leave to intervene. If granted leave to intervene, West Coast LEAF will not raise new legal issues not argued below. Its intervention therefore should not materially increase the costs of the parties.

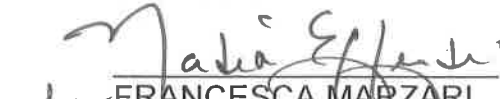
PART V - ORDER REQUESTED

28. West Coast LEAF respectfully requests an order granting West Coast LEAF leave to intervene in the present appeal for the purposes of presenting arguments by way of a factum and oral submissions according to the following terms:


- a. The proposed intervener will accept the record as is and will not file any additional evidence;
- b. The proposed intervener will serve and file a factum of no more than 15 pages on or before 14 days after leave is granted;
- c. The proposed intervener will make oral submissions of no more than 10 minutes; and
- d. West Coast LEAF does not seek its costs of this motion or of its intervention if granted leave, and requests that no costs be ordered against it.

All of which is respectfully submitted this 25th day of February, 2014.

SIGNED BY:


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