

**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**

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(RESPONDENTS)**

and

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WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND**

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**FACTUM OF THE INTERVENER
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TAB 1

PART I OVERVIEW AND STATEMENT OF FACTS

1. British Columbia's hearing fees deprive individuals of their s. 7 rights of liberty to access the courts and security of the person via protection of the law through the courts, particularly in the area of family law. The state cannot impose impediments on access to the courts, except in accordance with the principles of fundamental justice. While some administrative restrictions on access to justice may accord with these principles, hearing fees that impose an arbitrary, disproportionate, and unequal barrier to access to the court for women, cannot meet this test.

2. The trial judge found that hearing fees are "a barrier to access" the courts. The primary legislative intent of the fees is to deter people from going to court, and the effect of the fees is to inhibit, deter, and impede individuals from using the courts to resolve their disputes.¹ The Court of Appeal confirmed that the burden of hearing fees falls most heavily on women in family litigation, Aboriginal persons, those with disabilities and recent immigrants.²

3. Women, as a group, are less able to pay hearing fees after relationship breakdown than men, and therefore more likely to be deterred from the court by such fees. First Nations women, immigrant women, and women with disabilities disproportionately face significant barriers in accessing justice,³ and are over-represented among those who are unable to pay hearing fees, or for whom the hearing fees pose a significant barrier or deterrence to use of the court.⁴

PART II THE ISSUES

4. West Coast LEAF (WCL) was granted leave to intervene with respect to whether the imposition of hearing fees violates s.7 of the *Canadian Charter of Rights and Freedoms*.⁵

¹ *Vilardell v. Dunham*, 2012 BCSC 748 at paras. 309-10, 392, 395, 396, 398, Joint Appellants' Record (JAR), Vol.1, Tab 3.

² *Vilardell v. Dunham*, 2013 BCCA 65 at para. 39, JAR, Vol.1, Tab 6.

³ See, for example, Canadian Forum for Civil Justice, *Access to Civil & Family Justice: A Roadmap for Change*. Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013 at pp.13-14, Joint Appellants' Book of Authorities (JABA), Vol.II, Tab 33.

⁴ Affidavit of Susan Boyd, paras 15-33, Exhibit B at JAR, Vol II, Tab 18; Affidavit of Robert Carson, Exhibit B at JAR, Vol III, Tab 20; and *Vilardell*, BCSC at 90, 177, JABA, Vol I, Tab 3.

⁵ Since 2010, the hearing fees in BC are imposed under two separate regulations: B.C. Reg. 168/2009 and B.C. Reg. 169/2009, for civil and family law proceedings respectively. Both are the successor regulations of the single regulation imposing hearing fees at issue at trial, and both were the subject of the order at the BCCA.

PART III STATEMENT OF ARGUMENT

A. The Constitutional Rights at Issue

5. WCL says that the hearing fees are a direct and deliberate interference with women's liberty and security of the person rights. The rights at issue are:

(a) The right to freely seek a judicial resolution of their family law dispute, without interference from the state; and

(b) The right 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.

6. In the family law context, British Columbia'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.

7. The right asserted in this case is not a general right to counsel as was considered in *British Columbia (Attorney General) v. Christie*.⁶ Nor does the right asserted engage the historical analysis in *Christie* related to the rule of law;⁷ the historical imposition of hearing fees is irrelevant to compliance with modern *Charter* requirements.⁸

B. Hearing fees are state imposed interference with rights

8. The hearing fees engage s. 7 and 32 of the *Charter*. The state action at issue in this case is the imposition of hearing fees with the express purpose, and established effect, of inhibiting use of the courts for the resolution of civil and family law disputes.

9. There is no requirement that the hearing fees are the only, or even the dominant cause, of the impediment women face to accessing the court. The threshold is whether there is a "sufficient

⁶ *British Columbia (Attorney General) v. Christie*, [2007] 1 SCR 873 at para.11, JABA, Vol.I, Tab 3.

⁷ *Christie*, *Ibid.* at para.26-27, JABA, Vol.I, Tab 3.

⁸ *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 Benner at para.44. West Coast Leaf Book of Authorities (WCLBA), Tab 4

causal connection” between the state’s imposition of the hearing fees and the barrier to access the courts. There is no requirement to show that access to the courts would be possible “but for” the hearing fees in order to engage s. 7 of the *Charter*.⁹

10. The trial judge’s 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 causal connection between the hearing fees and the state’s interference with women’s liberty to access the courts and security interest in obtaining the protection of the law in family law matters.

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

11. The family law hearing fees are a direct and deliberate interference with women’s rights to freely seek a judicial resolution of their family law dispute.

12. WCL adopts the submissions of the CBA at paragraphs 70-81, and says that the deprivation of liberty created by the hearing fees applies *a fortiori* to women and to the family law hearing fees.

13. The right to liberty is engaged “where state compulsions or prohibitions affect important and fundamental life choices.”¹⁰ The freedom to seek justice by submitting 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.¹¹

14. The intent of the hearing fees to deter people from court implies that 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 analysis. 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. It therefore falls within that group of choices inextricably tied to the concept of human dignity which the *Charter* protects from state interference.

15. This is even more so in the case in family law matters where the cost of litigation can rarely be measured by the amount of damages that might be awarded, and the issues submitted to the court themselves generally engage the liberty interest:

⁹ *Bedford v Canada*, 2013 SCC 72 at paras 74-78, WCLBA Tab 3

¹⁰ *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras.49- 50, WCLBA Tab 5

¹¹ *Vilardell*, BCSC, *supra* note 1 at para.399, JAR, Vol.1, Tab 3

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. [...] [I]ndividuals have a deep personal interest as parents in fostering the growth of their own children.¹²

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

16. 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 matters that engage their physical and emotional health, safety, integrity and well-being.

17. The right to security of the person protects both the physical and psychological integrity of the person. Both are engaged in this case.¹³ 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.¹⁴

18. 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. This honourable Court noted in *New Brunswick (Minister of Health and Comm. Services) v G (J)*, that "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".¹⁵ The psychological security rights engaged in child protection matters recognized in *G(J)* are also engaged in child custody proceedings, which similarly pronounce on the "parent's fitness or parental status" and "pry into the intimacies of the relationship" between parent and child. Whether in custody disputes or child protection hearings, the state may only interfere with such relationships in accordance with the best interests of the child.

19. While child custody disputes may not engage direct state interference in the s.7 rights of parents in the same way as child protection proceedings, state imposed impediments to access to the courts for their resolution do. The hearings fees are an intentional state imposed deterrent to a judicial determination of custody disputes, which can result in serious psychological harm to both the parents and the child.

¹² *B.(R.) v Children's Aid Society of Metropolitan Toronto*, [1995] 1S.C.R. 315 at paras.83- 85, WCLBA Tab 1

¹³ *R v Morgentaler*, [1988] 1 SCR 30 at 173 (Wilson J), see also at 55 (Dickson J) and at 101-104 (Beetz J), WCLBA Tab 12.

¹⁴ *Blencoe*, *supra* note 9 at para.57, WCLBA Tab 5

¹⁵ *New Brunswick (Minister of Health and Comm. Services) v G.(J.)*, [1999] 3 SCR 46 at paras.61 and 64, WCLBA Tab 11; see also *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at para.412, WCLBA Tab 8

20. Hearing fees also interfere with security of the person rights by impeding access to the courts for women in violent and abusive 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. British Columbia's *Family Law Act* recognizes that alternative dispute resolution processes may not be appropriate where family violence is present.¹⁶

21. 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 that 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.

22. In *Canada (Attorney General) v. PHS Community Services Society*, Canada argued that it was not the cause of the deprivations of security of the person faced by the clients of Insite; rather, the deprivation of health and well-being was caused by the client's drug use and choices. This argument was rejected:

...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.).¹⁷

23. In *Bedford v. Canada*, the Attorneys General argued that third parties (ie pimps and johns), and not the state, were the cause of the deprivations of the security of the person faced by women engaged in prostitution. This Honourable Court rejected that argument, finding that while pimps and johns may be the *immediate* source of the harm, this "does not diminish the role of the state in making a prostitute more vulnerable to that violence."¹⁸

24. These decisions establish that laws which prevent access to facilities that protect individuals' well-being in potentially harmful situations, themselves violate the right to security of the person.

¹⁶ *Family Law Act*, SBC 2011, c.25, s. 8 at WCLBA Tab 18; See also *Roadmap*, *supra* note 3 at pp.18-19, JABA, Vol.II, Tab 33.

¹⁷ *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para.93, WCLBA Tab 6.

¹⁸ *Bedford*, *supra* note 8 at para. 89, WCLBA Tab 3.

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

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 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.¹⁹ This is the body of law that the hearing fees deter women from accessing through the courts.

26. The benefit of family law, and access to it through the courts, is 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*. British Columbia's deliberate interference with access to the protection and benefit of family law through the courts constitutes a state deprivation of women's security of the person.

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

27. 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. To limit access to court to only those wealthy enough to pay for such access is a violation of the rule of law, as well as a violation of the fundamental principle of equality.²⁰

28. The hearing fees are arbitrary in their deterrence of access to the courts on the basis of ability to pay, with a grossly disproportionate impact on women, First Nations and immigrants.²¹ While other restrictions on access to the court that are not discriminatory, arbitrary or grossly disproportionate will not violate s. 7, "a grossly disproportionate effect on one person is sufficient to violate the norm."²²

29. Substantive equality before and under the law, including equal access to the benefits of the law, is a principle of fundamental justice under s. 7 because the principles of equality

¹⁹ *M v H*, [1999] 2 SCR 3 at paras.164-170, WCLBA Tab 9.

²⁰ *Reference re s. 94 (2) of the Motor Vehicle Act of BC*, [1985] 2 SCR 486, at 503, 512-514 (Lamer J) WCLBA Tab 13.

²¹ Boyd Affidavit, *supra* note 4 at pp.15-33, JAR, Vol. II, Tab 18; Carson Affidavit, *supra* note 4, at pp. 254-264, JAR, Vol. III, Tab 20.

²² *Bedford*, *supra* note 8 at para 122, WCLBA Tab 3.

underlie all *Charter* guarantees. In *Andrews v Law Society of BC*, 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*.”²³

30. The principles of fundamental justice in s. 7, read in the context of the *Charter* as a whole, including ss. 15 and 28, provide that liberty and security interests cannot be deprived in a way that discriminates on the basis of sex.

31. This Honourable Court 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.²⁴

32. WCL submits that hearing fees disproportionately impact women in family law matters and therefore discriminate against them. The record shows that women are generally less able to afford the hearing fees than men; that this is particularly true of single mother households post-relationship breakdown; and that women who are Aboriginal, disabled or newcomers are even more likely to be lower income.²⁵

33. 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 social 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

²³ *Andrews v Law Society of BC*, [1989] 1 SCR 143 at para.52, JABA, Vol.I, Tab 1; *G(J)*, *supra* note 14 at para.112-115 (L’Heureux-Dubé J, concurring reasons), (JABA) Tab 1

²⁴ *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras.72-73, BA Tab 7

²⁵ Boyd Affidavit, *supra* note 20, JAR, Vol. II, Tab 18; Carson Affidavit, *supra* note 20, JAR, Vol. III, Tab 20;

gap between the economic well-being of divorced men, on the one hand, and their children and former wives on the other.²⁶

Contemporary studies indicate that while progress has been made, a significant gap remains between men's and women's resources at the time of and after marriage breakdown.²⁷

34. This Court has also noted the discriminatory effect on women of laws that affect low income parents: "Issues involving parents who are poor necessarily disproportionately affect women and therefore raise equality concerns and the need to consider women's perspectives."²⁸

35. 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. 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.²⁹

36. International human rights guarantees underscore the direct connection between rights and equal access to judicial 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*. In addition, the Committee on Economic Social and Cultural Rights has stated that 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].³⁰

²⁶ 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 853-856, BA Tab 10.

²⁷ Gadalla, T. "Impact of Marital Dissolution on Men's and Women's Incomes: A Longitudinal Study" *Journal of Divorce and Remarriage*, 50: 55-65, 2009 at BA Tab 14; Gadalla, T. "Gender Differences in Poverty Rates After Marital Dissolution: A Longitudinal Study" *Journal of Divorce and Remarriage*, Vol. 49 (3/4) 2008 at BA Tab 15

²⁸ *G(J)*, *supra* note 14 at para. 113 (L'Heureux-Dubé J, concurring reasons), BA Tab 11

²⁹ *Vilardell BCCA*, *supra* note 2 at para. 39, JAR, Vol. 1, Tab 6

³⁰ *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), BA Tab 20; *Åarelä and Näkkäläjärvi v. Finland*, Communication No 779/1997 24 October 2001 CCPR/C/73/D/779/1997 at 7.2 BA Tab 19; 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) para 21, BA Tab 21

37. In her report to the General Assembly, the Special Rapporteur on Extreme Poverty and Human Rights concluded the following in regard to 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.³¹

38. International law principles are a “critical influence” on the interpretation of the scope of *Charter* rights, including s.7.³² 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, the denial of which runs contrary to the fundamental principle of equality.

39. As stated most recently in *Bedford*, “a law that violates s. 7 is unlikely to be justified under s. 1 of the *Charter*”. Section 1 still has a role to play in querying whether the impairment of individual rights is proportionate to the impugned law’s public interest goals.³³ In this case the intent of the regulations to raise revenue and discourage access to the courts does not amount to a pressing and substantial public interest mandate; the hearing fees thus cannot be saved under s. 1.

F. Remedy

40. As the Court of Appeal noted, the deterrent intent of the fees will only be effective on those whose resources are so limited that the fees will actually have a deterrent effect.³⁴ Where the very purpose of the legislation is unconstitutional, the defect cannot be remedied other than by striking it down.³⁵

41. 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.

³¹ *Report of the Special Rapporteur on Extreme Poverty and Human Rights to the General Assembly of the United Nations*, UNGOAR, UN Doc A/67/278 (9 August 2012), at para.54, BA Tab 22.

³² *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para.70, BA Tab 2

³³ *Bedford*, *supra* note 8 at paras.125-129, BA Tab 3

³⁴ *Vilardell BCCA*, *supra* note 2 at para. 26, JAR, Vol.I Tab 6

³⁵ *R. v. Schachter*, [1992] 2 S.C.R. 679 at para. 45, JABA, Vol.II, Tab 21

42. The barrier experienced by Ms. Vilardell is not exceptional, and the BCCA exempted her from the fees.³⁶ Where the norm is that hearing fees cannot be charged constitutionally, requiring parties to apply for an exemption cannot cure the constitutional breach.

43. In the event that this Court finds that reading language into the *Rules* can cure the constitutional breach, the language read into the *Rules* by the Court of Appeal is insufficient to provide the pragmatic solution that was clearly intended. 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”. If the exemption is to survive constitutional scrutiny, it must be worded 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, food and other family expenses, all of which was implicit in the Court of Appeal’s decision, but is not clearly captured by the words “or in need.”

PART IV COSTS

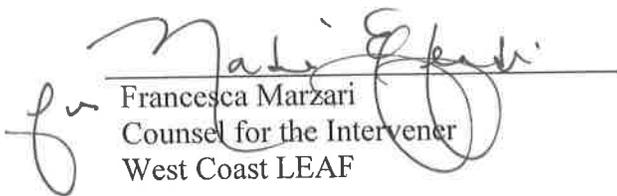
44. West Coast LEAF is not seeking costs and requests that no costs be ordered against it.

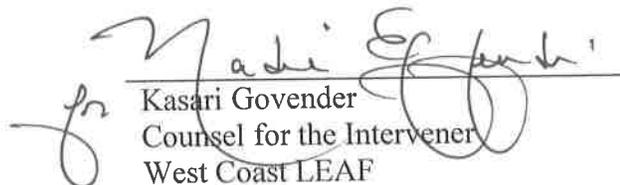
PART V ORDERS SOUGHT

45. West Coast LEAF respectfully requests: (a) a declaration that the hearing fees imposed pursuant to the British Columbia *Supreme Court Family Rules* are contrary to s. 7 of the *Charter* and must be struck down; and (b) that it be granted the right to make oral submissions at the hearing of this appeal.

All of which is respectfully submitted.

Dated at Vancouver, British Columbia this 3rd day of April, 2014.


for Francesca Marzari
Counsel for the Intervener
West Coast LEAF


for Kasari Govender
Counsel for the Intervener
West Coast LEAF

³⁶ *Vilardell BCCA*, *supra* note 2 at para.43, JAR, Vol.I, Tab 6.

PART VI LIST OF AUTHORITIES

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<i>Benner v. Canada (Secretary of State)</i> , [1997] 1 S.C.R. 358	7
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PART VII LEGISLATION

N/A