

BRIEFING NOTE

Court hearing fees are constitutional, says BC Court of Appeal in *Vilardell v. Dunham*, 2013 BCCA 65

The B.C. Court of Appeal has overturned a lower court's decision that hearing fees for court proceedings are unconstitutional. In *Vilardell v. Dunham*, the trial judge held that hearing fees were unconstitutional because they "materially hindered" access to the courts. While overturning that ruling, the BCCA also extended the exemption from paying hearing fees "to cover those who could not meet their everyday expenses if they were required to pay the fees." In other words, the hearing fees were deemed valid, but there are many more litigants who will now qualify for an exemption from paying the fees.

In this province, no hearing fees are payable for the first three days of trial. The hearing fee for the 4th to 10th day is \$500 per day. The hearing fee for every day over 10 is \$800. The constitutionality of these fees arose in the context of a family law matter, when the wife in *Vilardell v. Dunham* asked the court to waive the requirement that she pay hearing fees in the amount of \$3600. The trial judge deferred the matter to allow the Attorney General of British Columbia (AGBC), the B.C. Branch of the Canadian Bar Association (CBABC), and the Trial Lawyers Association (TLABC) to intervene. The West Coast Women's Legal Education and Action Fund intervened at the appellate level.

In considering this matter, the BCCA reviewed the history of court fees, which date back to the *Statute of Henry VII* in 1494, as a factor in their constitutionality. The court considered jurisprudence which recognized that "access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens." The court also recognized that the right to access the courts is not absolute and may be subject to "constitutionally valid government-imposed conditions and limits." The BCCA examined the hearing fees that apply in B.C. to determine whether they are a valid limitation on access to the courts.

The AGBC acknowledged that the primary purpose of hearing fees is to provide "an incentive for efficient use of court time and a disincentive for lengthy and inefficient trials" — that is, the fees are designed to act as a barrier to the courts. The secondary purpose of the fees is to provide revenue to allow partial recovery of the costs of providing trial facilities for litigants.

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At the trial level, the CBABC and TLABC led evidence from an economist to establish that a significant percentage of the population could not afford to pay the hearing fees for a 10 day trial, the length of trial in this case. The Rules provide an exemption to payment of hearing fees for "Persons Who Are Impoverished" (or "indigent" litigants), but the hearing fees are a barrier for those of modest means who would not be considered "impoverished" in the ordinary sense of that word.

While the trial judge refused to redefine indigency as a curative measure, the BCCA determined that this was the appropriate constitutional remedy in this case. The BCCA noted that the Rules changed in 2012 to prescribe persons who receive employment insurance benefits or government disability benefits or who are "otherwise impoverished" as those who may apply for an exemption from paying hearing fees. The court said that "otherwise impoverished" should be read as "impoverished or in need," which would include those who could not meet their everyday expenses if they were required to pay the hearing fees. Courts retain the discretion to determine whether a litigant is impoverished or "in need to the point that but for the hearing fees, they would be able to pursue their claim, thus qualifying for an exemption."

In short, the AGBC succeeded in upholding the constitutionality of hearing fees, however the BCCA has opened the door for more litigants to be granted exemptions from those fees based on their financial circumstances.

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