



West Coast LEAF NEWS ALERT August 18, 2008

Striving for equality in Family Law: *Rick v. Brandsema* factum filed

West Coast LEAF and LEAF National will be appearing at the Supreme Court in Ottawa as an intervener in the case of *Rick v Brandsema*, expected to be heard in October 2008. The factum was filed in Ottawa on August 6th.

Rick v. Brandsema is a family law case and West Coast LEAF's intervention deals with the issue of equality in separation agreements and the division of assets. Rick and Brandsema separated after 27 years of marriage. When the assets were divided, the wife received substantially less than the husband. West Coast LEAF argues that a separation agreement may be impacted by various vulnerabilities such as mental illness, spousal violence, differing levels of financial knowledge and different attitudes about negotiation and settlement.

In the factum, West Coast urges the court to include considerations of substantive sex equality (s. 15(1) of the *Charter of Rights and Freedoms* *) in the development of common law principles around separation agreements.

"Development of the common law regarding the validity of separation agreements in accordance with the value of sex equality can level the playing field, ensuring that both spouses are equally equipped with the information to settle the financial affairs of the marriage in their own best interests and that neither is able to take unfair advantage of the other."

Following are excerpts from the factum (statement of facts), researched and written by West Coast LEAF with LEAF National.

Separating spouses are not commercial contractors

Separating spouses are not akin to parties negotiating commercial contracts, equally able to exercise their freedom to contract in their own self-interests. In other contexts, the law has recognized systemic social differences in the positions of contracting parties, such as between employee and employer or insured and insurer, and has ensured that the legal framework governing such contractual relationships mitigates systemic inequalities in bargaining power. Such an approach enhances the ability of both parties to negotiate in their best interests. The systemic social differences between spouses at separation demonstrate that a legal framework that mitigates systemic inequalities in bargaining power is also desirable to guide judicial consideration of separation agreements.

Systemic inequality of women affects separation negotiations

Upon separation, there are at least three kinds of sex-based systemic disadvantage that detrimentally affect women's ability to negotiate in their own best interests: economic, informational, and psychological. The significant economic disadvantage to women at separation is well-established. In its 1992 decision in *Moge*** , this Court described the negative economic impact of divorce on women as "a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice." Studies referred to in that decision and subsequently affirm that, after separation, women's income persistently decreases by 20%-40%, while men's declines much less and may even increase.

Generally poorer outcomes for women at separation

Women are typically in the position of claimants in divorce negotiations. Negotiation theory demonstrates that claimants are at a structural disadvantage, leading to generally poorer outcomes for women at separation, and exacerbation of the feminization of poverty. Game theory also demonstrates that women generally end up worse off than men in bargaining. Since women are widely expected to be more risk-averse and to compromise, they tend to be less successful in negotiations. Greater risk aversion not only leads to a preference for a settlement, it also tends to undermine both bargaining position and resolve. Notwithstanding the advice of independent legal counsel, a more risk-averse party may accept less in a settlement than would be awarded by a court.

Circumstances of oppression or other vulnerabilities

Although women disproportionately experience vulnerabilities in relation to bargaining, there should be no presumption that women are incapable of negotiating valid separation agreements. The court must scrutinize the individual circumstances of each case to determine whether there were circumstances of oppression or other vulnerabilities that vitiated a party's consent to the bargain. Although it is impossible to set out an exhaustive list, circumstances of vulnerability may include: a history of abuse prior to or during the marriage, or post-separation; a disability that impairs a spouse's ability to negotiate; a spouse's limited education or facility with the language of the agreement; a spouse's lack of business, legal or financial experience relative to the other spouse; and a spouse's poverty or inability to readily access funds.

*s. 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

** See *Moge v. Moge*: A new vision of spousal support
<http://dsp-psd.tpsgc.gc.ca/Collection-R/LoPBdP/BP/bp339-e.htm>

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West Coast LEAF works to realize this vision of women's full equality through public legal education, strategic litigation, and law reform.

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