

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

BETWEEN:

**TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA and CANADIAN
BAR ASSOCIATION - BRITISH COLUMBIA BRANCH**

**APPELLANT
(RESPONDENTS)**

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

**RESPONDENT
(APPELLANT)**

AND:

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ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF ALBERTA,
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AND ACTION FUND AND DAVID ASPER CENTRE FOR
CONSTITUTIONAL RIGHTS**

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Factum of the Attorney General of Canada, intervener**OVERVIEW**

1. Many factors and actors are involved in improving access to justice.¹ One of the components to this overarching objective is access to courts. A reasonable court hearing fee enacted to encourage rational use of finite judicial resources can ensure access to courts by creating incentives which have the effect of freeing up those resources. Such a fee is reasonable where it is based on reasonable criteria or provides a judicial discretion to waive payment, where such a payment would, for example, deprive the litigant of the necessities of life. This compromise to a polycentric² problem ensures that access to a superior court is not threatened by the fee while being consistent with this Court's jurisprudence that the right to access to court is not absolute and that legislation may impose conditions on how and when such access can occur.³

2. As in all cases involving challenges to legislation, the critical first step in the process is to construe the fee scheme in accordance with the modern canons of interpretation.⁴ The result of that process demonstrates the reasonableness of the fee scheme at issue here,⁵ and why it is unnecessary to rely on interpretative principles like the "unwritten principles of the constitution". Absent some inappropriate limit on a judge's discretion, no constitutional question fairly arises.

¹ Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice – A Roadmap for Change*, October 2013, p. 7 (http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf), Attorney General of Canada's Book of Authorities ["AGCBOA"], Tab 18.

² The Attorney General uses the expression 'polycentric' in the manner the Court defined it at paragraph 36 of *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, being 'the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties', AGCBOA, Tab 12.

³ *British Columbia (AG) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873 at par. 17, Joint Appellant's Book of Authorities ["JABOA"], Tab 3.

⁴ *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at par. 15-16, AGCBOA, Tab 17.

⁵ The *British Columbia Supreme Court Rules*, B.C. Reg. 221/90, Appendix C were replaced by the *Supreme Court Rules*, B.C. Reg. 168/2009, r. 20-5 and Appendix C (the "fee scheme").

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PART I - FACTS

3. Canada refers to the following facts in support of its intervention.

4. By the time her action came on for hearing, the plaintiff had spent most of her savings on her lawyers' fees.⁶ Unable to afford both the living expenses for her daughter and herself and paying the hearing fees, she informally requested from the presiding judge, at the beginning of the hearing, to be exempted from paying those fees.⁷ At the time she applied, "*a person that is indigent*" could be exempted from that payment by the court, on summary application, pursuant to clause S1 to Schedule 1 to Appendix C to the *Supreme Court Rule* (the "exemption provision"). It provided:

S1 (1) If the court, on summary application before or after the commencement of a proceeding, finds that a person is indigent, the court may order that no fee is payable to the Crown by the person to commence, defend or continue the whole or any part of the proceeding unless the court considers that claim or defence

- (a) Discloses no reasonable claim or defence, or*
- (b) Is scandalous, frivolous or vexatious, or*
- (c) Is otherwise an abuse of the process of the court.*

(4) Despite anything in this Schedule, if the court makes an order in relation to a person under this section, no fees is payable to the Crown by that person in relation to the proceeding, part of proceeding, period of time or steps to which the order applies.

5. The trial judge postponed his decision on the plaintiff's informal request to the end of the hearing. In the meanwhile, he instructed the plaintiff not to pay the hearing fees.⁸ In his reasons on the action, the trial judge decided he

⁶ Affidavit of Ms. Vilardell at par. 16 & 20, Joint Appellant's Record ["JAR"], Vol III, Tab 19.

⁷ Affidavit of Ms. Vilardell at par. 19, JAR, Vol III, Tab 19; *Vilardell v. Dunham*, 2009 BCSC 434 ["*Vilardell 1*"] at par. 90, JAR, Vol I, Tab 1.

⁸ *Vilardell 1* at par. 90-91, JAR, Vol I, Tab 1; *Vilardell v. Dunham*, 2012 BCSC 748 ["*Vilardell 2*"] at par. 7-9, JAR, Vol I, Tab 3. He later stayed the plaintiff's obligation to pay those fees pending further order, to allow the debate on their constitutionality to unfold: *Vilardell 1* at par. 91, JAR, Vol I, Tab 1.

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would not order costs.⁹

6. By that time, the exemption provision had been repealed and replaced by rule 20-5 of the *Supreme Court Civil Rules*.¹⁰ This new exemption provision is virtually identical to the preceding one, save for the description of who can be exempted.¹¹ It now applies to “a person receives benefits under the Employment and Assistance Act or the Employment and Assistance for Persons with Disabilities Act or is otherwise impoverished”.

7. The plaintiff subsequently filed a formal application. In his reasons on her application, the trial judge found that the plaintiff's formal application for an exemption was not dispositive of this matter since this issue is “properly subsumed into the question of whether such fees are payable at all.”¹² He further found that the exemption provision only applies to the poor and not the middle class who also cannot afford the hearing fees.¹³ Ultimately, he declared the hearing fees unconstitutional because they materially hindered access to the courts¹⁴ and that neither the plaintiff nor the defendant was required to pay them.¹⁵

8. The Court of Appeal agreed that the hearing fee was unconstitutional, but found that it was saved by giving an enlarged interpretation to the exemption provision.¹⁶ Under this enlarged interpretation, the court stated that rule 20-5 should be read as including those who are “impoverished or in need” so as to “cover those who couldn't meet their everyday expenses if they were required to

⁹ *Vilardell 1* at par. 89, JAR, Vol I, Tab 1.

¹⁰ B.C. Reg. 168/2009, s 20-5.

¹¹ Since this new enactment merely addresses the procedure governing the application and not its substance, it controls the application: *Interpretation Act*, RSBC 1996, c. 238, s. 36(1)b). See *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256 at p. 265, AGCBOA, Tab 1.

¹² *Vilardell 2* at par. 27, JAR, Vol I, Tab 3.

¹³ *Vilardell v Dunham*, 2013 BCCA 65 [“*Vilardell BCCA*”] at par. 3, JAR, Vol II, Tab 6; *Vilardell 2* at par. 396 & 416, JAR, Vol I, Tab 3.

¹⁴ *Vilardell 2* at par. 425 & 431, JAR, Vol I, Tab 3.

¹⁵ *Vilardell 2* at par. 432, JAR, Vol I, Tab 3.

¹⁶ *Vilardell BCCA* at par. 26, 32-36, JAR, Vol II, Tab 6.

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pay the fees.”¹⁷ Consequently, the Court set aside the order striking the hearing fees and granted the plaintiff’s application for an exemption.¹⁸

PART II - QUESTION IN ISSUE

9. The Chief Justice has stated the following constitutional question:

Are the hearing fees set out in paragraph 14 of appendix C, Schedule 1 (B.C. Reg. 10/96, as amended) and the hearing fees set out in paragraphs 9 and 10 of Appendix C, Schedule 1 (B.C. Reg. 168/2009, as amended), unconstitutional on the basis that they infringe a right of access to justice and thereby offend the rule of law?

10. To answer this question, the Court must first construe the fee scheme to decide whether it hinders, impedes or delays access to the Supreme Court of British Columbia. This application must be based on a broad, purposive and contextual interpretation of the fee scheme to set out the parameters of a superior court’s discretion to waive payment. The case can be resolved on that basis, and there is no need to employ interpretative principles like the unwritten principles of the constitution.

PART III - ARGUMENTS

11. Canada acknowledges that the right of litigants to access a superior court is guaranteed by s. 96 of the *Constitution Act 1867*. At the very least, this includes the right to physical access to a superior court.¹⁹ But this right of access is not without limits - this Court has already decided that legislatures have the power, pursuant to s. 92 of the *Constitution Act 1867*, to “impose at least some conditions and how and when people have a right to access the courts.”²⁰

12. One of the appellants contends that hearing fees, however, can never

¹⁷ *Vilardell BCCA* at par. 41, JAR, Vol II, Tab 6.

¹⁸ *Vilardell BCCA* at par. 43, JAR, Vol II, Tab 6.

¹⁹ *B.C.G.E.U. v. British Columbia (AG)*, [1988] 2 S.C.R. 214, JABOA, Tab 4.

²⁰ *British Columbia (AG) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873 at par. 17, JABOA, Tab 3.

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be imposed by a government because they would be an intrusion in the exclusive responsibilities of the judicial branch.²¹ Taken to its logical conclusion, this claim would render unconstitutional the hearing fees imposed by the *Federal Courts Rules* to encourage better access to justice through reasonable court fees and manage the public purse.²² Thus, the resolution of this case is likely to have a significant impact on the ability of all legislators, including Parliament and the Governor in Council, to decide how best to manage the public purse and ensuring access to courts.

A. *The correct constitutional framework*

13. All parts of the Constitution, including the animating constitutional principles like the rule of law, must “*function in symbiosis*”.²³ This requires those parts, including the rule of law, to respect and be defined by other parts of the Constitution, like the functional separation among the executive, legislative and judicial branches of governance.²⁴

14. The first part of the Constitution at issue here is the control of public funds. With the exception of the salary of the superior and appellate court judges, the cost of administering justice in British Columbia is borne by provincial revenues, and in our constitutional framework the legislative branch of government has the authority to raise taxes and authorize expenditures from public funds.²⁵ In the exercise of this authority, this Court has already decided

²¹ Factum of the appellant Canadian Bar Association – British Columbia Branch, par. 30.

²² *Federal Courts Rules*, SOR/98-106, r. 19 and Tariff A, item 2. Interestingly, the Federal Court did not single out the hearing fee the *Federal Courts Rules* imposes as a barrier to access to that court, despite making improved access to justice the cornerstone of its recently released five-year strategic plan: Federal Court, *Strategic Plan (2014-2019)*, [http://cas-ncr-nter03.cas-sat1.gc.ca/rss/Strategic%20Plan%20\(Final%20for%20posting%20with%20COA\)%20English.pdf](http://cas-ncr-nter03.cas-sat1.gc.ca/rss/Strategic%20Plan%20(Final%20for%20posting%20with%20COA)%20English.pdf), AGCBOA, Tab 19.

²³ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at par. 49, JABOA, Tab 27; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at par. 42, JABOA, Tab 6.

²⁴ *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at par. 38-43, JABOA, Tab 11; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at par. 33, JABOA, Tab 6.

²⁵ *Ontario v. Criminal Lawyers Association of Ontario*, 2013 SCC 43 at par. 24-31, 38-43, JABOA, Tab 11.

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that legislatures “can impose at least some conditions on how and when people have a right to access the courts.”²⁶

15. The second part of the Constitution which the Court must consider is the authority of superior courts, anchored in s. 96 of the *Constitution Act 1867*, to ensure that litigants have access to courts. In this respect, the animating constitutional principle of the rule of law supports the cornerstone role of superior courts. However, the unwritten principles of the Canadian Constitution assist only in clarifying the text of the Constitution; they do not dispense with that text. As the Court stated unanimously in *Reference re the Secession of Quebec*:

*In the Provincial Judges Reference, supra, at paras. 93 and 104, we cautioned that the recognition of these constitutional principles (the majority opinion referred to them as “organizing principles” and described one of them, judicial independence, as an “unwritten norm”) could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review.*²⁷

16. Reconciling s. 96 of the *Constitution Act 1867* with the legislative authority to establish courts found in s. 92(14) of the *Constitution Act 1867* is achieved by controlling the ambit of the latter grant of legislative authority. In other words, in conferring legislative authority to establish courts and legislative and executive authority to appoint judges, the Constitution necessarily conceives of the fundamental role of superior courts in maintaining the rule of law along with the separation of powers and judicial independence. In this way, legislative authority is preserved and egregious restrictions on access to superior courts can

²⁶ *British Columbia (AG) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873 at par. 17, JABOA, Tab 3.

²⁷ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at par. 53 (emphasis added), JABOA, Tab 27; *B.C. v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 at par. 66-67, JABOA, Tab 5. See: *Eurig Estate (Re)*, [1998] 2 S.C.R. 565 at par. 66, JABOA, Tab 7.

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be prevented by that court.²⁸

B. Avoid trivializing the Constitution by construing legislation purposefully

17. Thus, the issue is not whether s. 96 courts have the power to strike down legislation imposing egregious restrictions on access to courts, but whether the fee scheme, properly interpreted, constitutes such an egregious restriction. Before considering the constitutionality of legislation, a court must construe it to ascertain precisely how it affects those rights.²⁹ In this case, this exercise necessarily includes construing the exemption provision to the fee scheme.

18. The text of the exemption provision must be examined, and its meaning extracted, in accordance with the traditional approach to interpreting legislation - reading the words in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the enactment, the object of the enactment, and the intention of the legislator.³⁰ Context plays an important role in the interpretation of legislation since words “*take colour from their surroundings*”.³¹ The modern approach accepts that legislators are skilful and careful in choosing the words of the legislation and do so with a specific purpose in mind - “[t]he legislator does not speak in vain.”³²

19. The object of the exemption provision is plain: to ensure that a judge of the Supreme Court can decide when and how a litigant can be exempted from paying court fees, including the hearing fee in issue. The intention of the regulator in enacting the exemption provision is equally clear: to give judicial

²⁸ *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at par. 38-42, JABOA, Tab 11.

²⁹ *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at par. 15-16, AGCBOA, Tab 17.

³⁰ *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] S.C.R. 773, at par. 25, AGCBOA, Tab 7.

³¹ *Bell ExpressVu v. The Queen*, 2002 SCC 42, [2002] 2 S.C.R. 559, at par. 26-27, citing John Willis, “Statute Interpretation in a Nutshell” (1938), 16 *Can. Bar. Rev.* 1 at p. 6, AGCBOA, Tab 2.

³² *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269, at par. 73, AGCBOA, Tab 14; *Bell ExpressVu v. The Queen*, 2002 SCC 42, [2002] 2 S.C.R. 559, at par. 37, AGCBOA, Tab 2.

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discretion to exempt indigent or impoverished litigants from paying the court fees in issue. The word “impoverished”, properly construed according to the purpose and context of the exemption provision, would include, as a minimum, those deprived of the necessities of life if required to pay the fees.

20. Since at least 1494, judges have enjoyed the discretion to ensure that litigants could access justice despite their inability to pay the related expenses. The act stated that the King “*willeth and intendeth indifferent Justice to be had and ministered according to his Common Laws, to all his subjects, as well to the Poor as the Rich, which poor Subjects be not of Ability ne Power to sue according to the Laws of this Land for the redress of Injuries and Wrongs to them daily done*”. This discretion included the power to relieve them from the payment of court fees. It also included the power to appoint counsel, without charge to those litigants. This power applied in all courts of record, not only in the superior courts.³³

21. The British Columbia fee scheme and the exemption provision are the result of recommendations from the Supreme Court Rules Committee. This Committee is composed of judges, masters, representatives of court services, legislative counsel and members of the private bar. Once the Committee makes recommendations to the Attorney General, the Attorney General then consults with the Chief Justice, as he is required by s. 6 of the *Court Rules Act*,³⁴ before presenting those recommendations to Cabinet. The Committee believes that its composition “*together with a policy of expansive consultation, ensures that proposed amendments to the Rules are evaluated in the broadest context.*”³⁵

22. Since 1494, the descriptor employed to identify the litigants who could

³³ *A Mean to help and speed poor Persons in their Suits*, A.D. 1494, 2 Henry VII, c. 12.

³⁴ R.S.B.C. 1996, c. 80, JABOA, Tab 37.

³⁵ Supreme Court Rules Revision Committee, *The Committee and its Mandate*, online: the Courts of British Columbia

<http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/acts_rules_and_forms/rule_s_revision_committee/index.aspx>, AGCBOA, Tab 20

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be exempted has evolved to reflect changing nomenclature – from “pauper” to “indigent” and now to “otherwise impoverished”. The exemption provision does not define the descriptor; the adjective “impoverished” simply means “*reduced to poverty; made poor, weak, etc.*”³⁶ Regardless of the label employed, the objective of the exemption provision remains the same – to ensure citizens have access to the court regardless of their means.³⁷

23. A judge achieves this objective by giving sufficient weight to all relevant circumstances, including the financial circumstances of a litigant in relation to the fees.³⁸ In the Federal Court, judges have waived payment if a litigant can establish that the requirement to pay court fees will prevent him from pursuing an existing claim at court.³⁹

24. A litigant need not be “*a person without means*”; it suffices that paying the court fees would deprive this litigant of the necessities of life.⁴⁰ Conceptually, this permits the court to adapt the class of litigants qualifying for an exemption to the fees in issue - the higher the court costs, the broader the potential class of litigants meeting the test.⁴¹ As one judge expressed it:

As court costs rise, however, an even smaller cohort of persons will be able to afford them. So when court access fees approach a thousand dollars per day, even middle class persons, with

³⁶ *The Oxford English Dictionary*, 2d ed., sub verbo “impoverished”. See also *The Oxford English Dictionary* (online: www.oed.com), sub verbo “impoverished”, AGCBOA, Tab 21.

³⁷ *Trautmann v. Baker*, [1997] B.C.J. No. 452 at par. 4 (B.C. C.A., in chambers), AGCBOA, Tab 16.

³⁸ *Reza v. Canada*, [1994] 2 S.C.R. 394 at p. 404-405, AGCBOA, Tab 13.

³⁹ *Pieters v. Canada (Attorney General)*, 2004 FC 1418, par. 4, AGCBOA, Tab 11. See also: *Pearson v. Canada* (2000), 195 F.T.R. 31 (T.D.), AGCBOA, Tab 9; aff’d 2002 FCA 326, AGCBOA, Tab 10; *Spatling v. Canada (Solicitor General)* (2003), 233 F.T.R. 6 (Proth.), AGCBOA, Tab 15. The Federal Court of Appeal also reached this result in relation to the power of the Tax Court of Canada to dispense with the payment of filing fees: *Canada v. Moss*, 1999 CanLII 8115 at par. 2 (FCA), AGCBOA, Tab 4.

⁴⁰ *National Sanatorium Assn. v. Mattawa (Town)*, [1925] 2 D.L.R. 491 (Ont. C.A.), AGCBOA, Tab 8. Cited with approval in *Griffith v. House*, 2000 BCCA 371 at par. 3 (B.C. C.A., in chambers), AGCBOA, Tab 5; *Jensen v. Jackman* 2010 BCCA 6 at par. 13-16 (B.C. C.A., in chambers), AGCBOA, Tab 6.

⁴¹ *Bingo City Games Inc. v. British Columbia Lottery Corp.*, 2004 BCSC 1472 at par. 13-15, AGCBOA, Tab 3.

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*incomes well above the poverty line, might be found impecunious in relation to such fees.*⁴²

25. The exemption provisions entrust to the judiciary a considerable degree of discretion in ensuring that an exemption order achieves its' intended purpose. Under both versions of the fee scheme:

- a. The court can exercise its' discretion before or after the commencement of a proceeding;⁴³
- b. Acting judicially, the court decides when a litigant is "indigent" or "otherwise impoverished" without limiting the definition;⁴⁴
- c. If the court decides a litigant is impoverished, it has the discretion to modulate the extent of the exemption granted to match the circumstances of the case – for the whole or only a part of the proceeding, retroactively or on a going forward basis only, without temporal limitations or only for a period of time;⁴⁵
- d. The court can also, of its own motion, revisit the exemption order to amend or vary the order;⁴⁶
- e. Lastly, regardless of whether the court finds a litigant to be "impoverished" or not, it is vested with the additional discretion to order another party to pay the hearing fees, either as a discrete order made before the proceeding is set down for hearing⁴⁷ or at the end of the proceeding, as part of the court's costs award.⁴⁸

⁴² *Bingo City Games Inc. v. British Columbia Lottery Corp.*, 2004 BCSC 1472, par. 13, AGCBOA, Tab 3.

⁴³ *Supreme Court Rules*, B.C. Reg. 221/90, Appendix C, Sch. 1, item S1(1); *Supreme Court Rules*, B.C. Reg. 168/2009, r. 20-5(1).

⁴⁴ *Supreme Court Rules*, B.C. Reg. 221/90, Appendix C, Sch. 1, item S1(1); *Supreme Court Rules*, B.C. Reg. 168/2009, r. 20-5(1).

⁴⁵ *Supreme Court Rules*, B.C. Reg. 221/90, Appendix C, Sch. 1, item S1(1), (2) and (4); *Supreme Court Rules*, B.C. Reg. 168/2009, r. 20-5(2) and (5).

⁴⁶ *Supreme Court Rules*, B.C. Reg. 221/90, Appendix C, Sch. 1, item S1(3); *Supreme Court Rules*, B.C. Reg. 168/2009, r. 20-5(4).

⁴⁷ *Supreme Court Rules*, B.C. Reg. 221/90, Appendix C, Sch. 1, item 14; *Supreme Court Rules*, B.C. Reg. 168/2009, Appendix C, Sch. 1, item 9.

⁴⁸ *Supreme Court Rules*, B.C. Reg. 221/90, r. 57(1); *Supreme Court Rules*, B.C. Reg. 168/2009, r. 14-1(1).

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26. The case of the plaintiff provides a useful illustration of other aspects of the court's discretion to control the process.

- a. While the exemption provision required an application in writing, the presiding judge exercised his discretion and entertained the plaintiff's request to be exempted despite the absence of an application in writing;⁴⁹
- b. He postponed a decision on the plaintiff's informal request to the end of the hearing and, in the meanwhile, instructed the plaintiff not to pay the hearing fees;⁵⁰
- c. He considered whether to allocate to the defendant the burden of paying the hearing fees as part of his order for costs but decided that he would not order costs given neither party had engaged, in relation to the litigation, in "unreasonable behaviour";⁵¹
- d. He also considered whether to invoke his discretion to direct the defendant to pay the hearing fees but, given his conclusion that they were not constitutional, decided he was not liable to pay them.⁵²

27. In *B.C.G.E.U.*, this Court concluded that a scheme which creates "*a rule of men and women who decide who shall and who shall not have access to justice*" offends the rule of law.⁵³ In that case, the barrier to access was a picket line⁵⁴ where the Union, by issuing "picket passes", controlled who could or could not pass through the picket line.⁵⁵ In that case, the "*men and women who decide who shall and shall not have access to justice*" were not judges and the barrier

⁴⁹ Affidavit of Ms. Vilardell at par. 19, JAR, Vol III, Tab 19; *Vilardell 1* at par. 90, JAR, Vol I, Tab 1.

⁵⁰ *Vilardell 1* at par. 90, JAR, Vol I, Tab 1; *Vilardell 2* at par. 7-9, JAR, Vol I, Tab 3. He later stayed the plaintiff's obligation to pay those fees pending further order, to allow the debate on their constitutionality to unfold: *Vilardell 1* at par. 91, JAR, Vol I, Tab 1.

⁵¹ *Vilardell 1* at par. 89, JAR, Vol I, Tab 1; *Vilardell 2* at par. 8, JAR, Vol I, Tab 3.

⁵² *Vilardell 2* at par. 432, JAR, Vol I, Tab 3.

⁵³ *B.C.G.E.U. v. British Columbia (AG)*, [1988] 2 S.C.R. 214, p. 230, JABOA, Tab 4.

⁵⁴ *B.C.G.E.U. v. British Columbia (AG)*, [1988] 2 S.C.R. 214, p. 232, JABOA, Tab 4.

⁵⁵ *B.C.G.E.U. v. British Columbia (AG)*, [1988] 2 S.C.R. 214, p. 220-221, JABOA, Tab 4.

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the Union created “*was bound to cause delays in the administration of justice*”.⁵⁶

28. The absence of judicial control over a condition of access is also the rationale of the decisions from lower courts about fees. Neither in *Polewsky* nor in *Pleau* did judges get to decide which litigant would be exempted from paying fees. In *Polewsky*, Small Claims Court judges had no express discretion to waive payment and there was no other mechanism to provide relief to impoverished litigants.⁵⁷ In *Pleau*, the exemption was tied to the litigant being admissible to legal aid, not to an exercise of judicial discretion.⁵⁸

29. British Columbia chose to place judicial discretion at the center of its fee scheme to exempt certain litigants from paying them. It did not limit that discretion. Rather, when it amended the legislation, it chose to give examples of the classes of applicants who would qualify, but did not limit a judge's ability to determine whether a person was impoverished in a way that would inhibit access to the court. Absent some such limitation, no constitutional question fairly arises and no constitutional remedy was required.

PART IV - COSTS

30. The intervener is not seeking costs in this Court and should not bear any.

PART V - RELIEF SOUGHT

31. For these reasons, the Attorney General of Canada asks that the case be disposed of consistently with the principles set out above.

⁵⁶ *B.C.G.E.U. v. British Columbia (AG)*, [1988] 2 S.C.R. 214, p. 232, JABOA, Tab 4.

⁵⁷ *Polewsky v. Home Hardware Stores Ltd.*, (2003), 66 O.R. (3^d) 600 (Ont. Div. Ct), par. 3 and 77, JABOA, Tab 13.

⁵⁸ *Pleau v. Nova Scotia (Supreme Court, Prothonotary)*, (1998), 186 N.S.R. (2^d) 1 (S.C.), par. 103 and 119, JABOA, Tab 12.

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OTTAWA, this 31th day of March 2014.



Alain Préfontaine
Counsel for the Attorney General of
Canada, intervener,

Factum of the Attorney General of Canada, intervener

PART VI - AUTHORITIES

	<i>Paragraph(s)</i>
A. Cases	
<i>Bell ExpressVu v. R.</i> , 2002 SCC 42, [2002] 2 S.C.R. 559	18
<i>Bingo City Games Inc. v. British Columbia Lottery Corp.</i> , 2004 BCSC 1472	23
<i>B.C.G.E.U. v. British Columbia (AG)</i> , [1988] 2 S.C.R. 214	11, 26
<i>British Columbia (AG) v. Christie</i> , 2007 SCC 21, [2007] 1 S.C.R. 873	1, 11, 14
<i>B.C. v. Imperial Tobacco Canada Ltd.</i> , 2005 SCC 49, [2005] 2 S.C.R. 473	15
<i>Doucet-Boudreau v. Nova Scotia (Minister of Education)</i> , 2003 SCC 62, [2003] 3 S.C.R. 3	13
<i>Eurig Estate (Re)</i> , [1998] 2 S.C.R. 565	15
<i>Griffith v. House</i> , 2000 BCCA 371 at par. 3 (B.C. C.A., in chambers)	23
<i>Jensen v. Jackman</i> 2010 BCCA 6 at par. 13-16 (B.C. C.A., in chambers)	23
<i>Lavigne v. Canada (Office of the Commissioner of Official Languages)</i> , 2002 SCC 53, [2002] S.C.R. 773	18
<i>National Sanatorium Assn. v. Mattawa (Town)</i> , [1925] 2 D.L.R. 491 (Ont. C.A.)	23
<i>Ontario v. Criminal Lawyers Association of Ontario</i> , 2013 SCC 43	13, 14, 16
<i>Pieters v. Canada (Attorney General)</i> , 2004 FC 1418	23
<i>Pleau v. Nova Scotia (Supreme Court, Prothonotary)</i> , (1998), 186 N.S.R. (2 ^d) 1 (S.C.)	27
<i>Polewsky v. Home Hardware Stores Ltd.</i> 2003, 66 O.R. (3 ^d) 600	27

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(Ont. Div. Ct)	
<i>Puspanathan v. Canada (Minister of Citizenship and Immigration)</i> , [1998] 1 S.C.R. 982	1
<i>Reference re Secession of Quebec</i> , [1998] 2 S.C.R. 217	13, 15
<i>Reza v. Canada</i> , [1994] 2 S.C.R. 394	23
<i>Schreiber v. Canada (Attorney General)</i> , 2002 SCC 62, [2002] 3 S.C.R. 269	18
<i>Trautmann v. Baker</i> , [1997] B.C.J. No. 452 at par. 4 (B.C. C.A, in chambers)	22
<i>Winko v. British Columbia (Forensic Psychiatric Institute)</i> , [1999] 2 S.C.R. 625	2, 17

B. Others

Action Committee on Access to Justice in Civil and Family Matters, <i>Access to Civil & Family Justice – A Roadmap for Change</i> , October 2013, p. 7 (http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)	1
Federal Court, <i>Strategic Plan (2014-2019)</i> , http://cas-ncr-nter03.cas-satj.gc.ca/rss/Strategic%20Plan%20(Final%20for%20posting%20with%20COA)%20English.pdf	12
Supreme Court Rules Revision Committee, <i>The Committee and its Mandate</i> , online: the Courts of British Columbia < http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/acts_rules_and_forms/rules_revision_committee/index.aspx >.	21
<i>The Oxford English Dictionary</i> , 2d ed., <i>sub verbo</i> “impoverished”	22
<i>The Oxford English Dictionary</i> (online: www.oed.com), <i>sub verbo</i> “impoverished”	22

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PART VII - LEGISLATION

Constitution Act 1867, s. 92(14) and 96 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

92. Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :

[...]

14. L'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux;

96. Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.

Court Rules Act, R.S.B.C. 1996, c. 80.

6 The Lieutenant Governor in Council must not make a rule under sections 1 to 4 unless the Lieutenant Governor in Council has received the recommendation of the Attorney General after the Attorney General has consulted with the following:

- (a) the Chief Justice of British Columbia, in relation to rules governing the Court of Appeal;
- (b) the Chief Justice of the Supreme Court, in relation to rules governing the Supreme Court;
- (c) the Chief Judge of the Provincial Court, in relation to rules governing the Provincial Court.

Interpretation Act, RSBC 1996, c. 238, s. 36(1)b)

36 (1) If an enactment (the "former enactment") is repealed and another enactment (the "new enactment") is substituted for it,

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(b) every proceeding commenced under the former enactment must be continued under and in conformity with the new enactment so far as it may be done consistently with the new enactment,

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A Mean to help and speed poor Persons in their Suits, A.D. 1494, 2 Henry VII, c. 12.

A.D. 1494.

2 HENRY VII.

CAP. 12.

CAP. XII.

A Mean to help and speed poor Persons in their Suits.

PRAYEN the Commons in this present Parliament assembled, That where the King our Sovereign Lord, of his most gracious Disposition, willeth and intendeth indifferent Justice to be had and ministered according to his Common Laws, to all his true Subjects, as well to the Poor as Rich, which poor Subjects be not of Ability ne Power to sue according to the Laws of this Land for the redress of Injuries and Wrongs to them daily done, as well concerning their Persons and their Inheritance, as other Causes: (2) For Remedy whereof, in the Behalf of the poor Persons of this Land, not able to sue for their Remedy after the Course of the Common Law; be it ordained and enacted by your Highness, and by the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by Authority of the same, That every poor Person or Persons, which have, or hereafter shall have Cause of Action or Actions against any Person or Persons within this Realm, shall have by the Discretion of the Chancellor of this Realm for the time being, Writ or Writs Original, and Writs of Subpoena, according to the Nature of their Causes, therefore nothing paying to your Highness for the Seals of the same, nor to any Person for the writing of the same Writ and Writs to be hereafter sued; (3) and that the said Chancellor for the time being shall assign such of the Clerks which shall do and use the making and writing of the same Writs, to write the same ready to be sealed, and also learned Counsel and Attornies for the same, without any Reward taken therefore: (4) And after the said Writ or Writs be returned, if it be afore the King in his Bench, the Justices there shall assign to the same poor Person or Persons, Counsel learned, by their Discretions, which shall give their Counsels, nothing taking for the same: (5) And likewise the Justices shall appoint Attorney and Attornies for the same poor Person or Persons, and all other Officers requisite and necessary to be had for the Speed of the said Suits to be had and made, which shall do their Duties without any Reward for their Counsels, Help, and Business in the same: (6) And the same Law and Order shall be observed and kept of all such Suits to be made afore the King's Justices of his Common Place, and Barons of his Exchequer, and all other Justices in the Courts of Record where any such Suit shall be.

See 2. Geo. 2. c. 28. f. 8. declaring what Persons sued by Capias may defend in Forma Pauperis.

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Supreme Court Rules, B.C. Reg. 221/90, r. 57(1), Appendix C, Sch. 1, item 14 and item S1(1)

Rule 57 — Costs**How costs assessed generally**

- (1) Where costs are payable to a party under these rules or by order
- (a) by another party,
 - (b) out of a fund of other parties, or
 - (c) out of a fund in which the party whose costs are being assessed has a common interest with other persons,

they shall be assessed as party and party costs under Appendix B, unless the court orders that they be assessed as special costs.

Appendix C**Schedule 1****Fees Payable to the Crown**

(Unless otherwise provided by Statute)

...			
14	For hearing a trial, unless the hearing is for judgment only, payable by the party who files the notice of trial, unless the court orders payment by another party		
	(a)	if the time spent on the hearing is 1/2 day or less	156
	(b)	if the time spent on the hearing is more than 1/2 day	
	(i)	for each of the first 5 days spent, in whole or in part, on the hearing	312
	(ii)	for each additional day spent after the first 5 days, in whole or in part, on the hearing	416
	(iii)	for each additional day spent after the first 10 days, in whole or in part, on the hearing	624

Indigency status

S1 (1) If the court, on summary application before or after the commencement of a proceeding, finds that a person is indigent, the court may order that no fee is payable to the Crown by the person to commence, defend or continue the whole or any part of the proceeding unless the court considers that the claim or defence

- (a) discloses no reasonable claim or defence, as the case may be,
- (b) is scandalous, frivolous or vexatious, or
- (c) is otherwise an abuse of the process of the court.

- (2) An order under subsection (1) may apply to one or more of the following:
- (a) a proceeding generally;
 - (b) any part of a proceeding;
 - (c) a specific period of time;
 - (d) one or more particular steps in a proceeding.

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(3) On application or on the court's own motion, the court may review, vary or rescind any order made under subsection (1) or (2).

(4) Despite anything in this Schedule, if the court makes an order in relation to a person under this section, no fee is payable to the Crown by that person in relation to the proceeding, part of the proceeding, period of time or steps to which the order applies.

In addition to any other fees payable under this Schedule, a further fee of \$7.00 must be paid for transmitting a document package to a registry through the electronic filing service of Court Services Online. For the purposes of this provision, a "document package" is any document or, if a group of documents is transmitted at one time in relation to the same court file, that group of documents.

Supreme Court Rules, B.C. Reg. 168/2009, r. 14-1, 20-5 and Appendix C, Sch. 1, item 9

Rule 14-1 — Costs

How costs assessed generally

(1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:

- (a) the parties consent to the amount of costs and file a certificate of costs setting out that amount;
- (b) the court orders that
 - (i) the costs of the proceeding be assessed as special costs, or
 - (ii) the costs of an application, a step or any other matter in the proceeding be assessed as special costs in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;
- (c) the court awards lump sum costs for the proceeding and fixes those costs under subrule (15) in an amount the court considers appropriate;
- (d) the court awards lump sum costs in relation to an application, a step or any other matter in the proceeding and fixes those costs under subrule (15), in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;
- (e) a notice of fast track action in Form 61 has been filed in relation to the action

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under Rule 15-1, in which event Rule 15-1 (15) to (17) applies;

(f) subject to subrule (10) of this rule,

(i) the only relief granted in the action is one or more of money, real property, a builder's lien and personal property and the plaintiff recovers a judgment in which the total value of the relief granted is \$100,000 or less, exclusive of interest and costs, or

(ii) the trial of the action was completed within 3 days or less,

in which event, Rule 15-1 (15) to (17) applies to the action unless the court orders otherwise.

Rule 20-5 — Persons Who Are Impoverished**Court may determine impoverished status**

(1) If the court, on application made in accordance with subrule (3) before or after the start of a proceeding, finds that a person receives benefits under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act* or is otherwise impoverished, the court may order that no fee is payable by the person to the government under Schedule 1 of Appendix C in relation to the proceeding unless the court considers that the claim or defence

(a) discloses no reasonable claim or defence, as the case may be,

(b) is scandalous, frivolous or vexatious, or

(c) is otherwise an abuse of the process of the court.

Application of order

(2) An order under subrule (1) may apply to one or more of the following:

(a) a proceeding generally;

(b) any part of a proceeding;

(c) a specific period of time;

(d) one or more particular steps in a proceeding.

How to apply

(3) An application under subrule (1) may be made by filing

(a) a requisition in Form 17,

(b) a draft of the proposed order in Form 79, and

(c) an affidavit in Form 80.

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Review, variation or rescission of order

(4) On application or on the court's own motion, the court may review, vary or rescind any order made under subrule (1) or (2).

No fee payable

(5) Despite anything in this rule, if the court makes an order in relation to a person under this rule, no fee is payable by the person to the government under Schedule 1 of Appendix C in relation to

- (a) the proceeding,
- (b) the part of the proceeding,
- (c) the period of time, or
- (d) the steps

to which the order applies.

Appendix C — Fees**Schedule 1****Fees Payable to the Crown**

(Unless otherwise provided by statute)

...

Fees Applicable to the Supreme Court		
Item	Description	Fee (\$)
...		
<i>Hearings</i>		
8	For resetting a trial or hearing	200
9	For each day spent in whole or in part at a hearing, unless the attendance on that day is for reasons for decision only, payable by the party who files the notice of application, appointment or other document by which the hearing was set, unless the court orders payment by another party	For the first 3 days: 0 For each of the 4th to 10th days: 500 For each day over 10: 800
10	For each day spent in whole or in part at trial, unless the attendance on that day is for judgment only, payable by the party who files the notice of trial, unless the court orders payment by another party	For the first 3 days: 0 For each of the 4th to 10th days: 500 For each day over 10: 800

Factum of the Attorney General of Canada, intervenuer**Federal Courts Rules, SOR/98-106, r. 19 and Tariff A**

19. A party shall pay to the Registry for a service or procedure set out in Tariff A the fees set out in that Tariff.

55. In special circumstances, in a proceeding, the Court may vary a rule or dispense with compliance with a rule.

19. Toute partie est tenue de payer au greffe, relativement aux procédures devant la Cour, les droits payables aux termes du tarif A.

55. Dans des circonstances spéciales, la Cour peut, dans une instance, modifier une règle ou exempter une partie ou une personne de son application.

**E. TARIFF A -
COURT FEES**

(Rules 19, 20, 42, 43, 71 and 89)

F. Registry Fees

2. Where a trial or hearing in the Federal Court lasts more than three days, each party who participated at the trial or hearing shall pay a fee determined by applying the formula

$$[(A \times B) + C] / D$$

where

A

is

(a) in respect of the hearing of a reference ordered under rule 153, \$75, and
(b) in respect of any other trial or hearing, \$150;

B

is the number of days of trial or hearing in excess of three;

C

is the amount payable by the Administrator to a court reporter in respect of the portion of the trial or hearing conducted after the first three days; and

D

is the number of parties who participated at the trial or hearing.

**G. TARIF A - FRAIS
JUDICIAIRES**

(règles 19, 20, 42, 43, 71 et 89)

DROITS PAYABLES AU GREFFE

2. Lorsqu'une instruction ou une audience devant la Cour fédérale dure plus de trois jours, chaque partie qui a participé à l'instruction ou à l'audience est tenue de payer les droits déterminés au moyen de la formule suivante :

$$[(A \times B) + C] / D$$

où :

A

représente

a) 75 \$, dans le cas de l'audition d'un renvoi ordonné en vertu de la règle 153,
b) 150 \$, dans tout autre cas;

B

le nombre de jours en sus de trois durant lesquels l'instruction ou l'audience s'est poursuivie;

C

le montant payable par l'administrateur au sténographe judiciaire à l'égard de la partie de l'instruction ou de l'audience qui s'est poursuivie au-delà de trois jours;

D

le nombre de parties qui ont participé à l'instruction ou à l'audience.