Court File No. 35315

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

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

FACTUM OF THE APPELLANT
CANADIAN BAR ASSOCIATION – BRITISH COLUMBIA BRANCH

(Pursuant to Rule 42 of the of the *Rules of the Supreme Court of Canada)*

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This case is about whether hearing fees found in Appendix C, Schedule 1 to the British Columbia Rules of Court, which are set and structured in a manner to impede access to the courts and which operate to create unequal access to justice, are unconstitutional.

2. The origin of the unconstitutionality is the purpose of hearing fees. The trial judge found that they are manifestly fixed at a level intended to deter use of the courts, that the government implemented them to influence the availability of the courts, and that their primary purpose is to cause litigants to ration court time.[1]. The Court of Appeal characterized hearing fees as an intentionally designed barrier to access justice.[2] Hearing fees animated by an objective to impede access to the courts are per se unconstitutional because their purpose offends the rule of law and access to justice

3. Hearing fees are unconstitutional in effect because they render access to the courts unaffordable by historically disadvantaged and marginalized British Columbians and because they create a litigation advantage for moneyed interests, including the provincial government which designed the regime.

4. A related but distinct question is whether an indigency exemption which pertains to all fees payable to the Crown under the Rules of Court (now the Supreme Court Civil Rules and the Supreme Court Family Rules), if enlarged, can cure the constitutional defects.

5. The exemption provided by the executive branch of government and enlarged by the Court of Appeal is an ineffective remedy. No exemption can address the unconstitutional purpose of hearing fees. In addition, an exemption simply changes the nature of the barrier from a fee to an extra court proceeding that is required only for persons subject to the inherently unequal effects of hearing fees.

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[1] *Vilardell v. Dunham*, 2012 BCSC 748 at paras. 309- 310 and 398, [*Vilardell #2 BCSC*], Joint Appellants' Record ("JAR"), Vol. I, Tab 3

[2] *Vilardell v. Dunham*, 2013 BCCA 65 at para. 19, [*Vilardell BCCA*], JAR, Vol. II, Tab 6.

6. The trial judge found hearing fees unconstitutional and not cured by the exemption provision. He declared the provision of the Rules of Court pertaining to hearing fees unconstitutional. The Court of Appeal held that the legitimacy of the fees depends on an exemption which effectively removes barriers to access, and that an appropriate antidote to their suspect constitutionality was to enlarge the exemption provision to cover persons who are impoverished (the word replacing the word "indigent" in the rules extant at the time this case arose) or in need.

B. Statement of Facts

7. The Canadian Bar Association British Columbia Branch ("CBABC") appears as a party to address fees Payable To The Crown for hearing a trial ("hearing fees"). The CBABC adopts the statement of facts set out in the factum of the Trial Lawyers Association of BC ("TLABC") and emphasizes that the trial judge held that "the relevant evidence is not in dispute, and is taken as fact to the extent I have set it out in these reasons."[3]

8. The CBABC supports and adopts the submissions of the TLABC.

PART II - QUESTIONS IN ISSUE

9. This appeal raises the following questions of law:

(a) 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?

(b) Can the constitutional defect be cured through an expanded exemption to the payment of hearing fees?

10. The Court of Appeal erred in four fundamental respects:

[3] *Vilardell #2 BCSC*, *supra* note 1 at para. 33, JAR, Vol. I, Tab 3.

(a) failing to undertake an integrated and purposive analysis and instead focusing only on the narrow issue of the application of *British Columbia (Attorney General) v. Christie*;[4]

(b) finding that the historical record of imposition of some form of hearing fee was determinative;

(c) conflating the analysis of whether hearing fees are unconstitutional with the remedy of enlarging the exemption; and

(d) ordering the remedy of reading in "an enlarged interpretation of the indigency exemption" which is inconsistent with constitutional remedial principles and which is insufficient to cure the constitutional defects.

PART III - ARGUMENT

A. The Regulation Provisions

11. At the time of the hearing of the trial, hearing fees for British Columbia Supreme Court hearings were mandated by item 14 of Appendix C, Schedule 1 (B.C. Reg. 10/96 as amended) of the British Columbia Rules of Court[5].

12. The party setting the matter for trial must undertake to pay the hearing fees. In 2009, that was accomplished through the filing of Form 35, Notice of Trial (BC. Reg. 143/94 as amended)[6] which set out the undertaking over the signature of the party or the party's solicitor. Form 35 did not refer to the exemption described below.

13. At the time of the trial, the exemption which excused persons found to be indigent (on summary application) was found in item S1 of Appendix C, Schedule 1[7]. The exemption provision applied to all fees payable to the Crown (in the Court of Appeal, Supreme Court and in any court). It read as follows:

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[4] *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873 [*Christie*], JABA, Vol. I, Tab 3.
[5] See Appendix B
[6] See Appendix B
[7] See Appendix B

> 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 consider 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 process of the court.

14. At the time of the hearing of the appeal, the British Columbia Supreme Court Rules had been revoked, including Appendix C, Schedule 1, and had been replaced with the Supreme Court Civil Rules and the Supreme Court Family Rules.

15. The current provisions pertaining to hearing fees in British Columbia Supreme Court civil and family hearings and trials are set out in items 9 and 10 of Appendix C, Schedule 1 to the Supreme Court Civil Rules and items 9 and 10 of Appendix C, Schedule 1 to the Supreme Court Family Rules.[8]

16. The undertaking to pay hearing fees is made on Form 40 of the Supreme Court Civil Rules and Form F44 of the Supreme Court Family Rules[9]. Both forms for setting trials require the person setting the trial or the person's lawyer to "undertake to pay all hearing fees payable under Appendix C, Schedule 1, Item 10". Neither form refers to an exemption provision.

17. The exemption provisions are no longer part of the same regulation or in the same Appendix to the rules as the hearing fees. Rather they are located in the rules themselves at Rule 20-5 of the Supreme Court Civil Rules and Rule 20-5 of the Supreme Court Family Rules.[10] As noted by the Court of Appeal, the language of the exemption changed now reads (the following is the Supreme Court Civil exemption, the Supreme Court Family exemption is substantially the same):

> (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*

[8] See Appendix C and Appendix D
[9] See Appendix C and Appendix D
[10] See Appendix C and Appendix D

> *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 process of the court.

18. The "on summary application" provision under the rules which governed the trial have been replaced with Rule 20-5(3) which reads:

> An application under subrule (1) may be made by filing
>
> (a) requisition in Form 17,
>
> (b) a draft of the proposed order in Form 79, and
>
> (c) an affidavit in Form 80.

19. The Rule 20-5 exemptions do not cover fees payable in other courts as did the previous exemption, but they do apply to all fees in the British Columbia Supreme Court.

20. At the time of the trial, the practice was that litigants were provided with an application form, a blank affidavit and a draft order on request or if they expressed to a court representative that they cannot afford fees payable to the Crown. The applications are not made by desk order. They are spoken to and orders are made in court, usually on an ex parte basis.[11]

21. Hearing fees are set per diem and rise with the length of the hearing, even though the per day costs do not rise. The party who sets the litigation for trial must undertake to pay hearing fees. The party setting the case for trial may be one of two or several parties to the litigation and may not know how long the trial will actually take (as in this case) and therefore not know what they are committing to paying and will not be ultimately in control of how long the trial takes.[12] It is common practice that trials are set based on the longest estimate provided.

22. The expert for the Attorney General of British Columbia, Mr. Barke, calculates the recovery of trial costs through hearing fees at approximately 45% overall but between 64% and 98% for trials up to 15 days in length. Trials over 15 days in length, under Mr. Barke's

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[11] Affidavit #1 of Robyn Snelling, at paras. 4-6 and Exhibit "A", JAR, Vol. IV, Tab. 22.
[12] *Vilardell #2 BCSC, supra* note 1, JAR, Vol. I, Tab 3.

calculations, pay for more than 100% of their costs. According to Hansard, overall recovery (except criminal and provincial family courts) is 92%.

23. All of these provisions are enacted through regulation. The source legislation, the *Court Rules Act*[13], does not prescribe hearing fees, the structure, or the amounts. The concept, design and implementation of hearing fees are all acts of the executive, not legislative, branch of the government of British Columbia.

24. The government, through hearing fees, seeks to cause litigants to ration court time by making them pay for time in court on an accelerating basis. As addressed above, this was found by the trial judge and by the Court of Appeal to be an intentionally designed barrier to access justice.

25. The Court of Appeal's enlarged exemption pertains to hearing fees under the Supreme Court Civil Rules. Although the Court of Appeal provided an exemption to Ms. Vilardell specifically, Donald J.A. did not address what, if anything, was to become of any hearing fees not yet paid under the regulation which governed at the time of trial. Nor did the Court of Appeal address hearing fees charged under the Supreme Court Family Rules.

B. The Constitutionality of Hearing fees

1. An Integrated And Purposive Constitutional Analysis

26. This case engages several facets of the Canadian Constitution and constitutionalism requiring that hearing fees be made the subject of an integrated, broad and purposive analysis as undertaken by the trial judge and as mandated by this Court.

27. An integrated, broad and purposive application of the Constitution means not only that the unwritten principles are to influence the interpretation of the express provisions of the *Charter*, but also that the express provisions influence the interpretation and application of constitutional principles.[14] In particular, the content of the rule of law must be expansively

[13] *Court Rules Act*, R.S.B.C. 1996, c. 80. s.1, JABA, Vol. II, Tab 37.
[14] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 [*R v. Big M Drug Mart*], at p.344, JABA, Vol. I, Tab 14.

interpreted and allowed to evolve to ensure that it can continue to serve as a foundation to the evolving society it supports.[15]

28. The trial judge's analysis considered the history of hearing fees; principles of democracy; access to justice in relation to the rule of law; section 92(14) of the *Constitution Act, 1867*[16]; constitutional principles pertaining to the relationship between branches of government; the relationship between the courts and the people who come before the courts for peaceful resolution of their disputes; and the relationship between the state and the individual. Through this integrated analysis McEwan J. reached the conclusion that for multi-faceted connected reasons, hearing fees are unconstitutional. The purpose and effect of hearing fees were appropriately central to this analysis.[17]

29. By contrast, the Court of Appeal's analysis on the issue of constitutionality did not include examining hearing fees in the context of the Constitution generally, or the role of the courts in Canadian democracy, but rather focused on whether "the current exemption is up to the mark, and if it is not, what should be done".[18] This analysis did not appropriately consider the purpose of hearing fees. If the purpose of the hearing fees is unconstitutional, it is not necessary to consider their effect. If their purpose is constitutional, then it is necessary to review the constitutionality of their effect.[19]

30. Instead, the Court of Appeal was focused on comparing hearing fees to the ruling of this court in *Christie* without consideration of the differences in the purpose of a tax on legal services with the purpose of hearing fees. The objective of the tax is to raise revenue and so does not stray from the sphere of the legislative branch in purpose. Hearing fees are a direct and purposeful intrusion into the sphere of the judicial branch. Despite this key difference, Donald, J.A., writing for the Court, said, "I doubt very much the proposition that hearing fees *per se*, without regard to their impeding effect, can survive *Christie* at para.17".

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[15] *Reference re: Secession of Québec*, [1998] 2 S.C.R. 217 at paras. 48-54, [*Secession Reference*], JABA, Vol. II, Tab 27; *Reference re: Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 paras. 85-89 and 106, [*PEI Provincial Court Judges Reference*], JABA, Vol. II, Tab 26.

[16] *Constitution Act, 1867*, (U.K.), 30 & 31, Vict., c. 3, reprinted in R.S.C. 1985, App. II. No 5, JABA, Vol. II, Tab 35.

[17] *R. v. Big M Drug Mart, supra* note 14 at p.331-334, JABA, Vol. I, Tab 14; *R. v. Schachter*, [1992] 2 S.C.R. 679 at pp. 695, 700, 703 and 707, [*Schachter*], JABA, Vol. II, Tab 21.

[18] *Vilardell BCCA supra* note 2 at para. 24, JAR, Vol. II, Tab 6.

[19] *R v. Big M Drug Mart supra* note 14 at p.331-334, JABA, Vol. I, Tab 14.

31. The Court of Appeal concluded that, apart from the exemption, hearing fees would be unconstitutional. Donald J.A. described hearing fees as "constitutionally suspect", and the result of a government efficiency objective which is invidious because the fees impinge the economically disadvantaged.[20] However this acknowledgement of the invidious objective did not lead to an appropriate an analysis of the constitutionality of the purpose of the hearing fees, but rather became confused with the analysis of the effect of the hearing fees and the remedy of an enlarged exemption.

32. The Court of Appeal erred in failing to undertake an integrated and purposive analysis despite the depth and integration of the analysis by the trial judge.

The Courts In Canadian Democracy

33. The justice system is a cornerstone of our democratic society. It provides the means by which Canadians resolve disputes peacefully, before an independent and impartial decision maker. It is premised on the maintenance of the rule of law, the independence of the judiciary and accessible justice. A fair, effective, accessible justice system is essential to the peaceful ordering and the economic and social well-being of our society.[21]

34. The constitutional principle of democracy is not simply concerned with the process of government. It includes substantive goals such as equality, social justice, and the inherent dignity of the person. Democracy cannot exist without the rule of law and there can be no realization of the goals of democracy without the courts because the courts are the very foundation of the rule of law.[22] Holding a trial is clearly a core function of the judiciary and one not to be directly hindered by another branch of government.[23]

35. There are significant barriers to accessing justice in Canada today; the causes are complex and therefore multi-pronged solutions are required including using proportionality principles, and reducing and simplifying pre-trial procedures. The courts must continue to play a

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[20] *Vilardell BCCA supra* note 2 at para. 26, JAR, Vol. II, Tab 6.
[21] Canadian Bar Association, *Systems of Civil Justice Task Force Report*, (Ottawa: Canadian Bar Association,1996), pp. 3-4, [*CBA Systems of Civil Justice Task Force Report*], JABA, Vol. II, Tab 31.
[22] *Secession Reference*, *supra* note 15 at paras. 67-69 and 76-81, JABA, Vol. II, Tab 27; *Vilardell #2 BCSC*, *supra* note 1 at paras. 403 and 405, JAR, Vol. I, Tab 3.
[23] *Vilardell #2 BCSC*, *supra* note 1 at paras. 35-37, JAR, Vol. I, Tab 3; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at 748, 752-754 JABA, Vol. I, Tab 10.

core function within the justice system as required by the Canadian Constitution and as a practical matter in interpreting and applying laws which create the foundation for all other forms of dispute resolution.[24]

36. The fundamental role of courts may be taken for granted like the air we breathe, but it has been recognized and reinforced through judicial interpretation:

> [9] I consider that everyone in Canada has a right to come to court and seek the help of the court in obtaining a resolution of the legal issues that have given rise to that person's problem. Everyone in Canada has a right to seek the protection of the court from any perceived oppression by the state. Everyone being prosecuted in our courts has the right to counsel and the right to make full answer and defence. And I consider that our social system and our system of government depend not only on our rights relating to dispute resolution, in courts and otherwise, but also on our rights relating to dispute prevention through a legal system which regulates succession to property, family law, and other areas of potential disharmony.[25]

37. Hearing fees impermissibly interfere with the fundamental relationship between the courts and the people as safeguarded by the Constitution. There is an essentially constitutional character to the occasion of appearing in court to resolve a dispute through the offices of a s.96 judge, and to do so knowing the government cannot influence the right of a litigant to do so or the outcome.[26]

38. The courts must maintain the rule of law in Canada. The provincial government is responsible for the administration of justice in the province under s.92(14) of the *Constitution Act, 1867*, but if in so doing so it interferes with the function of the courts to maintain the rule of

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[24] *Hryniak v. Mauldin* 2014 SCC 7 [*Hryniak*] at paras. 1-2 and 27-28, JABA, Vol. I, Tab 8; Canadian Forum Civil Justice, *Access To Civil & Family Justice – A Roadmap for Change*, (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, at pp. 7-8 and 15, [*Action Committee Report*], JABA, Vol. II, Tab 33; Canadian Bar Association, *Reaching Equal Justice: An Invitation To Envision And Act*, (Ottawa: Canadian Bar Association, 2013), pp. 44-45 and 124-125, [*CBA Reaching Equal Justice*], JABA, Vol. II, Tab 32.

[25] *John Carten Personal Law Corp. v. British Columbia (Attorney General)* (1997), 153 D.L.R. (4th) 460 (B.C.C.A); 40 B.C.L.R. (3d) 181 at para. 9, per Lambert J.A. for the majority, [*Carten*]; leave to appeal ref'd [1998] S.C.C.A. No. 205, JABA, Vol. I, Tab 9.

[26] *Vilardell #2 BCSC, supra* note 1 at paras. 344, 412, 425-426, JAR, Vol. I, Tab 3.

law, it oversteps its bounds.[27] Put another way, impeding or preventing access to the courts goes beyond placing conditions on "how and when" people access the courts.[28]

39. Access to the courts is both a practical compulsion and a fundamental right in a free and democratic society.[29] Because the objective of hearing fees is to inhibit access to the courts their purpose is unconstitutional. They are calculated in graduating amounts related to the time available before the judge for the purpose of causing litigants to ration time before the courts. As such they infringe the rule of law and its constituent principle, access to justice.

40. As dealt with at length by the trial judge, the Canadian Constitution mandates that the content of the legislative powers of the government be interpreted consistently with the democratic elements of the constitutional structure.[30]

41. Political debate and free elections are to democracy what the courts are to democracy and the rule of law. Courts are a branch of government that occupy a central place within the Canadian system of government. They uphold democracy by fulfilling the promise of the rule of law and protecting minority rights. The courts are fundamental to the ordering of the Canadian society as promised by the Constitution. Section 92(14) is limited such that it cannot be used to abrogate access to the courts in a way which undermines the rule of law.[31]

42. It cannot be better put than by the trial judge at paras. 379 and 410:

> [379]: The structure of the Constitution, as established by the *Constitution Act, 1867* presupposed the existence of courts that are open to all.
>
> [410]: A court that is not available to a significant segment of the public because another branch of government stands in its way is a court whose independence is compromised.[32]

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[27] *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 [*Criminal Lawyers' Association*] at paras. 28-29 and 33 JABA, Vol. I, Tab 11.
[28] *Christie*, *supra*, note 4, JABA, Vol. I, Tab 3.
[29] *Ibid*. at paras. 411-412, JAR, Vol. I, Tab 3; *Pleau v. Nova Scotia (Supreme Court, Prothonotary)*, (1999), 43 C.P.C. (4th) 201 (N.S.S.C.); 186 N.S.R. (2d) 1, at paras. 22, 95-96 and 110, [*Pleau*], JABA, Vol. I, Tab 12.
[30] *Vilardell #2 BCSC*, *supra* note 1 at paras. 364-370, JAR, Vol. I, TAB 3; *Reference re: Alberta Legislation*, [1938] S.C.R. 100 at pp. 132-133, JABA, Vol. II, Tab 23; *PEI Provincial Court Judges Reference*, *supra* note 15 at paras. 102-103, JABA, Vol. II, Tab 26.
[31] *PEI Provincial Court Judges Reference*, *supra* note 15 at para. 108, JABA, Vol. II, Tab 26; *Vilardell #2 BCSC*, *supra* note 1 at paras. 374-380, JAR, Vol. 1, Tab 3.
[32] *Vilardell #2 BCSC*, *supra* note 1 at paras. 379 and 410, JAR, Vol. I, Tab 3.

The Rule of Law and Access to Justice

The Rule of Law

43. The rule of law describes the state of a society where law is supreme, that is, where the highest representative of the Crown as well as the most humble citizen must act in accordance with law as interpreted by the courts. The rule of law is about an equal society where all are free from the exercise of the arbitrary power of the state and where all have equal opportunities to pursue their dreams.[33]

44. There are three requirements for the rule of law: first the law must be supreme over government as well as over private individuals; second, there must be an actual order of positive laws; and third, the relationship between the state and individuals must be regulated by law.[34]

45. Thus, the rule of law is a fundamental constitutional principle. It embodies the political, social and legal values or norms upon which the ordering of Canadian society rest. It establishes the parameters of the Canadian constitutional framework. It acts to influence the interpretation of our written constitutional texts and to supplement the written text in order to ensure that basic and fundamental aspects of our legal system and culture are respected.[35]

46. The law defines the rights and obligations of individuals and governments. The justice system provides the procedures and decision making authority by which disputes, including disputes with governments, can be resolved. It is axiomatic that the substantive content of the law, the rights and obligations, are hollow unless a means is available to ensure that these rights can be exercised equally by all they are intended to protect. Hence access to justice and equal access to justice are requisite to the operation of the rule of law.

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[33] *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 142-143 JABA, Vol II, Tab 28.
[34] *Reference re: Manitoba Language Rights*, [1985] 1 S.C.R. 721 [*Manitoba Language Reference*], at pp. 748-749, JABA, Vol. II, Tab 25; *Secession Reference supra* note 15 at para. 71, JABA, Vol. II, Tab 27; *British Columbia v. Imperial Tobacco Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 at para. 58, [*Imperial Tobacco*], JABA, Vol. I, Tab 5; *Christie, supra* note 4 at paras. 19-20, JABA, Vol. I, Tab 3.
[35] *Manitoba Language Reference, supra* note 34 at pp. 748-750 JABA, Vol. II Tab 25; *Secession Reference, supra* note 15, paras. 48-52 and 70, JABA, Vol. II, Tab 27; *PEI Provincial Judges Reference, supra* note 15 at para. 89, JABA, Vol. II, Tab. 26.

47. The unconstitutionality of hearing fees is apparent when compared against the requirements of the rule of law. Hearing fees set up a regime in which the extent to which the law is supreme and the extent to which it can regulate any relationship depends on the ability of an individual to pay hearing fees. The equality requirements of the rule of law cannot be met by this regime.

48. The evidence established, and the trial judge found, that many individuals, 30% to 50% of British Columbia families, have incomes in the range where they cannot reasonably afford hearing fees. The parties to this case, a veterinarian and a university instructor, would have had their combined net income for a month consumed by hearing fees. This puts certain classes of individuals at a disadvantage compared to well-to-do individuals, corporations and the state.[36]

49. As noted by McEwen J. at paras. 363 and 344, the government is a frequent user of the courts but it is obvious that it must not have special advantages in court:

> [363] This is particularly so given that the government is a frequent litigant. In light of the courts' essential characteristic as a forum where all who come before them must be treated as equals, the government cannot be, or be perceived to be, in control of or able to manipulate the court. That is one aspect of the limitation on the provincial authority to legislate respecting courts under s. 92(14).
>
> [344] A characteristic of the rule of law that may be traced back at least to Magna Carta, is that the Executive branch of government and its agencies appear before the courts as ordinary litigants with no particular or special status. Any person within the jurisdiction of the courts may take any other person or entity, including the government, to court and expect to be treated as an equal. Although it is not often characterized as such, adjudication in court is an aspect of the fundamental constitutional principle of democracy.[37]

50. Thus, hearing fees defeat the requirement that the law be supreme over government as well as private individuals. Hearing fees also interfere with the regulation of the relationship between the individual and the state. The designer and implementer of hearing fees, the provincial government, is a frequent litigant and has created an advantage for itself compared to a significant number of people who use the courts to resolve their disputes.

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[36] *Vilardell #2 SCBC, supra* note 1 at paras. 26 and 396, JAR, Vol. I, Tab 3.
[37] *Ibid*. at paras. 363 and 344, JAR, Vol. I, Tab 3.

51. The principle requiring creation and maintenance of an actual order of positive laws meets a similar fate. Courts play an essential role in the development and maintenance of the law. Access to the courts is necessary for the laws to be created, developed and enforced equally against or in favour of all to whom they apply.[38] Hearing fees interfere with the ability to have the laws enforced as between individuals and as between individuals and the state. If they cannot be enforced they have no meaning.[39]

52. The rule of law, as an underlying constitutional principle, has full legal force[40] and gives rise to substantive legal obligations:

> …which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force and are binding upon both courts and governments."[41]

53. Although questions have been raised about the role that the rule of law and unwritten constitutional principles play on constitutional review of laws, particularly legislation, it is established that the legislature is limited in that it cannot use its powers to undermine the judicial branch of government or fundamentally alter or interfere with the relationship between the courts and other branches of government.[42]

54. The very nature of the principles of constitutionalism and the rule of law demand that none of the provincial legislatures nor the federal parliament may use the authority of their democratically elected status to use powers in a manner which is inconsistent with other provisions of the Constitution and with the powers of other levels of the government. Hence British Columbia cannot, by relying on its powers under s.92(14), pass regulations, such as

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[38] *Ibid.* at paras 410 and 413-414, JAR, Vol. 1, Tab 3.
[39] *British Columbia Government Employees' Union. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at paras. 24-25, [*B.C.G.E.U.*], JABA, Vol. I, Tab 4.
[40] *Secession Reference*, *supra* note 15 at para 51-54, JABA, Vol. II, Tab 27.
[41] *Ibid* at para. 54, JABA, Vol. II, Tab 27.
[42] *PEI Provincial Court Judges Reference*, *supra* note 15 at paras. 60-61, JABA, Vol. II, Tab 26, *Imperial Tobacco*, *supra* note 34 at paras. 60-61, JABA, Vol. I, Tab 5; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3 at paras. 54-57, JABA, Vol. I, Tab 2.

hearing fees, that intrude on the power of the judicial branch of government in relation to the rule of law, as hearing fees do.[43]

55. In any event, the extent of the normative force of the rule of law in relation to the legislative branch raised in *Imperial Tobacco* need not be determined in this case because hearing fees are not actions of the legislative branch of government. Rather, as noted above, they are implemented through regulation and are therefore actions of the executive branch of government.

Access To Justice

56. The rule of law encompasses and presupposes access to justice.[44] It is axiomatic that the substantive content of the rule of law, the rights and obligations at law, are hollow unless a workable means is available to ensure that they can be accessed and exercised equally by everyone they are intended to protect. The right of access to justice flows by necessary implication from the three principles underlying the rule of law referred to above. No law, not even the written Constitutional text, can be given effect if access to justice is denied.[45]

57. This case is about access to the courts as was *B.C.G.E.U.* In his reasons in *B.C.G.E.U.*, Chief Justice Dickson said:

> Of what value are the rights and freedoms guaranteed by the Charter if a person is delayed or denied access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the Charter if court access is hindered, impeded or denied? The Charter protections would become illusory, the entire Charter undermined.
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> There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.[46]

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[43] *Secession Reference*, *supra* note 15 at paras. 70-74, JABA, Vol. II, Tab 27; *Criminal Lawyers' Association*, *supra* note 27, at para. 26-29, 33 and 42, JABA, Vol. I, Tab 11; *Vilardell #2 BCSC*, *supra* note 1, paras. 363 and 385-386, JAR, Vol. I, Tab 3.

[44] *B.C.G.E.U. supra* note 39 at pp. 229-230, JABA, Vol. I, Tab 4; *R. v. Domm*, (1996), 31 O.R. (3d) 540 (ON C.A.) at p. 546; leave to appeal ref'd, [1997] S.C.C.A. No. 78, JABA, Vol. I, Tab 15; *Carten , supra* note 25 at paras. 10-11, JABA, Vol. I Tab 9.

[45] *B.C.G.E.U.*, *supra* note 39 at p. 229, JABA, Vol. I, Tab 4; *Carten*, *supra* note 25 (per McEachern C.J.B.C. (dissenting), JABA, Vol. I, Tab 9.

[46] *B.C.G.E.U.*, *supra* note 39 at pp. 229-230, JABA, Vol. I, Tab 4.

58. While *B.C.G.E.U.* is often presented as a case purely about physical access to the courts, intangible barriers to accessing justice were also at issue in that case, namely an "obligation of conscience not to breach the picket line". More specifically, Dickson C.J.C. quoted with approval a passage from the Court of Appeal:

> We have no doubt that the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. It is the preservation of that right with which we are concerned in this case. Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, interference from whatever source falls into this category.[47]

59. In *Christie*, this Court addressed *B.C.G.E.U.* and said that it cannot stand for the proposition that every limit on access to the courts is automatically unconstitutional. This statement must be considered in the context of the court's characterization of the issue in *Christie* - constitutionally mandated legal aid in virtually all cases. Accordingly, in that passage the Court said that *B.C.G.E.U.* does not stand for the right to be able to afford legal representation. The Court did not reverse itself on the ratio of *B.C.G.E.U.*, which is that access to the courts is constitutionally protected.[48]

60. Hearing fees intended to hinder access to the courts and which go to the ability to have a hearing before a s.96 judge will always be unconstitutional. Hearing fees are different from a tax on legal services in the access to justice paradigm. The trial judge described the difference as legal fees being something that could be foregone in order to secure a day in court, while hearing fees, axiomatically, cannot be.[49] They are indistinguishable in purpose and effect from the physical and psychological barriers created by the picket line *B.C.G.E.U.* The picket line was described by Chief Justice Dickson as a barrier, both in intention and effect which "…could only lead to a massive interference with the legal and constitutional rights of the citizens of British Columbia."[50]

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[47] *Ibid*. at p. 230, JABA, Vol. I, Tab 4.
[48] *Christie, supra* note 4 at paras. 13-17, JABA, Vol. I, Tab 3.
[49] *Vilardell #2 BCSC, supra* note 1, JAR, Vol. I, Tab 3; *Pleau, supra*, note 29 at para. 110, JABA, Vol. I, Tab 12.
[50] *B.C.G.E.U., supra* note 39 at pp. 232-233, JABA, Vol. I, Tab 4.

61. Another qualitative difference between hearing fees and a tax on legal fees, is the nature of the government action at issue. In *Christie*, the issue was the taxing power of the legislature which is a power fundamental to the legislative branch. In this case, hearing fees are purported user fees imposed by the executive branch. Hearing fees, by the admission of British Columbia, have a primary purpose of causing litigants to ration time in court.

62. Seen this way, it is clear that the purpose of the hearing fees is not integral to the role of the executive branch of the government; rather it is inimical to the to the s.92(14) role and obligations of the provincial government and an intrusion into the judicial sphere. Because hearing fees relate directly to time in court and put a price on time in court, they are an unacceptable interference with the judicial branch and the people who come to court. [51]

63. Paragraph 17 of *Christie*, considered by the Court of Appeal at paragraphs 16 and 26, is answered by this aspect of this case and hearing fees. Whatever conditions the legislature may place on how and when persons access the courts, the executive branch of the government may not purposefully create barriers to the courts; create special advantages for governments over private citizens; or create unequal access between litigants or charge to exercise the constitutional right to go to court. In other words, hearing fees are not a condition on how and when persons access the courts. They determine whether a person accesses the courts and they are intended to hinder access to the courts.

Equal Access to Justice

64. The right of access to justice encompasses a norm of equality and therefore the meaning and legal requirements of this right should be considered with reference to the *Charter* value of substantive equality. Hearing fees have a disproportionate impact on low-income persons and persons of modest means.

65. Equal access to justice is a fundamental tenet of the Canadian justice system. The principle of equal access to justice flows from the overarching constitutional commitment to both the rule of law and the *Charter* value of substantive equality. These principles are inextricably linked in a constitutional democracy and in the inherent value of the dignity of the human

[51] *Pleau*, *supra* note 29 at paras. 120-122, JABA, Vol. I, Tab 12.

person, the commitment to social justice and equality and the respect for cultural and group identity.[52]

66. Hearing fees do not affect everyone equally. As the unchallenged economic evidence indicates, the most vulnerable in our society, people living in poverty, lone parent families (and among those lone-parent families headed by women), First Nations, recent immigrants, women in marital breakdowns, and people with disabilities are more likely to experience the economic barriers posed by hearing fees.[53] Depending on the socio-economic group, large portions of the population (30% to 50% of families) exist at $15,000 above the poverty line and cannot reasonably afford hearing fees.

67. Hearing fees therefore not only offend the principle of access to justice because of their purpose, they offend the principle of equal access to justice in effect. They unequally effect some of the most vulnerable groups in modern day society who are more likely to have legal problems[54] and who are supposed to be entitled to equal benefit of the law. The findings pertaining to economic evidence, the experience of Ms. Vilardell and the evidence of Peter Ritchie support the conclusion that hearing fees create a real and formidable barrier to access to justice for people of modest means and marginalized circumstances.

68. Hearing fees create an uneven playing field by putting up a barrier to access to the courts to only one party in the dispute. The size of the barrier is not within the control of the barricaded party. Opposing parties can increase the size of the barricade and therefore intentionally or unintentionally impede or prevent their opposing litigant to access the court to resolve the dispute. The facts of this case demonstrate that aptly.[55]

69. The rule of law is about equality. The notion of equality infuses the interpretation of all of the Constitution. In a case such as this, a singular provision of the *Charter* or constitutional principle does not govern or provide complete constitutional context to decide the issue. But additional provisions and principles, including sections 7, 15 and 28 of the *Charter*,

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[52] *R. v. Oakes*, [1986] 1 S.C.R. 103 at p. 136, [*Oakes*], JABA, Vol. I, Tab 19.
[53] Affidavit #1 of Robert Carson at Exhibit B "Carson Report" at pp. 260-264, ["*Carson Affidavit*"], JAR, Vol. III, Tab 20; Affidavit #1 of Susan Boyd, at pp. 35-44, JAR, Vol. II, Tab 18.
[54] *Action Committee Report*, *supra* note 24 at p.2, JABA, Vol. II, Tab 33.
[55] *Vilardell #2 BCSC*, *supra* note 1 at paras. 4-6 and 19-20, JAR, Vol. I, Tab 3.

support and inform the application of the rule of law to strike hearing fees as unconstitutional for unreasonably and unequally impeding access to justice.

Section 7

70. Section 7 protects "life, liberty and security of the person". The liberty aspects of s.7 compel an analysis of constitutional norms pertaining to the state and the individual. This cannot be described better than it was by Wilson J. in *R. v. Morgentaler*:

> The *Charter* is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The *Charter* reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.
>
> The *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity.[56]

71. Section 7 of the *Charter*, like all human rights protections, is rooted in the value of respect for the inherent dignity of the person. Inherent dignity cannot be taken away by disapproval, but liberty interests require the state to respect personal autonomy.[57]

72. Hearing fees engage the liberty interest because the state, through the imposition of hearing fees, deprives individuals of modest means of the ability to make fundamental personal decisions of whether to go to court to assert their legal rights. This is an impermissible infringement on liberty and results in an impermissible interference in the relationship between courts and individuals.

73. The "choice" to go to court to assert one's rights is the type of fundamental personal choice that must be protected by the *Charter*. As eloquently stated by the Court in

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[56] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at p.164 [*Morgentaler*], JABA, Vol. I, Tab 18.
[57] *Oakes*, *supra* note 52 at p.136, JABA, Vol. I, Tab 19; *Morgentaler*, *supra* note 56, JABA, Vol. I, Tab 18.

Pleau, the decision to go to court is not a mere choice but rather a question of "practical compulsion":

> In respect to the criteria and notwithstanding the respondent's assertion there is no compulsion to access the court, it is clear there is the "practical compulsion" referred to by Justice Majors. Citizens wronged, or believing themselves to have been wronged, or denied, or believing themselves to have been denied rights to which they are entitled and whether the alleged transgressor is another citizen or the state itself, apart from self help remedies, will see little alternative than to seek to have the judicial component of our Constitution affirm their rights. Self help remedies are unacceptable and therefore there is the practical compulsion to seek redress in the courts. The respondent's stated position that a litigant makes a choice to go to court and therefore there is no compulsion, fails to recognize the inherent right and in some cases need, for all of us to seek redress and relief. Although private resolution models have been developed and provide a valuable forum for resolving certain types of disputes, they cannot provide remedies in cases involving fundamental rights and freedoms. In respect to accessing the courts, there is a practical and real "compulsion".[58]

74. The fact that the fees are imposed on the party setting the matter for trial is also no answer to the deprivation of access to the court. Resort to the judicial system is no more a choice for a plaintiff seeking to enforce his or her rights than it is for a defendant called upon to defend him or herself; for both, the legal system is the best and often the only means of asserting his or her rights.

Section 15

75. The equality guarantee in the *Charter* informs the content of all other *Charter* rights. It is a guiding principle of statutory and common law, and it infuses international law. 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*."[59]

76. Section 15 is relevant to assessing the constitutionality of laws not directly challenged under section 15 because it demonstrates the Canadian commitment to promoting equality.[60]

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[58] *Pleau*, *supra* note 29 at para. 22, JABA, Vol. I, Tab.12
[59] *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p. 185, [*Andrews*], JABA, Vol. I, Tab 1; *R. v. Salituro*, [1991] 3 S.C.R. 654 at paras. 38 and 48-53, JABA, Vol. II, Tab 20.
[60] *R. v. Keegstra*, [1990] 3 S.C.R. 697 at p. 755-, JABA, Vol. I, Tab 17.

77. With regard to the relationship between the rule of law and hearing fees, section 15 jurisprudence demonstrates that equality is at the heart of the rule of law, and one of the constitutional principles it nourishes – democracy. Democracy is itself both an aspiration and a consequence of equality. Neither can be realized if access to justice is mired in an unequal regime.[61]

78. This case arose on the context of a family law proceeding where the person required to pay the hearing fees, Ms. Vilardell, was unemployed and at a financial disadvantage compared to her spouse. Ms. Vilardell and her estranged spouse were immigrants to Canada. English is her second language.

79. Ms. Vilardell's situation is like many other separated single parent women and marginalized people. Instead of the courts providing a means to gain equality, she found an unequal barrier to the court.

Section 28

80. The importance of considering the differential impact of the hearing fees on women is further underscored by s.28 of the *Charter*. Section 28 provides:

> Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

81. The expert evidence and the facts pertaining to Ms. Vilardell's experience demonstrate this phenomenon. Every day, the courts deal with women in marital breakdown who are financially disadvantaged compared to their former partners. Hearing fees exacerbate and extend the inequality by creating financial barriers in accessing the courts.

2. The Historical Record

82. The Court of Appeal erred in holding that there can be no right to be free from hearing fees given "the legal framework has traditionally organized the relationship between the two branches of government to include hearing fees with the power to waive payment *in forma*

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[61] *Andrews*, *supra* note 59 at pp. 171-172, JABA, Vol. I, Tab 1.

pauperis."[62] In so holding, the Court of Appeal misapplied *Christie* on how history is taken into account on constitutional review.

83. There are two aspects to this error. The first is that the Court of Appeal accepted that because hearing fees have been charged in the past, they cannot violate the unwritten constitutional principle of the rule of law and its constituent principle, access to justice. The second is that the hearing fees which have been charged through most of British history and through most of British Columbia's history (up to 1998) are different in quantity, quality and purpose than the hearing fees at bar.

84. With regard to the first error, constitutional principles evolve over time. Their content is not set in stone but rather develops in line with Canadian society. In particular, the content of the rule of law may include additional principles to those expressed in the jurisprudence to date and those expressed to date must be expansively interpreted to embrace new social imperatives.[63]

85. The historical inquiry in *Christie* was whether a general access to legal services was prescribed by the Constitution. The Court found that the general right to have a lawyer in court or tribunal proceedings was not part of the historical understanding of the rule of law. It also held that limited rights to counsel (in the criminal context) was supported by the historical understanding of the rule of law.

86. The Court of Appeal in this case fell into error by observing that the historical record demonstrated that hearing fees have been charged for most (but not all) of history, and inferring that history therefore provided constitutional legitimacy to hearing fees. The Court of Appeal failed to question whether the historical understanding of the rule of law was in accord with hearing fees which create barriers to access to the courts.

87. *Christie* does not stand for the proposition that where government has consistently taken a course of action, such actions have been constitutional and will continue to be so

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[62] *Vilardell BCCA, supra* note 2 at para. 14, JAR, Vol. II, Tab 6.
[63] *Christie, supra* note 4 at paras. 19-21, JABA, Vol. I, Tab 3; *PEI Provincial Court Judges Reference, supra* note 15 at paras. 85-89, 106, JABA, Vol. II, Tab 26; *Secession Reference, supra* note 15 at para. 52, JABA, Vol. II, Tab 27.

regardless of changing conditions or greater understanding of their impact on constitutional rights. There is no principle of law which holds that because something has been done historically, it must be constitutional. Such a state of affairs is only conclusive that the constitutionality has not been challenged. The historical analysis may also reveal that a historical custom, practice or common law rule, once fitting, has become out of step with Canadian society, particularly in the era of the *Charter*.[64]

88. By the same reasoning, prior lack of challenge is not a defence to a constitutional challenge. Such a proposition is in conflict with the equality underpinnings of constitutional principles necessary to ensure the rights of the marginalized and the vulnerable. By definition, those are often the persons on whose behalf laws, activities or decisions must be challenged on constitutional grounds. But also by definition, the marginalization and vulnerability of a group may mean that it takes a long time for the right circumstances to mount a challenge. There can be no principle that a challenge came "too late" to reveal the unconstitutionality of a law or behaviour.

89. This principle was most famously stated in *Reference re British North America Act, 1867 s. 24* (also know as the *Persons Reference* and *Edwards v. Canada*) where the Judicial Council of the Privy Council held that although women had not been considered "persons" for the purpose of nomination to the Senate at the time of Confederation they manifestly were "persons" in 1929. Lord Sankey said as follows:

> The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made, or the point being contested.
>
> Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.
>
> The appeal to history in this particular matter is not conclusive.[65]

90. So too, the fact that hearing fees have been charged for centuries does not mean that the hearing fees at issue here are constitutional in purpose of effect. As noted by the trial judge at paragraph 324:

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[64] *R v. Salituro*, *supra* note 59 at pp. 671-675, JABA, Vol. II, Tab 20.
[65] *Reference re British North America Act, 1867 s. 24*, [1930] A.C. 124, [1930] 1 D.LR. 98 at 104, JABA, Vol. II, Tab 24.

> Longstanding practices, on the other hand, may not have any particular authority despite their durability. This is simply to say that history is obviously crucial to an understanding of how we come to be where we are, but it is not always useful as a guide to where we should be. The law evolves, as they cases show. [66]

91. The second error is that the Court of Appeal's analysis does not take into account the differences between the hearing fees at issue in this case, and the history of hearing fees from the time of the *Statue of Henry VII* through Confederation.[67] The trial judge analysed the history in detail, and concluded that:

> …at Confederation, and for some time afterwards, fees were more onerous than they were later, and …. they had fallen to relatively nominal levels for several decades until the dramatic increases in 1998.[68]

92. With regard to the "dramatic increases in 1998", the trial judge concluded the hearing fees at issue in this case are part of the larger shift away from seeing the courts as a cost of good government to a discretionary expense which is subject to the financial and procedural preconditions that government imposes to limit the cases that get to the courts.[69]

93. Accordingly, the hearing fees charged at Confederation and the hearing fees at bar are different in quantity, quality and purpose. The dramatic increases in the fees in 1998 took them out of the range of affordability for many litigants. Most importantly, these dramatic increases incorporated a change in the purpose of the fees. As found by the trial judge, their primary purpose became to ration court time and to influence the availability of the courts through high, escalating fees.[70] That purpose must be central in the constitutional analysis. That purpose is not part of the history which the Court of Appeal relied upon.

C. Conflation of the Analysis of Constitutionality With Remedy

94. Constitutional remedial principles require a clear analysis and finding on constitutionality so that a proper remedy can be applied.[71] By failing to first consider the constitutionality of hearing fees, the Court of Appeal failed to undertake an appropriate analysis

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[66] *Vilardell #2 BCSC, supra* note 1 at para. 324, JAR, Vol. I, Tab 3.
[67] *Vilardell BCCA, supra* note 2 at para. 9, JAR, Vol. II, Tab 6.
[68] *Vilardell #2 BCSC, supra* note 1 at para. 299, JAR, Vol. I, Tab 3.
[69] *Ibid*. at para. 315-316, JAR, Vol. I, Tab 3.
[70] *Ibid*. at paras. 309-310, JAB, Vol. I, Tab 3.
[71] *Schachter supra* note 17 at pp. 694 and 702, JABA, Vol. II, Tab 21.

of whether there were constitutional shortcomings, and if so, their nature and extent. Instead, the Court of Appeal identified shortcomings in the exemption, and proceeded to address it. In the course of doing so, the Court of Appeal noted that hearing fees are "constitutionally suspect" with an "invidious" objective.

95. The Court of Appeal did not directly address the trial judge's finding of unconstitutionality. Given that the Court of Appeal undertook a remedy analysis, the inference is strong that it identified an unconstitutional element. However, the conclusions stated by Donald J.A., are not clear because in each case the remedy is blended into the constitutional analysis. They are found at paragraphs 4, 32 and 35 of the Court of Appeal decision:

> [4] In my opinion, were it not for the power of the courts to give relief from the hearing fees, they would be an unconstitutional impediment to justice. The power is found in an enlarged interpretation of the indigency provision.
>
> [32] … In this case, the constitutional inconsistency consists of an under-inclusive exemption from hearing fees, which restricts it to people who would be defined as impoverished. As I stated earlier, an enlarged interpretation of the indigency provision is necessary to uphold the constitutionality of hearing fees and remove a barrier to court access.
>
> [35] To the extent that hearing fees have the potential to interfere with the core judicial function of running a trial, which I think they do, the courts should respond to the interference. Judges must not shy away from dealing with such incursions. The remedy I propose in this case is a measured response to the problem.[72]

96. The failure to appropriately analyze the constitutionality of hearing fees led to an inappropriately focused remedy analysis as discussed below.

D. The Broadened Exemption Does Not Cure the Constitutional Defects

97. The Court of Appeal erred in concluding that the constitutional defects inherent in the hearing fees can be cured by reading in a broader exemption to cover persons "in need" as well as those who are impoverished. As noted above, the Court of Appeal addressed the exemption provision extant at the time the appeal was argued, not that which governed the trial and which covered persons who are indigent.

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[72] *Vilardell BCCA*, *supra* note 2 at paras. 4, 32 and 35, JAR, Vol. II, Tab 6.

98. Regardless of the terminology, the remedy misses the mark because the unconstitutional purpose of the hearing fees are left intact and the unequal effect continues. The Court of Appeal's remedy simply subjects persons who are in need (as well as those who are impoverished) to an access to justice barrier in the form of the requirement to bring a separate summary application, with and oral hearing and evidentiary requirements, to be exempted. It is a different barrier, but it is a barrier nonetheless.

99. This remedial approach is wrong in principle because the only remedy for laws which are unconstitutional in purpose is to strike them and because the remedy fashioned is unworkable and is an improper intrusion into the legislative role with unintended consequences.

1. Constitutional Remedial Principles

100. Section 52(1) of the *Constitution Act, 1982*[73] says as follows:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

101. When a law has been found to be unconstitutional, the court may strike it down, strike it down and temporarily suspend the declaration of invalidity to permit the legislature time to enact constitutional legislation in its place, or the court may resort to reading down or reading in.[74] The controlling considerations are to respect the purpose of the constitutional principles which have been infringed and to respect the separation of the functions among the executive, the legislative and the judiciary by ensuring that the remedy is one which, when fairly considered, is what the legislature would have enacted had the constitutionality shortcomings of the legislation been known at the time it was enacted.[75]

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[73] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, JABA, Vol. II, Tab 36.
[74] *Schachter, supra* note 17 at p. 695, JABA, Vol. II, Tab 21.
[75] *Ibid.* at p. 697; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 at paras. 33-34 and 56-57, [*Doucet-Boudreau*], JABA, Vol. I, Tab 6; *Vriend v. Alberta*, [1998] 1 SCR 493 [*Vriend*] at paras. 148-149, JABA, Vol. II, Tab 29.

102. The purposive approach is critical to constitutional remedies. Remedies must be responsive, ie: promote the purpose of the right infringed; and must be effective, ie: promote the purpose of the remedies provision to cure the constitutional wrong.[76]

103. The purposive approach includes the purpose of the offending legislation. If the legislation has a purpose which is consistent with the constitution, the courts are much more likely to utilize reading in or reading down than striking.[77] However, if the legislation has an unconstitutional purpose, it should be struck.[78]

104. *R. v. Ferguson* emphasized that a s. 52(1) remedy should be effective in the sense of ensuring constitutional compliance in all future cases:

> Section 52(1) provides a remedy for laws that violate Charter rights either in purpose or in effect…
>
> The presence of s. 52(1) with its mandatory wording suggests an intention of the framers of the Charter that unconstitutional laws are deprived of effect to the extent of their inconsistency, not left on the books subject to discretionary case-by-case remedies.[79]

105. In *Ferguson*, this Court also described the following limitations of the remedies of severance and reading in:

> When a court opts for severance or reading in as an alternative to striking down a provision, it does so on the assumption that had Parliament been aware of the provision's constitutional defect, it would likely have passed it with the alterations now being made by the court by means of severance or reading in. […] If it is not clear that Parliament would have passed the scheme with the modifications being considered by the court -- or if it is probable that Parliament would not have passed the scheme with these modifications -- then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere.[80]

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[76] *Doucet-Boudreau*, *supra* note 75 at paras. 24-25, JABA, Vol. I,Tab 6.
[77] *Vriend*, *supra* note 75, at para. 148-151 JABA, Vol. I, Tab 29.
[78] *Schachter*, *supra* note 17 at p.703, JABA, Vol. II, Tab 21.
[79] *R. v. Ferguson*, [2008] 1 S.C.R. 96 at paras. 61-65, [*Ferguson*], JABA, Vol. I, Tab 16.
[80] *Hryniak supra* note 24 at paras. 1-2 and 27-28, JABA, Vol. I, Tab 8; *Ferguson supra* note 798 at para. 51, JABA, Vol. I, Tab 16.

2. Problems With The Remedy Crafted By The Court of Appeal

106. As held in *Pleau*, hearing fees are structurally flawed because they place a charge on time in court (their pith and substance) and because they are high and they escalate.[81] These attributes fall out of their unconstitutional purpose, as discussed above. These structural flaws exist regardless of the income level of the litigant who must undertake to pay them.

107. Because the purpose of the fees is to inhibit the use litigants make of time before the court, litigants regard a trial as time which they have bought. McEwan J. observed the litigants in this trial behaving in a manner consistent with their understanding that each portion of a court day was something they had paid for and they needed to get their "money's worth".[82] That wrongful purpose affects the relationship between the court and the litigants, no matter what their means are, and survives an enlarged exemption.

108. Second, an exemption cannot cure the inequality effects because persons who cannot afford hearing fees are now subject to a different barrier – an extra court application to prove that they are impoverished or in need in order to dismantle the barrier. Instead of a remedy that requires the government to remove the unconstitutional barrier it has erected, the Court of Appeal requires litigants to bear the onus and to prove that they should not be subject to the barrier.

109. The onus is not one which is readily met. The proposition that access is preserved through exemptions for persons whose incomes fall below certain levels is rooted in "choice theory" – those above the minimum income levels can choose to spend their incomes on hearing fees. Setting aside the rather utopian assumptions underlying choice theory, it depends on a concomitant theory of being able to identify the boundaries of income where the choice theory can operate. The Court of Appeal described the other side of this line as the place where, but for hearing fees, litigants would be able to pursue their claims. However, economists are agreed that it is not possible to identify such a line.[83] This must be the same whether the line is indigency or

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[81] *Pleau*, *supra* note 29 at paras. 119-122, JABA, Vol. I, Tab 12.
[82] *Vilardell #2 BCSC*, *supra* note 1 at para. 418, JAB, Vol. I, Tab 3.
[83] *Carson Affidavit*, *supra* note 53 at pp. 2 and 10, JAR, Vol. II, Tab 20; Affidavit #1 of Douglas Hildebrand, Exhibit C, JAR, Vol. IV, Tab 23.

"impoverished or in need". The Court of Appeal simply moved a theoretical line which is incapable of being drawn.

110. In addition, the choice theory is inconsistent with the rule of law as the foundation of the Canadian Constitution and access to the courts as the guarantee of the rights and freedoms contained in the Constitution.[84]

111. The exemption is a pre-trial mini-trial based on an over-simplified premise that is inconsistent with the access to justice paradigm. Seen from the perspective of litigants, especially unrepresented litigants, each hearing involves an overwhelming number of tasks to complete (up to 119 steps per hearing), procedures to navigate, and legal principles to learn and apply for which the litigant has little or no experience or training.[85] Solutions to access to justice issues involve viewing the process from the perspective of litigants, simplifying pre-trial processes, removing barriers, and enhancing the understanding of how to resolve the legal problem or dispute.[86] The exemption provision requires an additional summary application to the court with evidence and an oral hearing. Regardless of its reach, it is inimical to enhancing access to justice.

112. When reading in, the court must consider the size of the group to be added to the group already included. Reading in should only be employed when the group to be added is relatively small.[87]

113. The number of persons at the poverty level and slightly above is considerable. An exemption provision which covers persons such as Ms. Vilardell and Mr. Dunham, a university professor and a veterinarian, whose combined income allowed them to live considerably above

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[84] *B.C.G.E.U.*, *supra* note 39 at pp. 229-230, JABA, Vol. I, Tab 4; *Pleau*, *supra* note 29 at paras. 102-110, JABA, Vol. I, Tab 12.
[85] *CBA Reaching Equal Justice*, *supra* note 24 at pp. 47 and 94, JABA, Vol. II, Tab 32; *Action Committee Report*, *supra* note 24, p.8, JABA, Vol. II, Tab 33; Ronald W. Staudt & Paula L. Hannaford, "*Access to Justice For The Self-Represented Litigant: An Interdisciplinary Investigation By Designers and Lawyers"* (2002) 52 Syracuse L Rev 1017 at p. 1027, JABA, Vol. II, Tab 34; *CBA Systems of Civil Justice Task Force*, *supra* note 21 at pp. 16-20, JABA, Vol. II, Tab 31.
[86] *CBA Reaching Equal Justice*, *supra* note 24 at pp. 47 and 60, JABA, Vol. II, Tab 32; *Action Committee Report*, *supra* note 24 at pp. 7-8, 13-14,16-17, 19, JABA, Vol. II, Tab 33.
[87] *Schachter*, *supra* note 17 at p. 712, JABA, Vol. II, Tab 21; *Vriend*, *supra* note 75 at paras. 162-163, JABA, Vol. II, Tab 29.

the poverty line,[88] yet still cannot afford hearing fees, will be very large. They are middle class, persons who regrettably make up a large portion of the access to justice crisis in Canada.[89]

114. These facts demonstrate the inaptness of the expanded exemption. It is no longer an "exemption" if the exemption becomes the rule but retains its structural inequality.

115. Compounding the problems with the exemption are a host of issues which arise out of the way litigation works from the perspective of litigants such as Ms. Vilardell and Mr. Dunham, both of whom were unrepresented.

116. In this regard, the remedial precision that the Court of Appeal intended to employ was not available. It could not fill in the gaps adequately and in trying to do so, it strayed into the legislature's role.[90]

117. For example, the exemption that the Court of Appeal re-wrote is in an entirely different part of the rules than the requirement to pay the hearing fees. In order for the remedy to be effective, litigants must be practically aware of it and able to effectively bring an application to use it. There was no evidence to support such an inference in this regard and the evidence was to the contrary. The Court of Appeal noted this with regard to the undertaking by which the litigant undertakes to pay the fees and remarked that "…women in family litigation, Aboriginal persons, those with disabilities and recent immigrants…should be made aware that hearing fees will not obstruct their pursuit of justice if they cannot afford them".[91] The Court of Appeal's order did not include any remedial elements that could make this aspiration a reality.

118. In order for such a remedy to be effective many aspects of the system must be redesigned, including: reference to the exemption in the part of the rules where the fees are set out and in the court forms where the undertaking is required; increasing and improving opportunities for the registry staff to bring the exemption to the attention of litigants; and creating and implementing effective means of guiding unrepresented litigants through the application process. Whether and, if so, how an effective exemption can be designed given the

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[88] *Vilardell #2 BCSC , supra* note 1 at para. 414, JAB, Vol. I, Tab 3.
[89] *Action Committee Report, supra* note 24 at pp. 2-4, JABA, Vol. II, Tab 33; *CBA Systems of Civil Justice Task Force Report, supra* note 21, JABA, Vol. II, Tab 31.
[90] *Schachter, supra* note 17 at p. 705, JABA, Vol II, Tab 21.
[91] *Vilardell BCCA, supra* note 2 at para. 39, JAR, Vol. II, Tab 6.

reality of the stresses and strains of the litigants and courts is an unanswered question. It is not one the courts are equipped to address with a reading in remedy.

119. In addition, the exemption with the words written in applies to all fees payable to the Crown, not just hearing fees. It is a significant leap to infer that the legislature, had it known that its exemption provision was under inclusive with regard to hearing fees, would have chosen to address that problem by amending the exemption for all fees payable to the Crown. In this regard, the remedy is overbroad. However, it is also significantly under inclusive because the Court of Appeal failed to address the hearing fee provision and exemption which applied to the case at bar, and failed to address the hearing fee provision and exemption which currently applies to family proceedings in British Columbia Supreme Court.

120. Finally, the Court of Appeal too lightly dismissed dignity concerns by saying they are addressed by changing the focus from socio-economic status (indigent or impoverished) to affordability (in need). This is not a satisfactory response to dignity aspirations underlying equality principles and the values of a free and democratic society, all of which inform the role of the courts in Canada.[92] The Court of Appeal added to this inadequate response the observation that "[a]ccording to the economic evidence in this case, the applicant will find himself or herself in the company of many similarly situated people in our community." The Court of Appeal failed to consider that this large mass of people are still subject to a barrier. Such an application is humiliating. Subjecting vulnerable persons to an additional court proceeding is an inappropriate response to a problem of inequality.

121. If this Court is of the view that a remedy other than striking down is appropriate, than such a remedy:

(a) must address the purpose of the constitutional right at issue; ie: equal access to justice;

[92] *Vriend, supra* note 75 at para. 67-69, JABA, Vol. II, Tab 29; *Oakes, supra* note 52 at para. 64, JABA, Vol. I, Tab 19; *R v. Salituro, supra* at note 59, JABA, Vol. II, Tab 20; *R. v. Big M Drug Mart, supra* note 14 at p.336, JABA, Vol. I, Tab 14; *Vilardell #2 BSCS, supra* note 1at paras. 404-405, JAR, Vol. I, Tab 3.

(b) not be characterized by a purpose that rations the time in court, inhibits access to justice, and causes some users of the justice system additional steps to bring the fees into constitutional conformity; and

(c) must be effective and so must reflect the practical reality of litigants in the courts.

122. The remedy as crafted offends the principles of constitutional remediation as it does not address the constitution right to be protected (equal access to the courts) or provide an effective means of securing equal access to the courts. It also leaves intact the unconstitutional purpose of the hearing fees which impermissibly interfere with the relationships between the courts and litigants. Reading in to the exemption drew the Court of Appeal too far into the role of the provincial legislature based on an unsound assumption that the legislature would have redrafted the exemption in this way.

123. The CBABC submits that the appropriate remedy is to strike item 14 of Appendix C, Schedule 1 to the former British Columbia Rules of Court and items 9 and 10 of the current Appendix C, Schedule 1 of the Supreme Court Civil Rules because hearing fees have an unconstitutional purpose and effect.

E. Conclusion

124. This case addresses the constitutional boundaries of government behaviour which affects access to justice. While the Constitution may permit some limits on how and when people have access to the courts, it is not within the bounds of the provincial legislature or the executive to create a regime of unequal access which is intended to inhibit access to the British Columbia Supreme Court. Hearing fees accentuate the barriers to justice of those most vulnerable in society and those most likely in need of a fair and accessible judicial system. This includes the poor and those whose incomes are slightly above the poverty line; women, especially those going through marital breakdown and/or are lone parents; First Nations; recent immigrants; and people with disabilities. Hearing fees are unconstitutional in both purpose and effect.

125. The trial judge was correct in declaring hearing fees unconstitutional. The constitutional question must be answered in the affirmative: 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), are unconstitutional on the basis that they infringe a right of access to justice and thereby offend the rule of law.

126. The remedy crafted by the Court of Appeal must be set aside and the provisions pertaining to hearing fees struck. The remedy does not address the unconstitutional purpose of the fees nor the unequal effects.

PART IV - SUBMISSIONS REGARDING COSTS

127. CBABC does not seek costs as against the AGBC or any party or intervenor except those provided for in the order of this Court made November 15, 2013.

PART V - ORDER REQUESTED

128. CBABC requests an order that the appeal be granted and the May 22, 2012 decision of McEwan J. be restored.

DATED at Vancouver, British Columbia, this ___ day of February, 2014.

Counsel for the Appellant,
Canadian Bar Association – British Columbia Branch,
SHARON D. MATTHEWS, Q.C. and
MELINA BUCKLEY

PART VI - TABLE OF AUTHORITIES

AUTHORITY	Paragraph(s) Referenced in Memorandum of Argument
CASES	
Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 [*Andrews*]	75, 77
Babcock v. Canada (Attorney General), 2002 SCC 57, [2002] 3 S.C.R. 3	53
British Columbia (Attorney General) v. Christie, 2007 SCC 21, [2007] 1 S.C.R. 873 [*Christie*]	10, 38, 44, 59, 84
British Columbia Government Employees' Union. v. British Columbia (Attorney General), [1988] 2 S.C.R. 214 [*B.C.G.E.U.*]	51, 56-57, 60, 110
British Columbia v. Imperial Tobacco Ltd., 2005 SCC 49, [2005] 2 S.C.R. 473 [*Imperial Tobacco*]	44, 53
Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R 3 [*Doucet-Boudreau*]	101-102
Hryniak v. Mauldin 2014 SCC 7	35, 105
John Carten Personal Law Corp. v. British Columbia (Attorney General) (1997), 153 D.L.R. (4th) 460 (B.C.C.A); 40 B.C.L.R. (3d) 181; leave to appeal ref'd [1998] S.C.C.A. No. 205 [*Carten*]	36, 56
MacMillan Bloedel Ltd. v. Simpson, [1995] 4 S.C.R. 725	34
Ontario v. Criminal Lawyers' Association of Ontario, 2013 SCC 43 [*Criminal Lawyers' Association*]	38, 54
Pleau v. Nova Scotia (Supreme Court, Prothonotary), (1999), 43 C.P.C. (4th) 201 (N.S.S.C.); 186 N.S.R. (2d) 1 [*Pleau*]	39, 60, 62, 73, 106, 110

AUTHORITY	Paragraph(s) Referenced in Memorandum of Argument
R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 [*R. v. Big M Drug Mart*]	28- 29, 120
R. v. Domm (1996), 31 O.R. (3d) 540 (Ont CA); leave to appeal ref'd, [1997] S.C.C.A. No. 78	56
R. v. Ferguson, [2008] 1 S.C.R. 96 [*Ferguson*]	104, 105
R. v. Keegstra, [1990] 3 S.C.R. 697	76
R. v. Morgentaler, [1988] 1 S.C.R. 30 [*Morgentaler*]	70, 71
R. v. Oakes, [1986] 1 S.C.R. 103 [*Oakes*]	65, 71, 120
R. v. Salituro, [1991] 3 S.C.R. 654	75, 87, 120
R. v. Schachter, [1992] 2 S.C.R. 679 [*Schachter*]	28, 94, 101, 103, 112, 116
Reference re: Alberta Legislation, [1938] S.C.R.100	40
Reference re: British North America Act, 1867 s. 24, [1930] A.C. 124, [1930] 1 D.L.R. 98	89
Reference re: Manitoba Language Rights, [1985] 1 S.C.R. 721 [*Manitoba Language Rights*]	44-45
Reference re: Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 [*PEI Provincial Court Judges Reference*]	27, 40-41, 45, 53, 84
Reference re: Secession of Québec, [1998] 2 S.C.R. 217 [*Secession Reference*]	27, 34, 44-45, 52, 54, 84

AUTHORITY	Paragraph(s) Referenced in Memorandum of Argument
Roncarelli v. Duplessis, [1959] S.C.R. 121	43
Vriend v. Alberta, [1998] 1 S.C.R. 493 [*Vriend*]	101, 103, 112, 120
SECONDARY SOURCES	
Canadian Bar Association, *Systems of Civil Justice Task Force Report*, (Ottawa: Canadian Bar Association, 1996) [*CBA Systems of Civil Justice Task Force Report*]	33, 111, 113
Canadian Bar Association, *Reaching Equal Justice: An Invitation To Envision And Act*, (Ottawa: Canadian Bar Association, 2013) [*CBA Reaching Equal Justice*]	35, 111
Canadian Forum Civil Justice, *Access to Civil & Family Justice – A Roadmap for Change*, (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013) [*Action Committee Report*]	35, 67, 111, 113
Ronald W. Staudt & Paula L. Hannaford, *"Access to Justice For The Self-Represented Litigant: An Interdisciplinary Investigation By Designers and Lawyers"* (2002) 52 Syracuse L Rev 1017	111

PART VII - LEGISLATION AT ISSUE

(Reproduced in Appellants' Book of Authorities)

1. *Constitution Act, 1867*, (U.K.), 30 & 31, Vict., c. 3, reprinted in R.S.C. 1985, App. II. No 5
2. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11
3. *Court Rules Act*, R.S.B.C. 1996, c. 80

APPENDIX A

Supreme Court of Canada | Cour suprême du Canada

November 15, 2013 | Le 15 novembre 2013

ORDER
MOTION

ORDONNANCE
REQUÊTE

TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA AND CANADIAN BAR ASSOCIATION - BRITISH COLUMBIA BRANCH v. ATTORNEY GENERAL OF BRITISH COLUMBIA
(B.C.) (35315)

THE CHIEF JUSTICE:

UPON APPLICATION by the appellant, Trial Lawyers Association of British Columbia, for an order stating constitutional questions in the above appeal;

AND THE MATERIAL FILED having been read;

IT IS HEREBY ORDERED THAT THE CONSTITUTIONAL QUESTIONS BE STATED AS FOLLOWS:

1. 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?

Any attorney general who intervenes pursuant to par. 61(4) of the *Rules of the Supreme Court of Canada* shall pay the appellants and respondent the costs of any additional disbursements they incur as a result of the intervention.

IT IS HEREBY FURTHER ORDERED THAT:

1. The appellants' records, factums and books of authorities shall be served and filed on or before February 11, 2014.

2. Any person wishing to intervene in this appeal under Rule 55 of the *Rules of the Supreme Court of Canada* shall serve and file a motion for leave to intervene on or before February 25, 2014.

3. The appellants and respondent shall serve and file their responses, if any, to the motions for leave to intervene on or before February 28, 2014.

4. Replies to the responses, if any, to the motions for leave to intervene shall be served and filed on or before March 3, 2014.

5. The respondent's record, factum and book of authorities shall be served and filed on or before March 31, 2014.

6. Any attorney general wishing to intervene pursuant to par. 61(4) of the *Rules of the Supreme Court of Canada* shall serve and file their factum and book of authorities no later than March 31, 2014.

À LA SUITE DE LA DEMANDE de l'appelante, Trial Lawyers Association of British Columbia, visant à obtenir la formulation de questions constitutionnelles dans l'appel susmentionné;

ET APRÈS AVOIR LU la documentation déposée;

LES QUESTIONS CONSTITUTIONNELLES SUIVANTES SONT FORMULÉES :

1. Est-ce que les frais d'audience prévus à l'article 14 de l'Appendix C, Schedule 1 (B.C. Reg. 10/96, et ses modifications) et ceux prévus aux articles 9 et 10 de l'Appendix C, Schedule 1 (B.C.Reg. 168/2009, et ses modifications) sont inconstitutionnels pour le motif qu'ils violeraient le droit d'accès à la justice et, de ce fait, porteraient atteinte à la primauté du droit?

Tout procureur général qui interviendra en vertu du par. 61(4) des *Règles de la Cour suprême du Canada* sera tenu de payer aux appelantes et à l'intimé les dépens supplémentaires résultant de son intervention.

IL EST EN OUTRE ORDONNÉ CE QUI SUIT :

1. Les dossiers, mémoires et recueils de sources des appelantes doivent être signifiés et déposés au plus tard le 11 février 2014.

2. Toute personne qui souhaite intervenir dans le présent appel en vertu de la règle 55 des *Règles de la Cour suprême du Canada* signifiera et déposera une requête en autorisation d'intervenir au plus tard le 25 février 2014.

3. Les appelantes et les intimés signifieront et déposeront leurs réponses aux demandes d'autorisation d'intervenir, le cas échéant, au plus tard le 28 février 2014.

4. Les répliques, le cas échéant, aux réponses aux demandes d'autorisation d'intervenir seront signifiées et déposées au plus tard le 3 mars 2014.

5. Les dossier, mémoire et recueil de sources de l'intimé doivent être signifiés et déposés au plus tard le 31 mars 2014.

6. Tout procureur général qui interviendra en vertu du par. 61(4) des *Règles de la Cour suprême du Canada* devra signifier et déposer son mémoire et son recueil de sources au plus tard le 31 mars 2014.

C.J.C.
J.C.C.

APPENDIX B

APPENDIX C

SCHEDULE 1

[rep. & sub. B.C. Reg. 10/96; am. B.C. Reg. 30/97; B.C. Reg. 227/97; rep. & sub. B.C. Reg. 75/98, Sch., s. 1; am. B.C. Reg. 266/98; am. B.C. Reg. 99/2000 am. B.C. Reg. 11/2003; am. B.C. Reg. 201/2004; am. B.C. Reg. 460/2004; am. B.C.Reg. 252/2005; am. B.C. Reg. 287/2005]

FEES PAYABLE TO THE CROWN

(Unless otherwise provided by Statute)

	In the Court of Appeal	$
1.	For filing a notice of appeal or a notice of an application for leave to appeal	291
2.	For filing an application to be heard by a Justice of the Court of Appeal excluding an application for leave to appeal	104
3.	For filing an application to be heard by 3 or more justices if the application is not returnable to the hearing of the appeal	208
4.	For filing a certificate of readiness	291
5.	For filing a book of authorities, other than a book of authorities filed jointly by 2 or more counsel of record	52
6.	For each half day spent in whole or in part on the hearing of an appeal, unless the hearing is for judgment only, payable by the party who files the certificate of readiness, unless the court orders payment by another party	156

	In the Supreme Court of British Columbia	$
7.	For commencing a proceeding in the Supreme Court that is not an appeal under Rule 53(6) or an application under section 78, 81, 83 or 87 of the *Legal Profession Act*	208
8.	For filing a statement of defence including a statement of defence to a counterclaim and a statement of defence to third party notice, (a) if a counterclaim is not included in the same record (b) if a counterclaim is included in the same record	 26 208
9.	For filing a counterclaim separately from a statement of defence	208
10.	For filing a third party notice	156
11.	For filing an interlocutory application, including applications under Rule 18A whether by motion or requisition, or any other application for which a fee is not payable under this Schedule	62
12.	For filing a notice of trial or hearing if proceedings are set down on the trial list	208

13.	For resetting a trial or hearing if proceedings are set down on the trial list, except where the matter must be reset due to the unavailability of a judge	200
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
15.	For filing a written agreement as provided for in section 122 of the *Family Relations Act*	31
16.	[*Repealed.* B.C. Reg. 99/2000]	
17.	For filing a requisition for judgment in default of appearance or defence	78

	Registrars and Special Referees	$
18.	For filing any appointment for a hearing before a Registrar or Special Referee but not including a hearing, inquiry or reference under the *Court Order Enforcement Act*	52
19.	For a Registrar's or Special Referee's hearing, unless the hearing is for reasons for decision only, payable by the party who files the appointment unless the court or registrar orders payment by another party	
	(a) if the time spent on the hearing is more than 1/2 day but not more than one day	78
	(b) if the time spent on the hearing is more than 1 day	
	(i) for each of the first 4 days spent, in whole or in part, on the hearing	156
	(ii) for each additional day spent after the first 4 days, in whole or in part, on the hearing	208
	(iii) for each additional day spent after the first 10 days, in whole or in part, on the hearing	312

	Probate, Administration and Resealing	$
20.	In addition to the fee payable under item 7, for every grant or ancillary grant of probate and administration, and on every resealing under the *Probate Recognition Act*, but not on a grant *de bonis non*, a cessate grant, or a double probate, if the gross value of all the real and personal property of the deceased situated in British Columbia that passes to the personal representative at the date of death exceeds $25 000, whether disclosed to the court before or after the grant is issued or resealed, (a) for each $1 000 or part of $1 000 by which the gross value of that real and personal property exceeds $25 000 but is not more than $50 000, the sum of (b) for each $1 000 or part of $1 000 by which the gross value of that real and personal property exceeds $50 000, the sum of No fee is payable under item 7 or this item to file for and obtain a grant of letters probate or administration if a person dies leaving an estate not exceeding $25, 000 in value.	6 14
	The fee payable under this item or item 7 is calculated on the values deposed to by or on behalf of a personal representative in the Statement of Assets, Liabilities and Distribution exhibited to the affidavit leading to the grant as required by the *Rules of Court*.	
21.	For filing a caveat	73
22.	For filing the records required for the issue of a citation	21

	Enforcement and Execution	$
23.	For filing the records required for the issue of a writ of execution, or a garnishing order before or after judgment, not including an application to the court	80
24.	For filing the records required for the issue of a subpoena to debtor	73
	Generally, in any Court	$
25.	For taking or swearing an affidavit for use in the court unless (a) the deponent swears the affidavit in the course of his or her duties as a peace officer or as an agent or officer of the Province, (b) the affidavit is sworn for the purpose of enforcing a maintenance or support order, or (c) provision is made elsewhere for a fee for that service	31
26.	For a search of a record, other than (a) an electronic search conducted from outside the registry, or (b) a search of a record of a proceeding by (i) a party to that proceeding (ii) a party's solicitor, or (iii) an official reporter who, or a representative of a transcription firm that, is retained by a party to produce a transcript of the proceeding	8

26.1	For returning by mail, fax or electronic mail the results of a search of a record, the aggregate of the following: (a) fee for returning the results (b) cost per page faxed	 10 1
26.2	For accessing from outside the registry, including, without limitation, viewing, printing or downloading, any record that is found by or created in response to an electronic search or request, including, without limitation, an index of cases produced in response to a search query	6
27.	For copies, per page	1
28.	For (a) a certified copy of a document of record (i) for 10 pages or less (ii) for each additional page over 10 pages, per page (b) issuing a certificate of judgment (c) issuing a certificate of pending litigation or other certificate not otherwise provided for (d) a copy, produced by the registry, of a transcript filed within 5 years of the request, per page	 31 6 31 31 3.50
29.	[*Repealed.* B.C. Reg. 11/2003]	
29.1	For returning by mail or by fax a confirmation of filing or rejection of a document submitted by fax to a fax pilot project registry	10
30.	For each payment into or out of court, except in a proceeding to which item 1, 7 or 11 applies	42
31.	For rental of a room for examination for discovery, per day	104

Despite anything in this schedule, if, after consultation with the Chief Justice, the Crown enters into an agreement with a person under which the person is authorized to access one or both of registry records and specified registry services and is exempted from payment of any or all of the fee provided under Items 26, 26.1, 26.2, and 27 for such access, the person may, on payment of any fee required under the agreement and on compliance with any other terms and conditions imposed by the agreement, access, during the term of the agreement, the regisrty records and registry services to which the agreement applies without payment of the fees from which the person is exempted under the agreement.

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.

(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.

[am. B.C. Reg. 227/97; B.C. Reg. 266/98; B.C. Reg. 11/2003; am. B.C. Reg. 201/2004, ss. 1 and 15; am. B.C. Reg. 460/2004; am. B.C. Reg. 252/2005; am. B.C. Reg. 287/2005]

GENERAL

Bonnerie v. K.I.M. Professional Management Services Ltd. (1982), 38 B.C.L.R. 364, 30 C.P.C. 32 (Co. Ct.) — An application is a document which is included in the definition of a proceeding in the *Law Stamp Act*, R.S.B.C. 1979, c. 226. If no stamp is attached to the application, it is void for all purposes.

ITEM 14

Dr. Morgan Campbell Inc. v. Towers (2006), 57 B.C.L.R. (4th) 363, 2006 BCSC 1030, at paras. [25] to [28] — The undertaking of counsel, prescribed by Form 35, "to pay all hearing fees" is a "guarantee" of payment, given by counsel on behalf of his or her client; it does not create a "solemn obligation upon [counsel] to become a co-adventurer in litigation", and therefore counsel has no "personal responsibility to pay" the fees.

ITEM 20

Bloom Estate (Re) (2004), 27 B.C.L.R. (4th) 176, 5 E.T.R. (3d) 1 (S.C.), at paras. [12] and [61] to [63] — Company shares whose ownership is evidenced by electronic entries in the books of banks and of the Canadian Depository for Securities Limited are situated at the place where the books are located, which is the place to which the personal representative must go to effect transmission.

Henry (Re) (1994), 113 D.L.R. (4th) 716 at p. 719, [1995] B.C.D. Civ. 4176-01 (S.C.) — The fee payable is the fee fixed by Order in Council as at the date the grant of probate is issued.

INDIGENT STATUS

See also Rule 56 of the *Court of Appeal Rules*.

Bingo City Games Inc. v. British Columbia Lottery Corp. (2004), 246 D.L.R. (4th) 713, 7 C.P.C. (6th) 143 (S.C.), at paras. [4] to [6] — This appendix contemplates indigency applications by corporations but the applications will only be allowed in "very unusual, if not unique" circumstances. It is not enough for a corporate applicant to prove that its business venture was launched and failed.

The court must take care not to sanction shams aimed at avoiding the payment of fees to the Crown.

Munro v. Stewart (1988), 31 B.C.L.R. (2d) 164 at pp. 165 to 167, [1988] B.C.D. Civ. 3576-04 (S.C.) — An application for relief from the requirement to pay the prescribed fees by a person claiming to be indigent should be made by praecipe entitled "In the Matter of an Application by X that he [or she] is indigent." The praecipe should be supported by an affidavit, exhibited to which should be the document intended to be filed. The application itself falls outside Schedule 1 and therefore no filing fee is payable for it. Once an order is made under Schedule 1, no further fees need be paid by the applicant in the proceeding, even if he or she later ceases to be indigent. A person receiving welfare or unemployment insurance benefits is not necessarily not indigent.

Despite anything in this schedule, if, after consultation with the Chief Justice, the Crown enters into an agreement with a person under which the person is authorized to access one or both of registry records and specified registry services and is exempted from payment of any or all of the fees provided under Items 26, 26.1, 26.2 and 27 for such access, the person may, on payment of any fee required under the agreement and on compliance with any other terms and conditions imposed by the agreement, access, during the term of the agreement, the registry records and registry services to which the agreement applies without payment of the fees from which the person is exempted under the agreement.

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.

(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.

Form 35
(Rule 39(2))
[en. B.C. Reg. 143/94; am. B.C. Reg. 165/97, s. 24]

[*Style of Proceeding*]

NOTICE OF TRIAL

TAKE NOTICE that the trial of this proceeding has been set down for hearing at the courthouse

at _____

on _____ [*Day, Month, Year*]

at the hour of _____

_____
Registrar

Nature of action _____

The place of trial set out above is the place of trial:
set out in the statement of claim
[*or*]
set out in the order of this Honourable Court dated _____

All solicitors of record and unrepresented parties of record in this action agree that not more than _____ is a reasonable time for the hearing of all evidence and argument in this action.
[*or*]
There is disagreement as to the estimate of a reasonable time for the hearing of all evidence and argument in this action. The estimates of the solicitors of record and of the unrepresented parties of record are as follows:

I undertake to pay all hearing fees payable under Appendix C, Schedule 1, Item 14.

Date_____ _____
Party [*or party's solicitor*]

Full name, address and telephone number
of party or solicitor having conduct of action:

name_____

address_____

_____

telephone_____

[*Full names, addresses and telephone numbers of all solicitors having conduct of action and unrepresented parties of record for contact by the registry.*]

APPENDIX C

APPENDIX C

SCHEDULE 1

FEES PAYABLE TO THE CROWN

(Unless otherwise provided by statute)

[Item 20 of Schedule 1 to Appendix C of the *Rules of Court* in effect through June 30, 2010 has no counterpart in the Civil Rules.]

Definitions

1. In this Schedule, "Item" means an Item in the table to this Schedule.

Amount payable

2 (1) Subject to subsection (2), for any Item, there must be paid to the government

(a) the fee shown in the table to this Schedule as being applicable to that Item, or

(b) if Part 1 of the table to this Schedule is amended under section 2 (4) of Schedule 4 of this Appendix C, the fee shown as being applicable to that Item in the table most recently published under section 2 (3) (b) of Schedule 4.

(2) A person filing a notice of civil claim or a response to civil claim need not pay the fee applicable to that filing if, at the time of filing, the person provides to the registry a certificate of mediation in Form 124 indicating,

(a) if the filing party is a named plaintiff, that that party or that party's representative engaged in mediation with one or more of the named defendants or a representative for one or more of the named defendants, or

(b) if the filing party is a named defendant, that that party or that party's representative engaged in mediation with one or more of the named plaintiffs or a representative for one or more of the named plaintiffs.

Electronic filing fee

3 (1) 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.

(2) 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.

	FEES APPLICABLE TO THE SUPREME COURT	
Item		Fee ($)
	Commencing proceedings	
1	Subject to section 2(2) of this Schedule, for commencing a proceeding that is not an appeal under Rule 23-6(8) or an application under section 66, 67, 70, 85 or 77 of the *Legal Profession Act*. No fee is payable under this item to file for and obtain a grant of probate or administration if a person dies leaving an estate that does not exceed $25 000 in value	200
2	For filing a counterclaim or a third party notice	200
	Responding to proceedings	
3	Subject to section 2 (2) of this Schedule, for filing a response to civil claim, a response to counterclaim or a response to third party notice	25
	Application filings	
4	For filing any one of the following: (a) a notice of application; (b) an appointment for a hearing before a registrar or a special referee but not including a hearing, inquiry or reference under the ***Court Order Enforcement Act***; (c) a requisition for a desk order; (d) a requisition for a default judgment	80
5	For setting a matter for hearing for which a fee is not payable under this Schedule. No fee is payable under this item to set a matter for hearing by notice of hearing of petition, notice of hearing of appeal or notice of hearing of stated case	80
	Other filings	
6	For filing a notice of case planning conference	80
7	For filing a notice of trial	200
	Hearings	
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
	Room Rentals	
11	For rental of examination for discovery room	100 per day

	Execution	
12	For filing a caveat, a citation, a garnishing order, a writ of execution or a subpoena to debtor	80
	Documents	
13	For taking or swearing an affidavit for use in the court unless (a) the person swearing the affidavit does so in the course of his or her duties as a peace officer or as an agent or officer of the government, or (b) provision is made elsewhere for a fee for that service	40
14	For a search of a record, other than (a) an electronic search conducted from outside the registry, or (b) a search of a record of a proceeding by (i) a party to that proceeding, (ii) a party's lawyer, or (iii) an official reporter who, or a representative of a transcription firm that, is retained by a party to produce a transcript of the proceeding	8
15	For returning by mail, fax or electronic mail the results of a search of a record, the aggregate of the following (a) fee for returning the results (b) cost per page faxed	 10 1
16	For accessing, without purchase, from outside the registry, including, without limitation, viewing, printing or downloading, any document that is found by or created in response to an electronic search or request, including, without limitation, an index of cases produced in response to a search query	6
17	For accessing any document referred to in Item 16 and purchasing that document	10
18	For copies, per page	1
19	For (a) a certified copy of a document (i) for 10 pages or less (ii) for each additional page over 10 pages, per page (b) issuing a certificate of judgment (c) issuing a certificate of pending litigation or other certificate not otherwise provided for (d) a copy, produced by the registry, of a transcript filed within 5 years of the request, per page	 40 6 40 40 4
20	For returning by mail or by fax a confirmation of filing or rejection of a document submitted by fax to a registry	10

[B.C. Reg. 119/2010, Sch. A, ss. 56 and 57; B.C. Reg. 65/2013, Sch. A, s. 7]

NOTE: Item 12 of the preceding table is amended by B.C. Reg. 149/2013, s. 17 (to come into force March 31, 2014), by striking out "caveat, a citation," and substituting "notice of dispute,".

permissive and not exhaustive of remedies and which method is simpler and more expeditious while being fair to all parties.

RULE 20-5 — PERSONS WHO ARE IMPOVERISHED

See also Rule 56 of the *Court of Appeal Rules*.

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. [B.C. Reg. 119/2010, Sch. A, s. 34; B.C. Reg. 112/2012, Sch. A, s. 4]**

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. [B.C. Reg. 95/2011, Sch. A, s. 10]**

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. [B.C. Reg. 119/2010, Sch. A, s. 34]

CASE LAW

CONTENTS

20-5 PERSONS WHO ARE IMPOVERISHED

Vilardell v. Dunham (2013), 223 A.C.W.S. (3d) 797, 2013 BCCA 65 (B.C. C.A.), at para. [33] — The words "or in need" should be read into this subrule after the word "impoverished".

20-5(1) COURT MAY DETERMINE INDIGENT STATUS

Madzar v. Insurance Corp. of British Columbia (2011), 200 A.C.W.S. (3d) 621, 2011 BCSC 398, at para. [5] — The court may order the provision to an indigent litigant of a transcript of the reasons for judgment of a judge who has determined an appeal from a judgment of the Provincial Court.

Stewart v. Canada (Attorney General) (2010), 196 A.C.W.S. (3d) 962, 2010 BCSC 1880, at para. [9] — The purpose of an order granting indigent status is to allow a party to pursue a claim [or mount a defence] the party could not otherwise afford to pursue [or mount].

Bingo City Games Inc. v. British Columbia Lottery Corp. (2004), 246 D.L.R. (4th) 713, 7 C.P.C. (6th) 143 (S.C.), at paras. [4] to [6] — The appendix which this rule replaces contemplated indigency applications by corporations but the applications were only allowed in "very unusual, if not unique" circumstances. It was not enough for a corporate applicant to prove that its business venture was launched and failed.

The court must take care not to sanction shams aimed at avoiding the payment of fees to the government.

Munro v. Stewart (1988), 31 B.C.L.R. (2d) 164 at pp. 165 to 167, [1988] B.C.D. Civ. 3576-04 (S.C.) — An indigency application itself fell outside the appendix which this rule replaces and therefore no filing fee was payable for it.

See also Rule 56 of the *Court of Appeal Rules*.

20-5(2) APPLICATION OF ORDER

Mesa Luna Dine & Dance Ltd. v. 536842 B.C. Ltd. (2008), 168 A.C.W.S. (3d) 960, 2008 BCSC 840, at paras. [5] and [6] — An application for an indigency order must be dismissed if it relates to steps in a proceeding that had been concluded when the application was made.

PART 21 — SPECIAL RULES FOR CERTAIN PROCEEDINGS

RULE 21-1 — ADMIRALTY MATTERS

Actions to which rule applies

(1) This rule applies if an action may be brought in rem against a ship or other property.

What actions may be brought in rem

(2) Except to the extent that jurisdiction has been otherwise specially assigned, an action may be brought in rem against a ship or other property that may be brought in rem in the Federal Court of Canada in all cases in which a claim for relief is made under or by virtue of Canadian maritime law or any other law of Canada relating to navigation and shipping.

Notice of civil claim — actions in rem

(3) An action in rem must be started by issuing a notice of civil claim in Form 81.

FORM 40
(RULE 12-1(2))

[*Style of Proceeding*]

NOTICE OF TRIAL

[*Rule 22-3 of the Supreme Court Civil Rules applies to all forms.*]

Filed by: .....[party(ies)].....
TAKE NOTICE that the trial and trial management conference of this proceeding have been set down at the following places, dates and times:

City	
Address of Courthouse	
Date [*dd/mmm/yyyy*]	
Time	

.....
Registrar

[*Check whichever one of the following boxes is correct and complete any required information.*]
The place of trial set out above is:

[ ] the place of trial set out in the notice of civil claim.

[ ] set out in the order of this Honourable Court dated .....[*dd/mmm/yyyy*]..... .

[*Check whichever one of the following boxes is correct and complete the required information.*]

[ ] All parties of record in this action agree that not more than ..... is a reasonable time for the hearing of all evidence and argument in this action.

[ ] There is a disagreement as to the estimate of a reasonable time for the hearing of all evidence and argument in this action. The estimates of the parties of record are as follows:

Name of party	Time Estimate

I undertake to pay all hearing fees payable under Appendix C, Schedule 1, Item 10.

Date: .....[*dd/mmm/yyyy*]..... .....

Signature of
[ ] filing party [ ] lawyer for filing party(ies)
.....[*type or print name*].....

Contact information for the parties and their lawyers is as follows:

[*Set out the full names, addresses and telephone numbers of all lawyers having conduct of this action and of all parties of record who are not represented by a lawyer and, in addition, any email addresses or fax numbers that may be used for contact purposes.*]

APPENDIX

[*The following information is provided for data collection purposes only and is of no legal effect.*]

Part 1: THIS CLAIM INVOLVES THE FOLLOWING:

[*Check one box below for the case type that best describes this case.*]

[ ] a motor vehicle accident

[ ] a personal injury, other than one arising from a motor vehicle accident

[ ] a dispute about real property (real estate)

[ ] a dispute about personal property

[ ] the lending of money

[ ] the provision of goods or services or other general commercial matters

[ ] an employment relationship

[ ] a dispute about a will or other issues concerning the probate of an estate

[ ] a matter not listed here

Part 2:

[*If an enactment is being relied on, specify. Do not list more than 3 enactments.*]

[B.C. Reg. 119/2010, Sch. A, s. 46; B.C. Reg. 95/2011, Sch. A, s. 15]

APPENDIX D

APPENDIX C

SCHEDULE 1

FEES PAYABLE TO THE CROWN

(Unless otherwise provided by statute)

Definitions

1. In this Schedule:

"Item" means an Item in the table to this Schedule;

"qualified mediator" means a person who is

(a) a member of the Family Roster of Mediate BC Society,

(b) a Family Mediation Canada Certified Family Mediator, or

(c) a person designated by the Ministry of Justice as a Family Justice Counsellor. [B.C. Reg. 95/2011, Sch. B, s. 22; B.C. Reg. 27/2013, Sch. 2, s. 16]

Amount payable

2 (1) Subject to subsection (2), for any Item, there must be paid to the government

(a) the fee shown in the table to this Schedule as being applicable to that Item, or

(b) if Part 1 of the table to this Schedule is amended under section 2 (4) of Schedule 4 of this Appendix C, the fee shown as being applicable to that Item in the table most recently published under section 2 (3) (b) of Schedule 4.

(2) A person filing a notice of family claim or a response to family claim need not pay the fee applicable to that filing if, at the time of filing, the person provides to the registry a certificate of mediation in Form F100 indicating that the mediator is a qualified mediator and,

(a) if the filing party is a named claimant, that that party or that party's representative engaged in mediation with one or more of the named respondents or a representative for one or more of the named respondents,

(b) if the filing party is a named respondent, that that party or that party's representative engaged in mediation with one or more of the named claimants or a representative for one or more of the named claimants, or

(c) that the mediator determined that it was not appropriate for the parties to engage in mediation and so advised those parties. [B.C. Reg. 119/2010, Sch. B, s. 46; B.C. Reg. 95/2011, Sch. B, s. 22]

Electronic filing fee

3 (1) 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.

(2) 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.

FEES APPLICABLE TO THE SUPREME COURT		
Item		Fee ($)
Commencing proceedings		
1	Subject to section 2 (2) of this Schedule, for commencing a family law case in the Supreme Court that is not an appeal under Rule 22-7 (8)	200
2	For filing a counterclaim	200
Responding to proceedings		
3	Subject to section 2 (2) of this Schedule, for filing a response to family claim or a response to counterclaim	25
Application filings		
4	For filing any one of the following: (a) a notice of application; (b) an appointment for a hearing before a registrar or a special referee but not including a hearing, inquiry or reference under the *Court Order Enforcement Act*; (c) a requisition for a desk order	80
5	For setting a matter for hearing for which a fee is not payable under this Schedule. No fee is payable under this item to set a matter for hearing by notice of hearing of petition, notice of hearing of appeal or notice of hearing of stated case	80
Other filings		
6	For filing a notice of judicial case conference	80
7	For filing a notice of trial	200
7.1	For filing a written agreement under Rule 2-1, whether or not that filing starts a family law case	30
7.2	For filing a determination of a parenting coordinator under Rule 2-1.1	30
Hearings		
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
Room Rentals		
11	For rental of examination for discovery room	100 per day
Execution		
12	For filing a caveat, a citation, a garnishing order, a writ of execution or a subpoena to debtor	80
Documents		
13	For taking or swearing an affidavit for use in the court unless (a) the person swearing the affidavit does so in the course of his or her duties as a peace officer or as an agent or officer of the government, or (b) provision is made elsewhere for a fee for that service	40
14	For a search of a record, other than (a) an electronic search conducted from outside the registry, or (b) a search of a record of a proceeding by (i) a party to that proceeding, (ii) a party's lawyer, or (iii) an official reporter who, or a representative of a transcription firm that, is retained by a party to produce a transcript of the proceeding	8
15	For returning by mail, fax or electronic mail the results of a search of a record (a) fee for returning the results (b) cost per page faxed	 10 1
16	For accessing, without purchase, from outside the registry, including, without limitation, viewing, printing or down-loading, any document that is found by or created in response to an electronic search or request, including, without limitation, an index of cases produced in response to a search query	6
17	For accessing any document referred to in Item 16 and purchasing that document	10
18	For copies, per page	1

19	For (a) a certified copy of a document (i) for 10 pages or less (ii) for each additional page over 10 pages, per page (b) issuing a certificate of judgment (c) issuing a certificate of pending litigation or other certificate not otherwise provided for, other than a certificate in Form F36 (d) a copy, produced by the registry, of a transcript filed within 5 years of the request, per page	 40 6 40 40 4
20	For returning by mail or by fax a confirmation of filing or rejection of a document submitted by fax to a registry	10

Despite anything in this Schedule, if, after consultation with the Chief Justice, the Crown enters into an agreement with a person under which the person is authorized to access one or both of registry records and specified registry services and is exempted from payment of any or all of the fees provided under Items 14, 15, 16, 17 and 18 for such access, the person may, on payment of any fee required under the agreement and on compliance with any other terms and conditions imposed by the agreement, access, during the term of the agreement, the registry records and registry services to which the agreement applies without payment of the fees from which the person is exempted under the agreement.

[B.C. Reg. 119/2010, Sch. B, ss. 47, 48; B.C. Reg. 95/2011, Sch. B, s. 23; B.C. Reg. 65/2013, Sch. B, s. 8; B.C. Reg. 68/2013]

SCHEDULE 2

FEES PAYABLE TO THE SHERIFF

Item		($)
1	For service	
	(a) receiving, filing, serving on one person and returning any process together with an affidavit of service or attempted service	100
	(b) each additional party served at the same address	20
	(c) each additional party served not at the same address	30
2	For arrest or execution on goods and chattels	
	(a) for every arrest, execution or similar writ or order	120
	(b) for attending, investigating, inventorying, cataloguing, taking possession, preparing for sale, per hour for each sheriff involved	75
	(c) as commission on the sum realized, or on the sum settled for, as the case may be, net of disbursements properly incurred	
	(i) if that net sum is $10 000 or less	10%

Service

(15) Unless the court otherwise orders, notice of an application for leave under subrule (14) must be served on the person under disability at least 10 days before the hearing of the application, in the manner provided by Part 6.

Litigation guardian must be appointed

(16) If no response to family claim, response to counterclaim or response to petition has been filed to a notice of family claim, counterclaim or petition on behalf of a person under disability, the person who started the family law case, before continuing the family law case against the person under disability, must obtain an order from the court appointing a litigation guardian for the person under disability.

Compromise by person under disability

(17) Unless an enactment otherwise provides, if a claim is made by or on behalf of a person under disability, no settlement, compromise, payment or acceptance of money paid into court, whenever entered into or made, so far as it relates to that person's claim, is binding without the approval of the court.

Approval of compromise

(18) If, before a family law case is started, an agreement is reached for the settlement or compromise of a claim of a person under disability, whether alone or with others, and it is desired to obtain the court's approval, application may be made by petition and the court may make any order it considers will further the object of these Supreme Court Family Rules.

RULE 20-4 —DECLARATORY RELIEF

Declaratory order

(1) A proceeding is not open to objection on the ground that only a declaratory order is sought, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

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 family law case, 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 family law case 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. [B.C. Reg. 119/2010, Sch. B, s. 24; B.C. Reg. 112/2012, Sch. B, s. 2]**

Application of order

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

- **(a) a family law case generally:**
- **(b) any part of a family law case;**
- **(c) a specific period of time;**

(d) one or more particular steps in a family law case.

How to apply

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

(a) a requisition in Form F17,

(b) a draft of the proposed order in Form F85, and

(c) an affidavit in Form F86. [B.C. Reg. 95/2011, Sch. B, s. 5]

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 family law case,

(b) the part of the family law case,

(c) the period of time, or

(d) the steps

to which the order applies. [B.C. Reg. 119/2010, Sch. B, s. 24]

PART 21 — GENERAL

RULE 21-1 —FORMS AND DOCUMENTS

Forms

(1) The forms in Appendix A must be used if applicable, with variations as the circumstances of the family law case require, and each of those forms must be completed by including the information required by that form in accordance with any instructions included on the form.

Documents

(2) Unless the nature of the document renders it impracticable, every document prepared for use in the court must be in the English language, legibly printed, typewritten, written or reproduced on 8 1/2 inch æ 11 inch durable white paper or durable off-white recycled paper.

Transcripts

(3) Transcripts of oral evidence must conform to subrule (2).

Space for stamp

(4) The first page of each document prepared for use in a family law case must contain a blank area extending at least 5 centimetres from the top of the page and at least 5 centimetres from the left edge of the page.

Style of proceeding

(5) A document prepared for use in a family law case must be headed with the style of proceeding set out on the most recent notice of family claim, counterclaim or petition to be filed in that family law case, but in a document, other than an order or a document that starts a family law case, if there is more than one party to the family law case identified as a claimant or as any other classification of party, the style of

FORM F44
(RULE 14-2(1))

Court File No.: .....
Court Registry: .....

In the Supreme Court of British Columbia

Claimant:

Respondent:

FAMILY

NOTICE OF TRIAL

[*Rule 21-1 of the Supreme Court Family Rules applies to all forms.*]

Filed by: .....[*party*].....
TAKE NOTICE that the trial and trial management conference of this family law case have been set down at the following places, dates and times:

City	
Address of Courthouse	
Date [*dd/mmm/yyyy*]	
Time	

.....
Registrar

[*Check whichever one of the following boxes is correct and complete any required information.*]

The place of trial set out above is the place of trial set out in

[ ] the notice of family claim.

[ ] the order dated .....[*dd/mmm/yyyy*]..... .

[*Check whichever one of the following boxes is correct and complete the required information.*]

[ ] All parties agree that not more than ..... is a reasonable time for the hearing of all evidence and argument in this family law case.

[ ] There is a disagreement as to the estimate of a reasonable time for the hearing of all evidence and argument in this family law case. The estimates of the parties are as follows:

Name of party	Time Estimate

I undertake to pay all hearing fees payable under Appendix C, Schedule 1, Item 10.

Date: .....[*dd/mmm/yyyy*]..... .....

Signature of

[ ] filing party [ ] lawyer for filing party(ies)

.....[*type or print name*].....

Contact information for the parties and their lawyers is as follows:

[*Set out the full names, addresses and telephone numbers of all lawyers having conduct of this family law case and of all parties who are not represented by a lawyer and, in addition, any email addresses or fax numbers that may be used for contact purposes.*]

[B.C. Reg. 119/2010, Sch. B, s. 37; B.C. Reg. 95/2011, Sch. B, s. 12]