

Supreme Court Judgments

Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)

Collection: Supreme Court Judgments

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Case number: 35315

Judges: McLachlin, Beverley; LeBel, Louis; Abella, Rosalie Silberman; Rothstein, Marshall; Cromwell, Thomas Albert; Moldaver, Michael J.; Karakatsanis, Andromache

On appeal from: British Columbia

Subjects: Constitutional law

Notes: SCC Case Information: [35315](#)



SUPREME COURT OF CANADA

CITATION: Trial Lawyers Association of British Columbia v.
British Columbia (Attorney General), 2014 SCC 59, [2014] 3
S.C.R. 31

DATE: 20141002
DOCKET: 35315

BETWEEN:

**Trial Lawyers Association of British Columbia and
Canadian Bar Association — British Columbia Branch**

Appellants/Respondents on cross-appeal

and

Attorney General of British Columbia

Respondent/Appellant on cross-appeal

- and -

**Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec,
Attorney General of Alberta, Advocates' Society, West Coast Women's Legal Education and
Action Fund and David Asper Centre for Constitutional Rights**

Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

REASONS FOR JUDGMENT: McLachlin C.J. (LeBel, Abella, Moldaver and
(paras. 1 to 69) Karakatsanis JJ. concurring)

REASONS CONCURRING IN Cromwell J.
RESULT:
(paras. 70 to 79)

DISSENTING REASONS: Rothstein J.
(paras. 80 to 117)

TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA v. BRITISH COLUMBIA (ATTORNEY GENERAL), 2014 SCC 59, [2014] 3 S.C.R. 31

**Trial Lawyers Association of British
Columbia and Canadian Bar Association
— British Columbia Branch** *Appellants/Respondents on cross-appeal*

v.

Attorney General of British Columbia *Respondent/Appellant on cross-appeal*

and

**Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of Alberta,
Advocates' Society,
West Coast Women's Legal Education and Action Fund
and David Asper Centre for Constitutional Rights** *Interveners*

Indexed as: Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)

2014 SCC 59

File No.: 35315.

2014: April 14; 2014: October 2.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Courts — Access to justice — Court hearing fees — Province enacting regulations establishing graduated court hearing fees — Regulations containing exemption provision from fees for persons who are “indigent” or “impoverished” — Whether province can establish hearing fee scheme under its administration of justice power pursuant to [s. 92\(14\)](#) of [Constitution Act, 1867](#) — Whether regulations imposing hearing fees denying some people access to courts infringing core jurisdiction of [s. 96](#) superior courts — Whether provincial hearing fee scheme constitutionally valid — [Constitution Act, 1867, ss. 92\(14\)](#), [96](#) — Court Rules Act, R.S.B.C. 1996, c. 80 — Supreme Court Rules, B.C. Reg. 221/90, as amended by B.C. Reg. 10/96 and B.C. Reg. 75/98 — Supreme Court Civil Rules, B.C. Reg. 168/2009, r. 20-5(1).

This case began as a family action. V and D were involved in a custody dispute. V went to court to have these issues resolved. In order to get a trial date, she had to undertake in advance to pay a court hearing fee. At the outset of the trial, V asked the judge to relieve her from paying the hearing fee. The judge reserved his decision on this request until the end of the trial. The parties were not represented by lawyers, and the hearing took 10 days. The hearing fee amounted to some \$3,600

— almost the net monthly income of the family. After legal fees had depleted her savings, V could not afford the hearing fee.

Aware that there was some authority for the proposition that hearing fees are unconstitutional, the judge invited submissions and interventions on the subject from outside parties and stayed V's obligation to pay the hearing fee. Ultimately, the B.C. branch of the Canadian Bar Association ("CBA"), the Trial Lawyers Association of British Columbia ("Trial Lawyers") and the Attorney General of British Columbia (the "Province") intervened.

The *Supreme Court Rules*, which were in place at the time this case began, were replaced in 2010 by the *Supreme Court Civil Rules*. The constitutionality of the hearing fees set out in both rules of court is challenged. The current hearing fees escalate from no fee for the first three days of trial, to \$500 for days four to ten, to \$800 for each day over ten. Rule 20-5(1) of the *Supreme Court Civil Rules* provides for an exemption from hearing fees if the court finds that a person is "impoverished". The exemption in place at the time of the trial provided that a judge could waive all fees for a person who is "indigent".

The trial judge in this case ruled that the hearing fee provision was unconstitutional. The Court of Appeal agreed that the scheme could not stand as it is, but held that if the exemption provision were expanded by reading in the words "or in need", it would pass constitutional muster. The Trial Lawyers and CBA appeal the remedy to this Court. The Province cross-appeals on the issue of the constitutionality of the hearing fees.

Held (Rothstein J. dissenting): The appeal should be allowed and the cross-appeal dismissed.

Per McLachlin C.J. and LeBel, Abella, Moldaver and Karakatsanis JJ.: Levying hearing fees is a permissible exercise of the Province's jurisdiction under [s. 92\(14\)](#) of the [Constitution Act](#),

[1867](#) ; however, that power is not unlimited. It must be exercised in a manner that is consistent with [s. 96](#) of the [Constitution Act, 1867](#) and the requirements that flow by necessary implication from [s. 96](#) . [Section 96](#) restricts the legislative competence of provincial legislatures and Parliament; neither level of government can enact legislation that removes part of the core or inherent jurisdiction of the superior courts. The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. Therefore, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts and impermissibly impinge on [s. 96](#) of the [Constitution Act, 1867](#) .

The connection between access to justice and [s. 96](#) is further supported by considerations relating to the rule of law. The [s. 96](#) function and the rule of law are inextricably intertwined. As access to justice is fundamental to the rule of law, it is natural that [s. 96](#) provide some degree of constitutional protection for access to justice. Concerns about the rule of law in this case are not abstract or theoretical. If people cannot bring legitimate issues to court, laws will not be given effect, and the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed.

[Section 92\(14\)](#) , read in the context of the Constitution as a whole, does not give the provinces the power to administer justice in a way that denies the right of Canadians to access courts of superior jurisdiction. Any attempt to do so will run afoul of the constitutional protection for the superior courts found in [s. 96](#) of the [Constitution Act, 1867](#) .

Hearing fees are unconstitutional when they deprive litigants of access to the superior courts. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court. A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum. But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants

who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts. It is the role of the provincial legislatures to devise a constitutionally compliant hearing fee scheme. But as a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court. A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an amount such that anyone who is not impoverished can afford them. Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims.

The hearing fee scheme at issue in this case places an undue hardship on litigants and impedes the right of British Columbians to bring legitimate cases to court and is unconstitutional. The current exemptions do not provide sufficient discretion to the trial judge to exempt litigants from having to pay hearing fees in appropriate circumstances.

V is excused from paying the hearing fee. The hearing fee scheme prevents access to the courts in a manner inconsistent with [s. 96](#) of the [Constitution Act, 1867](#) and the underlying principle of the rule of law. It therefore falls outside the Province's jurisdiction under [s. 92\(14\)](#) to administer justice.

The proper remedy is to declare the hearing fee scheme as it stands unconstitutional and leave it to the Legislature or the Lieutenant Governor-in-Council to enact new provisions, should they choose to do so. "Reading in" is a remedy sparingly used, and available only where it is clear the legislature, faced with a ruling of unconstitutionality, would have made the change proposed. This condition is not met here. Further, modifying the exemption as suggested might still not cover all litigants who cannot afford the hearing fee and other provisions might be required in order to avoid the onerous or undignified process of proving that one falls within the exception.

Per Cromwell J.: This case can be resolved on administrative law grounds and it is unnecessary to address the broader constitutional issues. There is a common law right of reasonable access to civil justice. This right of reasonable access may only be abrogated by clear statutory language. This common law right is preserved by the *Court Rules Act*. The common law right of access to civil justice allows court fees, but only if there is an exemption to ensure that no person is prevented from making an arguable claim or defence because he or she lacks the resources to carry on the proceeding. This is a flexible standard: whether a person has the ability to pay the fees depends not only on wealth and income, but also on the amount of their reasonable, necessary expenses and the magnitude of the fees. If the hearing fee exemptions cannot be interpreted to ensure that the common law right of access is not defeated, then the fees are *ultra vires* the *Court Rules Act*.

Here, the trial judge found as a fact that the hearing fees are unaffordable and therefore limit access for litigants who do not fall within the exemptions for the indigent and the impoverished. The plain meaning of the exemption, referring to persons who are “impoverished” and “indigent” cannot be interpreted to cover people of modest means who are prevented from having a trial because of the hearing fees. The hearing fees do not meet the common law standard preserved by the *Court Rules Act*. The exemptions under the *Court Rules Act* cannot be interpreted in a way that is consistent with the common law right of access to civil justice which is preserved by the *Court Rules Act*. Thus, the fees are *ultra vires* the regulation-making authority conferred by the *Court Rules Act*.

Per Rothstein J. (dissenting): The British Columbia hearing fee scheme does not offend any constitutional right. There is no express constitutional right to access the civil courts without hearing fees. [Section 92\(14\)](#) of the [Constitution Act, 1867](#) entrusts the administration of justice in the provinces to provincial legislatures. It is well established that provinces have the power under [s. 92\(14\)](#) to enact laws that prescribe conditions on access to the courts. Legislatures must balance a number of important values, including providing access to courts and ensuring that those same courts are adequately funded. They are accountable to voters for the choices they make. Absent a violation of the *Charter* and within the bounds of their constitutional jurisdiction, provincial

legislatures have leeway to make policy decisions regarding the allocation of funding and the recovery of costs.

The hearing fee scheme in this case cannot be struck down on the basis of a novel reading of [s. 96](#) of the [Constitution Act, 1867](#). [Section 96](#) protects the core jurisdiction of superior courts that is integral to their operations; however, it does not follow that legislation that places conditions on access to superior courts removes or infringes upon an aspect of their core jurisdiction. This Court has previously established a three-part test for determining whether legislation impermissibly removes an aspect of the core jurisdiction of superior courts. The majority does not apply this test because no aspect of the core jurisdiction of superior courts is removed by legislation that merely places limits on access to superior courts. In the absence of any demonstrated destruction of the core powers of the superior courts, there is no such removal sufficient to find a violation of [s. 96](#). Instead, the majority significantly expands what is meant by the “core jurisdiction” of the superior courts beyond what is contemplated in the text or this Court’s jurisprudence on the scope of [s. 96](#). The hearing fees are a financing mechanism and do not go to the very existence of the court as a judicial body or limit the types of powers it may exercise.

The unwritten principle of the rule of law does not support the striking down of legislation otherwise properly within provincial jurisdiction. The majority uses the rule of law to support reading a general constitutional right to access the superior courts into [s. 96](#). [Section 96](#) requires that the existence and core jurisdiction of superior courts be preserved, but this does not, necessarily imply the general right of access to superior courts described by the majority. So long as the courts maintain their character as judicial bodies and exercise the core functions of courts, the demands of the Constitution are satisfied. In using an unwritten principle to support expanding the ambit of [s. 96](#) to such an extent, the majority subverts the structure of the Constitution and jeopardizes the primacy of the written text. This purported constitutional right to access the courts circumvents the careful checks and balances built into the structure of the *Charter*. Unlike *Charter* rights, rights read into [s. 96](#) are not subject to s. 1 justification or the s. 33 notwithstanding clause.

This Court has clearly and persuasively cautioned against using the rule of law to strike down legislation. To circumvent this caution, the majority characterizes the rule of law as a limitation on the jurisdiction of provinces under [s. 92\(14\)](#) . Dressing the rule of law in division-of-powers clothing does not disguise the fact that the rule of law, an unwritten principle, cannot be used to support striking down the hearing fee scheme. Reading the unwritten principle of the rule of law too broadly would also render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers. Provisions such as ss. 11(d) and 24(1) of the *Charter* would be unnecessary if the Constitution already contained a more general right to access superior courts. The rule of law is a vague and fundamentally disputed concept. To rely on this nebulous principle to invalidate legislation based on its content introduces uncertainty into constitutional law and undermines our system of positive law.

Even if there were a constitutional basis upon which to challenge the British Columbia hearing fee scheme, it would not be unconstitutional. The majority's approach to determining whether hearing fees prevent litigants from accessing the courts overlooks some important contextual considerations. In particular, the majority does not account for measures that offset the burden of hearing fees or eliminate them altogether. When these measures are taken into consideration, there is no indication that the hearing fees at issue would prevent litigants from bringing meritorious legal claims.

Cases Cited

By McLachlin C.J.

Distinguished: *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, rev'g 2005 BCCA 631, 262 D.L.R. (4th) 51; **applied:** *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; **referred to:** *Pleau v. Nova Scotia (Prothonotary)*

(1998), 186 N.S.R. (2d) 1; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, aff'g (1985), 20 D.L.R. (4th) 399; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

By Cromwell J.

Referred to: *Polewsky v. Home Hardware Stores Ltd.* (2003), 66 O.R. (3d) 600; *Fabrikant v. Canada*, 2014 FCA 89, 459 N.R. 163; *Toronto-Dominion Bank v. Beaton*, 2012 ABQB 125, 534 A.R. 132; *R. v. Lord Chancellor, Ex parte Witham*, [1998] Q.B. 575; *R. v. Secretary of State for the Home Department, ex p. Saleem*, [2000] 4 All E.R. 814; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810.

By Rothstein J. (dissenting)

OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185; *De Fehr v. De Fehr*, 2001 BCCA 485, 156 B.C.A.C. 240; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1.

Statutes and Regulations Cited

A Mean to help and speed poor Persons in their Suits (Eng.), 11 Hen. 7, c. 12 [*Statute of Henry VII*].

[Canadian Charter of Rights and Freedoms, ss. 1 , 2 , 7 , 11 \(d\), 24\(1\) , 33 .](#)

[Constitution Act, 1867, ss. 92\(14\) , 96 .](#)

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

Employment and Assistance Act, S.B.C. 2002, c. 40.

Employment and Assistance for Persons with Disabilities Act, S.B.C. 2002, c. 41.

Supreme Court Civil Rules, B.C. Reg. 168/2009, rr. 14-1, 20-5(1), (3), App. C, Sch. 1.

Supreme Court Family Rules, B.C. Reg. 169/2009, App. C, Sch. 1.

Supreme Court Rules, B.C. Reg. 221/90 [rep. 168/2009], App. C, Sch. 1 [rep. & sub. 10/96; *idem* 75/98].

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Chiasson and Garson JJ.A.), 2013 BCCA 65, 43 B.C.L.R. (5th) 217, 334 B.C.A.C. 71, 572 W.A.C. 71, 359 D.L.R. (4th) 524, [2013] 7 W.W.R. 478, 286 C.R.R. (2d) 26, [2013] B.C.J. No. 243 (QL), 2013 CarswellBC 354, setting aside a decision of McEwan J., 2012 BCSC 748, 260 C.R.R. (2d) 1, [2012] B.C.J. No. 1016 (QL), 2012 CarswellBC 1485. Appeal allowed and cross-appeal dismissed, Rothstein J. dissenting.

Darrell W. Roberts, Q.C., and *Chantelle M. Rajotte*, for the appellant/respondent on cross-appeal the Trial Lawyers Association of British Columbia.

Sharon D. Matthews, Q.C., *Melina Buckley* and *Michael Sobkin*, for the appellant/respondent on cross-appeal the Canadian Bar Association — British Columbia Branch.

Bryant A. Mackey and *J. Gareth Morley*, for the respondent/appellant on cross-appeal.

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

Rochelle Fox and *Padraic Ryan*, for the intervener the Attorney General of Ontario.

Alain Gingras and *Dana Pescarus*, for the intervener the Attorney General of Quebec.

Donald Padget, for the intervener the Attorney General of Alberta.

Joseph J. Arvay, Q.C., Kelly D. Jordan and *Tim A. Dickson*, for the intervener the Advocates' Society.

Francesca V. Marzari and *Kasari Govender*, for the intervener the West Coast Women's Legal Education and Action Fund.

Paul Schabas and *Cheryl Milne*, for the intervener the David Asper Centre for Constitutional Rights.

The judgment of McLachlin C.J. and LeBel, Abella, Moldaver and Karakatsanis JJ. was delivered by

THE CHIEF JUSTICE —

I. Overview

[1] The issue in this case is whether court hearing fees imposed by the Province of British Columbia that deny some people access to the courts are constitutional. The trial judge, upheld on appeal, held that the legislation imposing the fees was unconstitutional. I agree.

[2] In my view, the fees at issue here violate [s. 96](#) of the [Constitution Act, 1867](#). Although the province can establish hearing fees under its power to administer justice under [s. 92\(14\)](#) of the [Constitution Act, 1867](#), the exercise of that power must also comply with [s. 96](#) of the [Constitution Act, 1867](#), which constitutionally protects the core jurisdiction of the superior courts. For the reasons discussed below, the fees impermissibly infringe on that jurisdiction by, in effect, denying some people access to the courts.

II. Facts

[3] This case began as a family action (2009 BCSC 434 (CanLII)). Ms. Vilardell and Mr. Dunham began a relationship in England and came to British Columbia, Canada, with their daughter. The relationship foundered, and the question arose — who should have custody of the child? Ms. Vilardell wanted to return with the child to Spain, her country of origin. Mr. Dunham wanted to keep the child in British Columbia. Ms. Vilardell also claimed an interest in Mr. Dunham’s house.

[4] Ms. Vilardell went to court to have these issues resolved. In order to get a trial date, she had to undertake in advance to pay a court hearing fee. At the outset of the trial, Ms. Vilardell asked the judge to relieve her from paying the hearing fee. The judge reserved his decision on this request until the end of the trial, so he could address the question of ability to pay after hearing evidence respecting the parties’ means, circumstances, and entitlement to property.

[5] The parties were not represented by lawyers, and the hearing took 10 days. The hearing fee amounted to some \$3,600 — almost the net monthly income of the family (2012 BCSC 748, 260 C.R.R. (2d) 1, at para. 396). Ms. Vilardell is not an “impoverished” person in the ordinary sense of the word. She is qualified as a veterinary surgeon in Europe. She was unemployed in the year leading up to the trial; the “family” income appears to have come mainly from her partner. She had some assets, including about \$10,000 in savings in a Canadian bank account, \$10,000 in a Barclays

Investment Savings Account in the United Kingdom, and \$4,500 in a registered retirement account in Spain. However, after legal fees had depleted her savings, she could not afford the hearing fee.

[6] Aware that there was some authority for the proposition that hearing fees are unconstitutional (*Pleau v. Nova Scotia (Prothonotary)* (1998), 186 N.S.R. (2d) 1 (S.C.)), the judge held that the Attorney General should be given an opportunity to intervene on Ms. Vilardell's application. He also invited submissions from the Law Society of British Columbia and the B.C. branch of the Canadian Bar Association. The judge stayed Ms. Vilardell's obligation to pay the hearing fee pending further order.

[7] Ultimately, the B.C. branch of the Canadian Bar Association and the Trial Lawyers Association of British Columbia intervened and challenged the hearing fee scheme as unconstitutional. They argued that people like Ms. Vilardell — possessing some means but not able to pay the hearing fee — have the right to have a court adjudicate their legal disputes, and that the hearing fee regime in British Columbia essentially denies them that right.

[8] The trial judge ruled that the hearing fee provision was unconstitutional. The Court of Appeal agreed that the scheme could not stand as it is, but held that if the exemption provision were expanded by reading in the words “or in need”, it would pass constitutional muster (2013 BCCA 65, 43 B.C.L.R. (5th) 217). The Trial Lawyers Association of British Columbia and the Canadian Bar Association — British Columbia Branch appeal the remedy to this Court. The Province cross-appeals on the issue of the constitutionality of the hearing fees.

III. The Legislative Regime

[9] The *Supreme Court Rules*, B.C. Reg. 221/90, as amended by B.C. Reg. 10/96 and B.C. Reg. 75/98, in place at the time this case began, were enacted as subordinate legislation under the *Court Rules Act*, R.S.B.C. 1996, c. 80. In 2010, the *Supreme Court Rules* were replaced by the

Supreme Court Civil Rules, B.C. Reg. 168/2009. The appellants challenge the constitutionality of the hearing fees set out in both rules of court.

[10] The current hearing fees are set out in Schedule 1 of Appendix C of the *Supreme Court Civil Rules* and the *Supreme Court Family Rules*, B.C. Reg. 169/2009. The fees escalate from no fee for the first three days of trial, to \$500 for days four to ten, to \$800 for each day over ten.

[11] Rule 20-5(1) of the *Supreme Court Civil Rules* provides for an exemption from hearing fees:

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.

[12] In B.C., the party that sets a case down for trial (usually the plaintiff) is required to undertake to pay the hearing fee — regardless of whether the trial length is based on that party's estimate or the estimate of the other party or the court.

[13] Applications for the impoverishment exemption are usually spoken to in court, often on an *ex parte* basis. The registry provides the applicant with an application form, a blank affidavit, and a draft order (r. 20-5(3)).

IV. Issues

[14] This appeal raises the following issues:

1. Is B.C.'s hearing fee scheme constitutionally valid?
2. If not, what is the appropriate remedy?

[15] The appellants challenge the Province's hearing fees on a number of grounds, including the rule of law and access to an independent judiciary.

[16] The Province argues that the hearing fee scheme is a valid exercise of the provincial power over the administration of justice under [s. 92\(14\)](#) of the [Constitution Act, 1867](#) .

[17] The question arises: What, if any, are the limits of the scope of provincial authority over the administration of justice under [s. 92\(14\)](#) ? The authority is a wide one, but it must be exercised harmoniously with the core jurisdiction of provincial superior courts protected by [s. 96](#) . The issue in this case comes down to whether [s. 96](#) is infringed by legislation that imposes hearing fees that deny some people access to the courts.

V. Analysis

A. *The Province Has the Power to Impose Hearing Fees*

[18] The Province has the power to legislate with respect to the administration of justice under [s. 92\(14\)](#) of the [Constitution Act, 1867](#) . This includes the power to charge fees for court services.

[19] [Section 92\(14\)](#) of the [Constitution Act, 1867](#) provides:

92. In each Province the Legislature may exclusively make Laws in relation to . . .

. . .

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

[20] In *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, this Court said:

The legislature has the power to pass laws in relation to the administration of justice in the province under [s. 92\(14\)](#) of the [Constitution Act, 1867](#) . This implies the power of the province to impose at least some conditions on how and when people have a right to access the courts. Therefore *B.C.G.E.U.* cannot stand for the proposition that every limit on access to the courts is automatically unconstitutional. [Emphasis added; para. 17.]

[21] Hearing fees fall squarely within the “administration of justice” and may be used to defray some of the cost of administering the justice system, to encourage the efficient use of court resources, and to discourage frivolous or inappropriate use of the courts.

[22] It was argued that *all* hearing fees are unconstitutional; as courts are a “first charge on government”, charging fees for time in court is as offensive to democracy as charging fees for voting. However, this argument is flawed because it focuses on the type of the fee, rather than the real problem — using fees to deny certain people access to the courts. Moreover, the argument raises policy issues relating to how governments should generate revenue and allocate their funds. Hearing fees paid by litigants who *can* afford them may be a justifiable way of making resources available for the justice system and increasing access to justice overall.

[23] I conclude that levying hearing fees is a permissible exercise of the Province’s jurisdiction under [s. 92\(14\)](#) of the [Constitution Act, 1867](#) .

B. *The Provinces' Power to Impose Hearing Fees Is Not Unlimited*

[24] On its face, [s. 92\(14\)](#) does not limit the powers of the provinces to impose hearing fees. However, that does not mean that the province can impose hearing fees in any fashion it chooses. Its power to impose hearing fees must be consistent with [s. 96](#) of the [Constitution Act, 1867](#) and the requirements that flow by necessary implication from [s. 96](#). This follows from two related tenets of constitutional interpretation.

[25] First, particular constitutional grants of power must be read together with other grants of power so that the Constitution operates as an internally consistent harmonious whole. Thus s. 92(14) does not operate in isolation. Its ambit must be determined, not only by reference to its bare wording, but with respect to other powers conferred by the Constitution. In this case, this requires us to consider [s. 96](#) of the [Constitution Act, 1867](#).

[26] Second, the interpretation of s. 92(14) must be consistent not only with other express terms of the Constitution, but with requirements that “flow by necessary implication from those terms”: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 66, *per* Major J. As this Court has recently stated, “the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text”: *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 26 (emphasis added).

[27] It follows that in determining the power conferred on the province over the administration of justice, including the imposition of hearing fees, by s. 92(14), the Court must consider not only the written words of that provision, but how a particular interpretation fits with other constitutional powers and the assumptions that underlie the text.

[28] In this case, the other constitutional grant of power that must be considered is [s. 96](#) of the [Constitution Act, 1867](#), which has been held to guarantee the core jurisdiction of provincial superior courts throughout the country.

[29] While s. 92(14) gives the provinces the responsibility for the administration of justice, [s. 96](#) gives the federal government the power to appoint judges to the superior, district and county courts in each province. Taken together, these sections have been held to provide a constitutional basis for a unified judicial presence throughout the country: *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 11 and 52. Although the bare words of [s. 96](#) refer to the appointment of judges, its broader import is to guarantee the core jurisdiction of provincial superior courts: Parliament and legislatures can create inferior courts and administrative tribunals, but “[t]he jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution” (*MacMillan Bloedel*, at para. 15). In this way, the Canadian Constitution “confers a special and inalienable status on what have come to be called the ‘[section 96](#) courts’” (*MacMillan Bloedel*, at para. 52).

[30] [Section 96](#) therefore restricts the legislative competence of provincial legislatures and Parliament — neither level of government can enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction: *MacMillan Bloedel*, at para. 37; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (“*Provincial Judges Reference*”), at para. 88.

[31] It is not suggested that legislating hearing fees that prevent people from accessing the courts would abolish or destroy the existence of the courts. The question is rather whether legislating hearing fees that prevent people from accessing the courts infringes on the core jurisdiction of the superior courts.

[32] The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by [s. 96](#) of the [Constitution Act, 1867](#). As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.

[33] The jurisprudence under [s. 96](#) supports this conclusion. The cases decided under [s. 96](#) have been concerned either with legislation that purports to transfer an aspect of the core jurisdiction of the superior court to another decision-making body or with privative clauses that would bar judicial review: *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *MacMillan Bloedel*; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220. The thread throughout these cases is that laws may impinge on the core jurisdiction of the superior courts by denying access to the powers traditionally exercised by those courts.

[34] In *Residential Tenancies*, the law at issue unconstitutionally denied access to the superior courts by requiring that a certain class of cases be decided by an administrative tribunal. In *Crevier*, the law at issue unconstitutionally denied access to the superior courts by imposing a privative clause excluding the supervisory jurisdiction of the superior courts. In *MacMillan Bloedel*, the legislation at issue unconstitutionally barred access to the superior courts for a segment of society — young persons — by conferring an exclusive power on youth courts to try youths for contempt in the face of superior courts. This Court, *per* Lamer C.J., relied on *Crevier*, concluding that “[it] establishes . . . that powers which are ‘hallmarks of superior courts’ cannot be removed from those courts” (*MacMillan Bloedel*, at para. 35).

[35] Here, the legislation at issue bars access to the superior courts in yet another way — by imposing hearing fees that prevent some individuals from having their private and public law disputes resolved by the courts of superior jurisdiction — the hallmark of what superior courts exist to do. As in *MacMillan Bloedel*, a segment of society is effectively denied the ability to bring their matter before the superior court.

[36] It follows that the province’s power to impose hearing fees cannot deny people the right to have their disputes resolved in the superior courts. To do so would be to impermissibly impinge on [s. 96](#) of the [Constitution Act, 1867](#). Rather, the province’s powers under [s. 92\(14\)](#) must be exercised in a manner that is consistent with the right of individuals to bring their cases to the superior courts and have them resolved there.

[37] This is consistent with the approach adopted by Major J. in *Imperial Tobacco*. The legislation here at issue — the imposition of hearing fees — must conform not only to the express terms of the Constitution, but to the “requirements . . . that flow by necessary implication from those terms” (para. 66). The right of Canadians to access the superior courts flows by necessary implication from the express terms of [s. 96](#) of the [Constitution Act, 1867](#) as we have seen. It follows that the province does not have the power under [s. 92\(14\)](#) to enact legislation that prevents people from accessing the courts.

[38] While this suffices to resolve the fundamental issue of principle in this appeal, the connection between [s. 96](#) and access to justice is further supported by considerations relating to the rule of law. This Court affirmed that access to the courts is essential to the rule of law in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214. As Dickson C.J. put it, “[t]here 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” (p. 230). The Court adopted, at p. 230, the B.C. Court of Appeal’s statement of the law ((1985), 20 D.L.R. (4th) 399, at p. 406):

... access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. . . . 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 the same category. [Emphasis added.]

As stated more recently in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, *per* Karakatsanis J., “without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined” (para. 26).

[39] The [s. 96](#) judicial function and the rule of law are inextricably intertwined. As Lamer C.J. stated in *MacMillan Bloedel*, “[i]n the constitutional arrangements passed on to us by the British and recognized by the preamble to the [Constitution Act, 1867](#), the provincial superior courts are the foundation of the rule of law itself” (para. 37). The very rationale for the provision is said to be “the maintenance of the rule of law through the protection of the judicial role”: *Provincial Judges Reference*, at para. 88. As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the [s. 96](#) courts, it is only natural that [s. 96](#) provide some degree of constitutional protection for access to justice.

[40] In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state’s power to make and enforce laws and the courts’ responsibility to rule on citizen challenges to them may be skewed: *Christie v. British Columbia (Attorney General)*, 2005 BCCA 631, 262 D.L.R. (4th) 51, at paras. 68-9, *per* Newbury J.A.

[41] This Court’s decision in *Christie* does not undermine the proposition that access to the courts is fundamental to our constitutional arrangements. The Court in *Christie* — a case concerning a 7 percent surcharge on legal services — proceeded on the premise of a fundamental right to access the courts, but held that not “every limit on access to the courts is automatically unconstitutional” (para. 17). In the present case, the hearing fee requirement has the potential to bar litigants with legitimate claims from the courts. The tax at issue in *Christie*, on the evidence and arguments adduced, was not shown to have a similar impact.

[42] Nor does the argument that legislatures generally have the right to determine the cost of government services undermine the proposition that laws cannot prevent citizens from accessing the superior courts. (Indeed, the Attorney General does not assert such a proposition.) The right of the province to impose hearing fees is limited by constitutional constraints. In defining those constraints, the Court does not impermissibly venture into territory that is the exclusive turf of the legislature. Rather, the Court is ensuring that the Constitution is respected.

[43] I conclude that s. 92(14), read in the context of the Constitution as a whole, does not give the provinces the power to administer justice in a way that denies the right of Canadians to access courts of superior jurisdiction. Any attempt to do so will run afoul of the constitutional protection for the superior courts found in [s. 96](#) .

C. *When Do Hearing Fees Become Unconstitutional?*

[44] The remaining question is how to determine when hearing fees deny access to superior courts.

[45] Litigants with ample resources will not be denied access to the superior courts by hearing fees. Even litigants with modest resources are often capable of arranging their finances so that, with reasonable sacrifices, they may access the courts. However, when hearing fees deprive

litigants of access to the superior courts, they infringe the basic right of citizens to bring their cases to court. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court.

[46] A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum — as tacitly recognized by the exemption in the B.C. scheme at issue here. But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts.

[47] Of course, hearing fees that prevent litigants from bringing frivolous or vexatious claims do not offend the Constitution. There is no constitutional right to bring frivolous or vexatious cases, and measures that deter such cases may actually increase efficiency and overall access to justice.

[48] It is the role of the provincial legislatures to devise a constitutionally compliant hearing fee scheme. But as a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court. A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an amount such that anyone who is not impoverished can afford them. Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims. This is in keeping with a long tradition in the common law of providing exemptions for classes of people who might be prevented from accessing the courts — a tradition that goes back to the *Statute of Henry VII*, 11 Hen. 7, c. 12, of 1495, which provided relief for people who could not afford court fees.

D. *Application to Hearing Fee at Issue*

[49] To recap, provinces may impose hearing fees as part of the administration of justice. However, this power does not extend to hearing fees that effectively prevent litigants from accessing the courts because they cannot afford the fees.

[50] On the findings of the trial judge, the hearing fee scheme at issue in this case places an undue hardship on litigants and impedes the right of British Columbians to bring legitimate cases to court.

[51] The trial judge held that the primary purpose of the hearing fee scheme is to provide an incentive for efficient use of court time and a disincentive for lengthy and inefficient trials (para. 309). The secondary purpose of the scheme is to provide sufficient revenue to offset the costs of providing civil justice in Provincial Court Small Claims matters, Supreme Court civil claims, and Supreme Court family claims (paras. 302-7). To put it in other words, the Province's aim is to establish a revenue-neutral trial service.

[52] The trial judge, affirmed by the Court of Appeal, found that B.C.'s hearing fees go beyond these purposes and limit access to courts for litigants who are not indigent or impoverished (and therefore who do not fall under the exemption provision), but for whom the hearing fees are nonetheless unaffordable. This is supported by the evidence. At trial, the appellants filed a report by economist Robert Carson, who used a "Market Basket Measure" ("MBM") developed in 2003 by Human Resources Development Canada to measure poverty. Assuming that the test for the indigency exemption was based on an MBM measure of poverty, he concluded that a significant percentage of the population would not be exempted from hearing fees (because their income is above MBM), but would nonetheless have great difficulty affording the hearing fees for a 10-day trial, like the one in this case, because the fees would equal or exceed any income in excess of MBM. In other words, the

effect of the fees is unconstitutional, because for many litigants, bringing a claim would require sacrificing reasonable expenses.

[53] Mr. Carson's summary is as follows:

In 2005 the median after tax income of couples households in B.C., without children, was \$53,468. About 8.7% of couples without children had incomes below MBM which is, in my opinion, a conservative (that is, a relatively low) estimate of the line between poverty and income sufficient to meet people's basic needs. Adding \$15,000 to MBM results in an estimate of 82,500 couples whose incomes were above MBM and therefore, too high to qualify for exemption from hearing fees, using an MBM based test, but still well below the median level. In this group, comprising one couple in five, incomes ranged from \$21,745, the amount required simply to cover basic needs to \$36,745, an amount sufficient to increase average daily expenditures per household member by about \$20 above MBM. At the upper end of the income range in this group, fees for a ten day trial would equal the daily spendable income, in excess of MBM, for almost three months.

Among couples households with children median income was \$68,357 in 2005. MBM for B.C. couples with children was about \$34,750 in that year. About 15% of couples with children had incomes below MBM. Adding \$15,000 to MBM resulted in an estimate of 67,000 couples with relatively low incomes who would not meet an MBM based test for indigence. The addition of \$15,000 to MBM income increased spendable income by about \$11 per day per household member, in couples families with children. The number of couples with incomes exceeding MBM either marginally, or by as much as \$15,000 per year, is about equal to the number of couples with incomes below MBM who could qualify for exemption. In other words, there are at least as many people who would not be exempt from fees, but who would be hard pressed to meet the cost of hearing fees, as there are who could claim exemption.

Among female loan [sic] parent families in private households, median income in 2005 was \$33,151. About four in ten such households would meet an MBM based test for indigence. Adding \$15,000 to MBM results in an estimate of 31,600 families with incomes between MBM and \$43,700. About one loan [sic] parent female headed family in four would not meet an MBM based test for indigence but would, at the outside, be able to spend \$12 per day per family member more than MBM. Similar calculations, for loan [sic] parent families headed by males, adds about 7,000 families to those I would consider to be living on modest incomes, with similarly limited ability to bear the costs of hearing fees.

Among single men median pre-tax income in 2005 was \$28,175 and among single women, it was \$22,833. About 28% of all singles had incomes below MBM and about one in five had incomes between MBM and the medians. Medians exceeded MBM by \$12,645 (men) and \$7,300 (women). It is my opinion that among single people in B.C. at least half either would either have to seek indigent status, or would find hearing fees to be a significant barrier to their access to a court.

On the basis of fairly limited information with respect to income distribution and the extent and quality of participation in paid work among First Nations people, recent immigrants and the disabled it is my opinion that people in these groups are certain to be over-represented among those likely to qualify for indigent status, and among those with incomes that are too high to qualify for indigence, but low enough that hearing fees would represent a significant barrier to recourse to a court. [Emphasis added.]

[54] Mr. Carson’s evidence was based on the Province’s previous hearing fee scheme, in place at the time this case began. However, in my view, it is equally relevant to the current hearing fee regime. Under the current *Supreme Court Civil Rules*, the fee for a 10-day trial is \$3,500 — almost the same as under the previous *Supreme Court Rules*.

[55] Indeed, the effect of B.C.’s hearing fee scheme is illustrated in this case. Ms. VilardeLL is not “impoverished”, and is therefore not caught by the exemption provision. However, the fee for Ms. VilardeLL’s 10-day trial amounted to her family’s net monthly income. This was on top of \$23,000 already spent on lawyer fees. She could not afford the fee. That the fee arbitrarily was imposed only on Ms. VilardeLL and escalated with the length of the trial — even though she did not control the length of the trial — worsened her situation.

[56] The Province argues that the exemption provision for impoverished litigants should be interpreted broadly to allow a judge to waive the hearing fees in appropriate cases, thereby avoiding the potentially unconstitutional impact of the scheme. I cannot accept this submission.

[57] The current exemption, cited above, provides an exemption for people receiving benefits under the *Employment and Assistance Act*, S.B.C. 2002, c. 40, and the *Employment and Assistance for Persons with Disabilities Act*, S.B.C. 2002, c. 41, or for persons who are “otherwise impoverished”. The exemption in place at the time of the trial provided that a judge could waive all fees for a person who is “indigent”. I conclude that these exemptions do not provide sufficient

discretion to the trial judge to exempt litigants from having to pay hearing fees in appropriate circumstances.

[58] I agree with the view of the trial judge that the plain meaning of the words “impoverished” and “indigent” does not cover people of modest means who are nonetheless prevented from having a trial because of the hearing fees:

The AGBC . . . reconciles the principle that the courts are meant to be accessible by pointing to the indigency exemption. It is clear, however, that if indigency is not redefined to include those who would otherwise be described as middle class, many will be forced to forego the assertion of their rights and interests in a courtroom for lack of money. I again note that in this particular case the cost of hearing fees for 10 days approached the net income of the family for a month.

. . .

. . . The AGBC’s answer dares the courts to redefine indigency — while maintaining the label — in a manner that would bring the whole exercise into disrepute. The courts simply do not engage in calling things what they are not, and could not be enlisted into an executive function by administering a more general form of means test to those who come before them, without compromising the appearance of independence, and the fact of equality before the law, as the TLABC has noted: see para. 180 herein. The “indigency” remedy does not cure this obvious impediment to access to justice. [paras. 396 and 398]

[59] Like the trial judge, I am of the view that the courts must read “impoverished” in its ordinary sense. A judge may waive fees for the very poor, and no one else. As the trial judge noted, while a person who cannot afford a fee of \$100 or \$200 may properly be described as “indigent” or “impoverished”, it is awkward to use these terms to describe a middle class family’s inability to pay a fee that amounts to a month’s net salary. As the trial judge found, there “may be something at odds between the indigency test and the level of the fees” (para. 26).

[60] Other objections to the exemption provision can be raised. Litigants are required to come before the court, explain why they are indigent and beg the court to publicly acknowledge this status and excuse the payment of fees. This is arguably an affront to dignity and imposes a significant

burden on the potential litigant of adducing proof of impoverishment — a burden she may be unable or unwilling to assume. This burden may further hamper access to the court. In clear cases of impoverishment, the task may be relatively straightforward. However, if “impoverished” were extended to the large group of additional people that the evidence indicates is prevented from going to court because of the current hearing fees, the task might be much more complex. In such circumstances, there is a practical concern the exemption application itself may contribute to hardship.

[61] The contention that this hearing fee regime promotes proportionality and efficiency by weeding out unmeritorious cases and encouraging shorter trials, thereby actually increasing access to the courts, does not answer the findings of the trial judge that it unconstitutionally prevents access to the courts. Moreover, the trial judge held that it is “dubious” that the hearing fees at issue here increase efficacy and fairness (para. 310). They penalize long trials simply because they are long, and do so by incremental leaps. But long trials are not necessarily inefficient. Prolonged trials may be caused by the nature of the case or the evidence. Litigants in long but efficient trials ought not to be penalized by hearing fees — particularly fees that escalate with the length of the trial.

[62] Moreover, the plaintiff who is required to pay the hearing fee may not control the length or efficiency of the trial — the defendant may be responsible for prolonging the matter. The ability of the trial judge to make orders for costs against such a defendant does not address the real problem — before being able to set a matter down for trial the plaintiff must undertake to pay hearing fees that may escalate through no fault of her own. If she cannot afford the prospective fees, she may reasonably conclude that she cannot bring her dispute to the court.

[63] Most fundamentally, unlike cost awards, the imposition of the hearing fees at issue are not dependent on efficiency or the merit of one’s claim. The hearing fees imposed by this scheme escalate to \$800 per day after 10 days of trial — the highest price tag in the country — without any

relationship to the efficiency of the proceeding. These hearing fees do not promote efficient use of court time; at best they promote *less* use of court time.

[64] I conclude that the hearing fee scheme prevents access to the courts in a manner inconsistent with [s. 96](#) of the [Constitution Act, 1867](#) and the underlying principle of the rule of law. It therefore falls outside the Province's jurisdiction under [s. 92\(14\)](#) to administer justice.

VI. What Is the Appropriate Remedy?

[65] This leaves the question of the appropriate remedy. The trial judge struck down the scheme as unconstitutional. The Court of Appeal preferred the remedy of “reading in” the words “or in need” into the exemption provision.

[66] “Reading in” is a remedy sparingly used, and available only where it is clear that the legislature, faced with a ruling of unconstitutionality, would have made the change proposed: *Schachter v. Canada*, [1992] 2 S.C.R. 679. I am not satisfied that this condition is met here. The legislature or Lieutenant Governor in Council has a number of options, from abandoning or modifying the hearing fee to changing the exemption provision. Moreover, any expansion of the exemption provision will be at odds with the legislative objective of deterring use of the courts. “Reading in” to cure the constitutional defect of the hearing fee scheme would defeat the purpose of the legislation.

[67] I would also note that modifying the exemption as suggested by the Court of Appeal might still not cure the problem; it is not clear that the term “or in need” will cover all litigants who cannot afford the hearing fee and other provisions might be required in order to avoid the onerous or undignified process of proving that one falls within the exception.

[68] The proper remedy is to declare the hearing fee scheme as it stands unconstitutional and leave it to the legislature or the Lieutenant Governor in Council to enact new provisions, should they choose to do so.

VII. Conclusion

[69] The appeal is allowed and the cross-appeal is dismissed, both without costs. I would affirm the declaration of unconstitutionality of the trial judge and set aside the order of the Court of Appeal expanding the exemption provision. Ms. Vilardell is excused from paying the hearing fee.

The following are the reasons delivered by

[70] CROMWELL J. — I prefer to resolve this case on administrative law grounds and find that it is unnecessary to address the broader constitutional issues raised by the appellants. The submissions made by the Attorney General of British Columbia in my view make it desirable to follow this narrower route to the resolution of the appeal.

[71] First, the Attorney General concedes that there is a common law right of reasonable access to civil justice: R.F., at para. 10. I agree. Courts in Canada and the United Kingdom have recognized the existence of this right: *Polewsky v. Home Hardware Stores Ltd.* (2003), 66 O.R. (3d) 600 (S.C.J.), at para. 60; *Fabrikant v. Canada*, 2014 FCA 89, 459 N.R. 163, at para. 7; *Toronto-Dominion Bank v. Beaton*, 2012 ABQB 125, 534 A.R. 132, at paras. 17-20; in the United Kingdom, see *R. v. Lord Chancellor, Ex parte Witham*, [1998] Q.B. 575, at p. 585; *R. v. Secretary of State for the Home Department, ex p. Saleem*, [2000] 4 All E.R. 814 (C.A.), at p. 820.

[72] It is widely accepted, and the Attorney General agrees, that this right of reasonable access may only be abrogated by clear statutory language: *Polewsky*, at para. 60; *Witham*, at p. 585; *Saleem*, at p. 821. The Attorney General does not suggest that there is any such clear language in the

Court Rules Act, R.S.B.C. 1996, c. 80. On the contrary, the Attorney General's position is that this common law right is *preserved* by the Act: R.F., at para. 10.

[73] The Attorney General also rightly points out that since the hearing fees in dispute here are found in subordinate legislation made under the authority of the *Court Rules Act*, they should be reviewed for consistency with the Act. As I have said, the Attorney General's position, which I accept, is that the right is preserved, not abrogated by the Act: R.F., at paras. 10 and 12. It follows, as the Attorney General submits, that subordinate legislation purportedly adopted pursuant to the *Court Rules Act* which is inconsistent with the common law right of access to civil justice is *ultra vires*: *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at para. 24.

[74] The Attorney General submits, and I agree, that the common law right of access to civil justice allows court fees, but only if there is an exemption to ensure that no person is prevented from making an arguable claim or defence because he or she lacks the resources to carry on the proceeding: R.F., at para. 71. This is a flexible standard: whether a person has the ability to pay the fees depends not only on wealth and income, but also on the amount of their reasonable, necessary expenses and the magnitude of the fees: *ibid.*, at para. 72.

[75] Finally, the Attorney General submits, again in my view correctly, that if the hearing fee exemptions cannot be interpreted to ensure that the common law right of access is not defeated, then the fees are *ultra vires* the *Court Rules Act*: R.F., at para. 47.

[76] The trial judge found as a fact that the hearing fees are unaffordable and therefore limit access for litigants who do not fall within the exemptions for the indigent and the impoverished. This finding and the evidentiary basis for it are reviewed in the Chief Justice's reasons, at paras. 52-55. Like the Chief Justice, I accept this key factual conclusion of the trial judge. It follows that the issue then becomes whether the exemptions under the *Court Rules Act* can be interpreted so that they are

consistent with the common law right of access to civil justice, which is preserved, as the Attorney General submits, by the *Court Rules Act*.

[77] On that question, I agree with the Chief Justice and the trial judge: the plain meaning of the exemption, referring to persons who are “impoverished” and “indigent” cannot be interpreted to cover people of modest means who are prevented from having a trial because of the hearing fees: trial judge’s reasons, 2012 BCSC 748, 260 C.R.R. (2d) 1, at paras. 396-98; reasons of the Chief Justice, at para. 61.

[78] In summary, the hearing fees do not meet the common law standard which the Attorney General correctly accepts is preserved by the *Court Rules Act*. The exemption cannot be interpreted in a way that would do so. It follows, in accordance with the Attorney General’s submissions, that the fees are *ultra vires* the regulation-making authority conferred by the *Court Rules Act*.

[79] I would therefore allow the appeal, dismiss the cross-appeal, set aside the order of the Court of Appeal and in its place declare that the hearing fees are *ultra vires* the *Court Rules Act*. Ms. Vilardell does not have to pay the hearing fee. It is not necessary for me to answer the constitutional question. I would make no order as to costs.

The following are the reasons delivered by

[80] ROTHSTEIN J. (dissenting) — Courts do not have free range to micromanage the policy choices of governments acting within the sphere of their constitutional powers. This appeal concerns the constitutionality of a hearing fee scheme contained in the British Columbia *Supreme Court Civil Rules*, B.C. Reg. 168/2009, to encourage the efficient use of courtroom time in civil courts and to recoup some of the costs for the provision of such time. The appellants submit that the imposition of hearing fees is unconstitutional. The majority finds that the hearing fees *do* fall within the powers of a province to make laws in relation to the administration of justice in the province but that they are

nevertheless unconstitutional when they cause undue hardship to some litigants and effectively prevent their access to courts. In the majority's view, [s. 96](#) of the [Constitution Act, 1867](#), supported by the rule of law, provides a general right to access the courts. They find that this right is undermined by hearing fees that Canadians cannot afford.

[81] In my respectful view, the British Columbia hearing fee scheme does not offend any constitutional right. The majority must base its finding on an overly broad reading of [s. 96](#), with support from the unwritten constitutional principle of the rule of law, because there is no express constitutional right to access the civil courts without hearing fees.

[82] In engaging, on professed constitutional grounds, the question of the affordability of government services to Canadians, the majority enters territory that is quintessentially that of the legislature. The majority looks at the question solely from the point of view of the party to litigation required to undertake to pay the hearing fee. It does not consider, and has no basis or evidence upon which to consider, the questions of the financing of court services or the impact of reduced revenues from reducing, abolishing, or expanding the exemption from paying hearing fees. Courts must respect the role and policy choices of democratically elected legislators. In the absence of a violation of a clear constitutional provision, the judiciary should defer to the policy choices of the government and legislature. How will the government deal with reduced revenues from hearing fees? Should it reduce the provision of court services? Should it reduce the provision of other government services? Should it raise taxes? Should it incur debt? These are all questions that are relevant but that the Court is not equipped to answer. I respectfully dissent.

I. [Section 92\(14\)](#) of the [Constitution Act, 1867](#)

[83] [Section 92\(14\)](#) of the [Constitution Act, 1867](#) entrusts the administration of justice in the provinces to provincial legislatures. Legislatures must balance a number of important values, including providing access to courts and ensuring that those same courts are adequately funded. They

are accountable to voters for the choices they make. In a constitutional democracy such as ours, courts must be wary of subverting democracy and its accountability mechanisms beneath an overly expansive vision of constitutionalism.

[84] In *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, Beetz J. stated that unlike in a [Canadian Charter of Rights and Freedoms](#) case,

in a distribution of powers case, once it is demonstrated that the enacting legislature is competent, the balancing of conflicting values depends on the political judgment of such legislature and cannot be reviewed by the courts without their passing upon the wisdom of the legislation. [p. 56]

Accordingly, absent a violation of the [Charter](#) and within the bounds of their constitutional jurisdiction, provincial legislatures have leeway to make policy decisions regarding the allocation of funding and the recovery of costs.

[85] In this appeal, the majority does not dispute that the provinces are competent to prescribe hearing fees under [s. 92\(14\)](#) of the [Constitution Act, 1867](#). Yet they nevertheless proceed to assess whether the hearing fees infringe a general right to access the courts, a right derived from an overly expansive understanding of both [s. 96](#) of the [Constitution Act, 1867](#), and the unwritten principle of the rule of law. In my view, this inquiry unduly enlarges the role of courts and hampers the ability of legislatures to respond to complex legislative challenges.

[86] I therefore take exception to the majority striking down the British Columbia hearing fee scheme on a novel reading of [s. 96](#) and the rule of law. On the contrary, it is well established that provinces have the power under [s. 92\(14\)](#) to enact laws that prescribe conditions on access to the courts. In *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, this Court expressly held:

The legislature has the power to pass laws in relation to the administration of justice in the province under [s. 92\(14\)](#) of the [Constitution Act, 1867](#). This implies the power of the province to impose at least some conditions on how and when people have a right to access the courts. [Emphasis added; para. 17.]

[87] This is not to deny that universal, free (or at least affordable) access to courts is a laudable goal; it is merely to say that [s. 96](#) and the unwritten principle of the rule of law cannot be used to force provincial governments to expend funds or forego cost recovery to bring this goal to fruition. As this Court recently found, “the allocation of resources between competing priorities remains a policy and economic question; it is a political decision and the legislature and the executive are accountable to the people for it” (*Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 43, *per* Karakatsanis J.).

II. [Section 96](#) of the [Constitution Act, 1867](#)

[88] The majority states that [s. 96](#) of the [Constitution Act, 1867](#) limits the power of the provinces to administer justice under [s. 92\(14\)](#). It is true that [s. 96](#) protects the core jurisdiction of superior courts that is integral to their operations. In *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, this Court stated:

Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment. [para. 37, *per* Lamer C.J.]

[89] However, it does not follow that legislation that places conditions on access to superior courts removes or infringes upon an aspect of their core jurisdiction. In *Re Residential Tenancies Act*, 1979, [1981] 1 S.C.R. 714, Dickson J. (as he then was) established a three-part test for determining whether legislation impermissibly removes an aspect of the core jurisdiction of superior courts. This Court later affirmed and summarized the test as follows:

The first branch of the test is an historical inquiry into “whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation” (p. 734). . . . The second step asks whether the function in question is “judicial” in its institutional setting, and [Dickson J.] contrasts “judicial” functions with policy making functions. The final branch of the test involves an assessment of the “tribunal’s function as a whole in order to appraise the impugned function in its entire institutional context” (p. 735).

(*MacMillan Bloedel*, at para. 12, citing *Residential Tenancies*.)

[90] But the majority on this appeal does not apply this test because no aspect of the core jurisdiction of superior courts is removed by legislation that merely places limits on access to superior courts. In the absence of any demonstrated destruction of the core powers of the superior courts, there is no such removal sufficient to find a violation of [s. 96](#) . Instead, the majority approach significantly expands what is meant by the “core jurisdiction” of the superior courts beyond what is contemplated in the text or this Court’s jurisprudence on the scope of [s. 96](#) . The cases cited by the majority speak of the inability of governments to remove “core or inherent jurisdiction”, as doing so “emasculates the court, making it something other than a superior court” (*MacMillan Bloedel*, at paras. 29-30; see also *Residential Tenancies*; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220). The British Columbia government’s measures cannot be said to have “emasculated” B.C. courts or to have made them something “other than a superior court”. The hearing fees are a financing mechanism and do not go to the very existence of the court as a judicial body or limit the types of powers it may exercise. The concept of core jurisdiction in [s. 96](#) cannot justify striking down the regulations at issue in this appeal.

III. The Rule of Law

[91] The majority reads the unwritten principle of the rule of law as supporting the striking down of legislation otherwise properly within provincial jurisdiction. It is true that this Court has, on occasion, turned to unwritten principles to fill in “gaps in the express terms of the constitutional text” (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997]

3 S.C.R. 3, at para. 104). But there are no such gaps in the text of [s. 92\(14\)](#) . With respect, gaps do not exist simply because the courts believe that the text should say something that it does not. This Court, in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, reiterated its earlier insistence on the primacy of the written constitutional text, stating that unwritten principles “could not be taken as an invitation to dispense with the written text of the Constitution” (para. 53, affirming *Re: Remuneration of Judges*, at paras. 93 and 104). The written constitutional provisions guide government action and provide the touchstone for judicial review, anchoring the authority of courts to invalidate non-compliant laws enacted by democratically elected governments.

[92] There is no express right of general access to superior courts for civil disputes in the text of the Constitution. Rather, the Constitution specifies the particular instances in which access to courts is guaranteed. [Section 24\(1\)](#) of the [Charter](#) provides that persons whose [Charter](#) rights have been infringed or denied may apply to the courts for a remedy. It is in this sense that this Court, in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, held that access to courts for the purpose of vindicating [Charter](#) rights is protected (pp. 228-29). [Section 11](#) (d) of the [Charter](#) guarantees persons charged with an offence the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”.

[93] But the majority uses the rule of law to support reading a general constitutional right to access the superior courts into [s. 96](#) . This provision of the [Constitution Act, 1867](#) requires that the existence and core jurisdiction of superior courts be preserved, but this does not, for the reasons herein, *necessarily* imply the general right of access to superior courts described by the majority. So long as the courts maintain their character as judicial bodies and exercise the core functions of courts, the demands of the Constitution are satisfied. In using an unwritten principle to support expanding the ambit of [s. 96](#) to such an extent, the majority subverts the structure of the Constitution and jeopardizes the primacy of the written text.

[94] This purported constitutional right to access the courts circumvents the careful checks and balances built into the structure of the *Charter* . Unlike *Charter* rights, rights read into [s. 96](#) are absolute. They are not subject to [s. 1](#) justification or the [s. 33](#) notwithstanding clause. These provisions reflect a recognition that, in certain circumstances, governments will be permitted to enact legislation or take action that places limits on *Charter* rights. Indeed, s. 33 contemplates and permits the legislative override of, among other things, the fundamental freedoms described in [s. 2](#) , the right to life, liberty and security of the person embodied by [s. 7](#) , and numerous rights applicable in the criminal context. The question my colleagues avoid answering is why access to superior courts for civil disputes warrants even stronger protection than those rights expressly enumerated in the *Charter* .

[95] I now turn to the specific unwritten constitutional principle invoked by the majority.

[96] The majority proposes to invalidate those provincial laws relating to the administration of justice that, in their view, are contrary to the rule of law. The unwritten principle of the rule of law, as defined by this Court, consists of three elements:

- (1) “[T]he law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power” (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 748);
- (2) The rule of law “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order” (*ibid.*, at p. 749);
and
- (3) “[T]he exercise of all public power must find its ultimate source in a legal rule” (*Reference re Secession of Quebec*, at para. 71, quoting *Re: Remuneration of Judges*, at para. 10).

As this Court found in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, “none of the principles that the rule of law embraces speak directly to the terms of legislation” (para. 59).

[97] This Court has clearly and persuasively cautioned against using the rule of law to strike down legislation:

So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. . . .

This does not mean that the rule of law as described by this Court has no normative force. As McLachlin C.J. stated in *Babcock*, at para. 54, “unwritten constitutional principles”, including the rule of law, “are capable of limiting government actions”. See also *Reference re Secession of Quebec*, at para. 54. But the government action constrained by the rule of law as understood in *Reference re Manitoba Language Rights* and *Reference re Secession of Quebec* is, by definition, usually that of the executive and judicial branches. Actions of the legislative branch are constrained too, but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed). [Emphasis added.]

(*Imperial Tobacco*, at paras. 59-60)

[98] To circumvent this caution against using the rule of law as a basis for striking down legislation, the majority characterizes the rule of law as a limitation on the jurisdiction of provinces under [s. 92\(14\)](#) of the [Constitution Act, 1867](#). The majority acknowledges that imposing hearing fees is a permissible exercise of the province’s jurisdiction according to the *written* constitutional text — that is, [s. 92\(14\)](#) (para. 23). But they ultimately conclude that the hearing fees fall outside the province’s jurisdiction in part because the fees are inconsistent with the *unwritten* principle of the rule of law (paras. 38-40). Dressing the rule of law in division-of-powers clothing does not disguise the fact that the rule of law, an unwritten principle, cannot be used to support striking down the hearing fee scheme.

[99] In using the rule of law to support the striking down of legislation that is indisputably within the scope of [s. 92\(14\)](#) of the [Constitution Act, 1867](#), without attention to this Court's entrenched understanding of the rule of law, the majority ignores this Court's caution in *Imperial Tobacco*:

The rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text. [Emphasis added; para. 67.]

With respect, the rule of law does not demand that this Court invalidate the hearing fee scheme — if anything, it demands that we uphold it.

[100] The unwritten principles of our Constitution often work at cross purposes. Even if we were to accept that the rule of law favours striking down the hearing fees, the unwritten principle of democracy favours upholding legislation passed by democratically elected representatives which conforms to the express terms of the Constitution. As the Court stated in *Imperial Tobacco*, “in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box” (para. 66).

[101] *Imperial Tobacco* offers yet another caution against reading the unwritten principle of the rule of law too broadly: it would “render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers” (para. 65). As noted above, [s. 11](#) (d) of the [Charter](#) specifically includes a right of access to the courts for a person charged with an offence and [s. 24\(1\)](#) gives this right to those vindicating their [Charter](#) rights. These provisions would be unnecessary if the Constitution already contained a more general right to access superior courts.

[102] In any event, the rule of law is a vague and fundamentally disputed concept. In *Imperial Tobacco*, this Court endorsed the observation of Strayer J.A. that “[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be” (para. 62, citing *Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185 (C.A.), at para. 33). To rely on this nebulous principle to invalidate legislation based on its content introduces uncertainty into constitutional law and undermines our system of positive law.

IV. The Hearing Fees Are Not Unconstitutional

[103] Even if there were a constitutional basis upon which to challenge the British Columbia hearing fee scheme, I would not find the scheme to be unconstitutional.

[104] The majority holds that the hearing fee scheme is unconstitutional because it “places an undue hardship on litigants and impedes the right of British Columbians to bring legitimate cases to court” (para. 50). The primary source of the violation appears to be the inadequacy of the impoverishment exemption (see paras. 55-59).

[105] But the majority’s approach to determining whether hearing fees prevent litigants from accessing the courts overlooks some important contextual considerations. In particular, the majority does not account for measures that offset the burden of hearing fees or eliminate them altogether. When these measures are taken into consideration, there is no indication that the hearing fees at issue would prevent litigants from bringing meritorious legal claims.

[106] First, the so-called “indigency” exemption (applicable at trial) was replaced in 2010. Rule 20-5(1) now reads:

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.

[107] In my view, the updated impoverishment exemption provides a measure of discretion to trial judges in determining its application. The term “may” establishes a foundational discretion. But the addition of the phrase “otherwise impoverished” indicates that a trial judge may exercise this discretion where the hearing fees themselves would be a source of impoverishment. This is the approach adopted by the British Columbia Court of Appeal (interpreting the indigency exemption in the British Columbia *Court of Appeal Rules*) in *De Fehr v. De Fehr*, 2001 BCCA 485, 156 B.C.A.C. 240:

Although the applicant in this case has regular employment income, I am persuaded that after he meets the support obligations imposed in the trial court, along with his own expenses, he would effectively be denied access to the courts by reason of impecuniosity if he were required to pay the fees to the Crown. [para. 16]

[108] However, while courts have discretion in applying the impoverishment exemption, it is not unlimited: it should be exercised only where a litigant is impoverished or, if not impoverished, would be rendered so if required to pay the hearing fees. In this regard, I agree with the trial judge’s observation that the “courts simply do not engage in calling things what they are not, and could not be enlisted into an executive function by administering a more general form of means test to those who come before them” (2012 BCSC 748, 260 C.R.R. (2d) 1, at para. 398).

[109] Second, the financial burden of hearing fees, a disbursement, may be reapportioned through both interim and final costs awards (Rule 14-1 of the British Columbia *Supreme Court Civil*

Rules). Judges may consider factors such as the success of a party, the reasonableness of the positions taken, the importance of the case, and whether one party was responsible for an excessively lengthy hearing.

[110] Third, and most importantly, judges have a key role to play in limiting hearing fees. Active judicial case management is critical to ensuring reasonable timelines in civil proceedings and efficient use of court resources, especially in the case of self-represented litigants. I agree with the trial judge that courts must be careful, in situations involving self-represented litigants, not to appear to refuse relevant evidence (para. 19). But judges must enforce the requirement for relevance so that evidence that does not bear directly on the issues will not prolong a trial. In this context, judges are entrusted with the obligation to manage the resources of the court in the interests of justice and, with respect to hearing fees, to have regard for the interests of the litigants. As this Court has recently noted in the context of summary judgment proceedings, “it is the motion judge, not counsel, who maintains control over the extent of the evidence to be led and the issues to which the evidence is to be directed” (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 61, quoting *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1, at para. 60). There is no reason to think that this case-management principle of *Hryniak* should not extend to all court proceedings, especially those involving self-represented parties.

[111] Finally, my colleagues rely on the evidence of economist Robert Carson for their assessment of the affordability of hearing fees. Like Mr. Carson, they use the amount of hearing fees for a 10-day trial as the benchmark. The hearing fees, in their view, are unfair because the party “who is required to pay the hearing fee may not control the length or efficiency of the trial” (para. 62).

[112] Yet characterizing 10-day trials as the norm skews the analysis. There is no reason to believe that a 10-day trial is standard. Under the British Columbia hearing fee scheme, the first three days are free, which incentivizes short, efficient trials (see Schedule 1 of Appendix C of the *Supreme*

Court Civil Rules). And, as discussed above, judges have an obligation to ensure that trials do not consume unnecessarily lengthy periods.

[113] I make two final observations regarding the “[o]ther objections” to the hearing fees raised by the majority at paras. 60-63.

[114] First, my colleagues at once indicate that judges must have sufficient discretion in applying exemptions to fees (para. 48), and yet critique the very existence of the exemption provision on the basis that it requires litigants to apply to the court (para. 60). These two positions are irreconcilable: it is not possible in the same breath to provide for increased judicial discretion and eliminate the requirement that litigants apply to have such discretion exercised.

[115] In any event, I question whether the application to be exempted from hearing fees is any more an “affront to dignity” than other applications made in court (majority reasons, at para. 60). As the majority acknowledges, such applications are usually made on an *ex parte* basis. And, in the family law context, the assets and liabilities of the parties are regularly exposed to courts charged with determining levels of spousal support.

[116] Second, I do not agree that the “hearing fees do not promote efficient use of court time” (majority reasons, at para. 63). The comment of the trial judge that the efficacy of the hearing fees is “dubious” (para. 310) is not a finding of fact. It is true that hearing fees incentivize parties to use less court time where possible. But this, in turn, encourages efficiency by promoting prioritization and dissuading excessive use of court time. Incentivizing efficient use of court time addresses the problem that excessive use of court time by one party may delay or deny access to other litigants.

V. Conclusion

[117] For the reasons above:

(a) I would answer the constitutional question stated in this appeal as follows:

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?

No.

(b) I would dismiss the appeal from the Court of Appeal's order setting aside the trial judge's order striking down the hearing fees without costs;

(c) I would allow the appeal from the Court of Appeal's decision to read in "or in need" to the exemption provision without costs (2013 BCCA 65, 43 B.C.L.R. (5th) 217, at para. 41);

(d) I would allow the cross-appeal without costs;

(e) I would allow the appeal from the Court of Appeal's order relieving Ms. Vilardell from paying the hearing fees and remit this question to the trial judge for determination.

Appeal allowed and cross-appeal dismissed, ROTHSTEIN J. dissenting.

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