Editor's Note: Erratum released on February 19, 2013. Original judgment has been corrected with text of erratum appended.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Vilardell v. Dunham*,
2013 BCCA 65

Date: 20130215
Docket: CA039971

Between:

Montserrat Vilardell

Respondent
(Plaintiff)

And

Bruce Dunham

Respondent
(Defendant)

And

Attorney General of British Columbia

Appellant
(Intervenor)

And

**Canadian Bar Association – British Columbia Branch, and
Trial Lawyers Association of British Columbia**

Respondents
(Intervenors)

And

West Coast Women's Legal Education and Action Fund

Intervenor

Corrected Judgment: The text of the judgment was corrected at paragraph 18 on February 19, 2013

Before: The Honourable Mr. Justice Donald

The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Garson

On appeal from: Supreme Court of British Columbia, May 22, 2012
(*Vilardell v. Dunham*, 2012 BCSC 748, Vancouver Docket E081953)

Counsel for the Appellant:	G.H. Copley, Q.C. and V.L. Jackson
Counsel for the Respondent, Montserrat Vilardell:	J. F. Maclaren and R. W. Parsons
Counsel for the Respondent, Canadian Bar Association, British Columbia Branch:	S.D. Matthews, Q.C. and M.L. Buckley
Counsel for the Respondent, Trial Lawyers Association of British Columbia:	D. W. Roberts, Q.C.
Counsel for the Intervenor, West Coast Women's Legal Education and Action Fund:	F.V. Marzari and K. Govender
Place and Date of Hearing:	Vancouver, British Columbia January 21, 22 and 23, 2013
Place and Date of Judgment:	Vancouver, British Columbia February 15, 2013

Written Reasons by:
The Honourable Mr. Justice Donald

Concurred in by:
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Garson

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] In this family action, the trial judge struck down the hearing fees charged by the Crown in Supreme Court trials as unconstitutional. He held that the fees "materially hindered" access to the courts: 2012 BCSC 748.

[2] The Attorney General of British Columbia appeals from that decision on, amongst other grounds, that this case does not present a real access problem. If the fees would actually hinder a litigant, the Attorney General says the Rules provide that the judge can exempt the litigant from paying them.

[3] The judge rejected that argument on the basis that the indigency rule applies only to the poor, not to the struggling middle class who, while not poor in the ordinary sense, cannot afford the fees.

[4] In my opinion, were it not for the power of the courts to give relief from the hearing fees, they would be an unconstitutional impediment to justice. The power is found in an enlarged interpretation of the indigency provision.

[5] I would set aside the order striking down the fees and I would grant Ms. Vilardell's application for relief.

Nature of the Proceeding

[6] During the trial, Ms. Vilardell asked the judge to relieve her from paying the hearing fees imposed by the Crown. The judge reserved his decision on the request until he decided the property, custody and maintenance issues. When he rendered his judgment, 2009 BCSC 434, he spotted a potential jurisdictional problem and invited submissions from the Attorney General, the Law Society of British Columbia and the British Columbia Branch of the Canadian Bar Association. The invitation was in the conclusion to his reasons:

> [90] Lastly, at the outset of the case the plaintiff requested that I relieve her from the payment of the hearing day fees. She advised that she had not been asked to prepay them or to pay as they were incurred, but that she would be billed at the end of the case. I am now advised by the registry that

> the invoice amounts to some $3,600. I am in no position to rule on whether the court has jurisdiction to make such an order, or the basis on which, if it has jurisdiction, it should act. The parties really cannot assist.
>
> [91] It seems to me to be a matter of some general importance, however. I am, for one thing, aware of the reasoning in *Pleau v. Nova Scotia (Supreme Court, Prothonotary*), 43 C.P.C. (4th) 201. I think the Attorney General ought to be given an opportunity to intervene, before I address the matter. In line with what appears to have happened in *Pleau*, I also direct that these reasons be drawn to the attention of the Law Society of B.C. and the B.C. Branch of the Canadian Bar Association, should they wish to offer the court any assistance. I fix April 30th as the date by which notices of any intervention should be filed following which I will fix a date for further hearing if required. The plaintiff's obligation to pay is stayed pending further order.

[7] Ultimately, the Attorney General of British Columbia (AGBC), Canadian Bar Association – British Columbia Branch (CBABC), and the Trial Lawyers' Association of British Columbia (TLABC) intervened. They adduced evidence, conducted interrogatories and made full argument. West Coast Women's Legal Education and Action Fund (WCLEAF) joined as an intervenor at the appeal level. The actual parties to the action, Ms. Vilardell and Mr. Dunham, played a minor role in what in truth became a declaratory proceeding on the constitutional validity of the hearing fees. The Crown and the bar occupied centre stage. I will refer to all those who supported the decision below as respondents.

The Hearing Fees

[8] The fees schedule in place at the time of trial is attached as Appendix "A". The schedule was changed in the major revision to the Rules in 2010 and this current schedule is attached as Appendix "B".

History

[9] History plays a critical role in this case. It tells us that the Crown hearing fees and an accompanying exemption for those who cannot pay them have been a feature of the English legal system going back to the *Statute of Henry VII*, 11 Henry VII, c. 12, in 1494 and which we inherited upon becoming a colony in 1858.

[10] The judge's recitation of the history is at paras. 141-142 of the reasons, which are reproduced as Appendix "C" to these reasons.

[11] This long-standing practice is of vital constitutional significance because it shapes the relationship between the executive and the judicial branches of government. Except for the period 1890-1912, the Crown has always charged hearing fees in this Province and has had an indigency provision.

[12] When the respondents argue for an unwritten constitutional principle that prohibits government's interference with access to justice, they must come to terms with the relevant history. In *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, the Court identified history as one of three areas which must be examined in determining whether the matter in question has a constitutional aspect:

> [23] The issue, however, is whether *general* access to legal services in relation to court and tribunal proceedings dealing with rights and obligations is a fundamental aspect of the rule of law. In our view, it is not. Access to legal services is fundamentally important in any free and democratic society. In some cases, it has been found essential to due process and a fair trial. But a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent's contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law.
>
> [Underlined emphasis added.]

[13] This echoes what was said in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217:

> [32] As we confirmed in *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793, at p. 806, "The *Constitution Act, 1982* is now in force. Its legality is neither challenged nor assailable." The "Constitution of Canada" certainly includes the constitutional texts enumerated in s. 52(2) of the *Constitution Act*, *1982*. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules", as we recently observed in the [*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3] at para. 92. Finally, as was said in the [*Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 *(Patriation Reference*)], at p. 874, the Constitution of Canada includes

> the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.
>
> These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities. The foundation and substance of these principles are addressed in the following paragraphs. We will then turn to their specific application to the first reference question before us.
>
> [Emphasis added.]

[14] Thus, if the legal framework has traditionally organized the relationship between the two branches of government to include hearing fees with the power to waive payment *in forma pauperis*, then the claim for a constitutional right to be free of them falls away.

Impact of the *Christie* Case

[15] *Christie* was the second attempt to strike down a provincial sales tax on legal fees, promised by the government to be earmarked for legal aid but never was. The foundation for the claim in *Christie*, as with the first attempt in *John Carten Personal Law Corp. v. British Columbia (Attorney General)* (1997), 153 D.L.R. (4th) 460, 40 B.C.L.R. (3d) 181 (C.A.), leave to appeal ref'd [1998] 2 S.C.R. viii, was the judgment in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, where, in ringing tones, Chief Justice Dickson put access to justice on a very high plane and arguably gave it constitutional status as an aspect of the rule of law. He wrote at 230:

> There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice. Counsel for the Attorney General of British Columbia posed this question:

> By what authority and on what criteria were the Union leaders deciding who were to be given passes and who were to be denied them?

I cannot believe that the *Charter* was ever intended to be so easily thwarted.

I would adopt the following passage from the judgment of the British Columbia Court of Appeal (at p. 406):

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

[16] The respondents put their case on an absolute proposition that no one, not even government, can impede access to justice. They contend the fees violate the constitutional principle of unimpeded access. However, the Supreme Court of Canada in *Christie* rejected an absolutist interpretation of *B.C.G.E.U.*:

> [17] The right affirmed in *B.C.G.E.U.* is not absolute. 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.

[17] So it is necessary to decide whether the hearing fees fall within the class of subjects to which *Christie* referred to as constitutionally valid government-imposed conditions and limits.

Hearing Fees as a Barrier

[18] The Crown justifies the fees as legitimate efforts to recover costs and promote efficiency.

[19] As the judge noted in his reasons, the hearing fees are designed to act as a barrier:

> [309] The government's preoccupation with reducing the cost of civil justice and of the court system in general has extended to other attempts to reshape the work and the role of the courts more directly. This is evident in the rationale offered for the hearing fees themselves. Cost recovery is only the *secondary* purpose of the fees according to the AGBC. The first is rationing court time:
>
> > We understand the purpose of the increase in the fee as the number of trial days increase to be twofold. The primary purpose is evident on the face of the enactment. Construing the enactment, it is to provide an incentive for efficient use of court time and a disincentive for lengthy and inefficient trials. The secondary purpose is the same as the overall purpose of the court fees in general. It is to provide sufficient revenue on average to partially offset the overall costs of providing trial facilities for litigants. [emphasis of McEwan J.]
>
> [310] While the efficacy and fairness of this method of rationing is dubious, as explained in detail by the TLABC in its submission (para. 67 herein) and by the CBABC (para. 112 herein), it is clear that the government assumes the right to influence the availability of the court by manipulating fees.

[20] The respondents, CBABC and TLABC, presented the evidence of Robert Carson, an economist who analysed the impact of the fees. The gist of his opinion, which was unchallenged, was that a significant percentage of the population could not afford the fees for a ten-day trial (the length of trial in the present case). Mr. Carson used, as a measure of income and ability to pay, the Market Basket Measure (MBM) developed in 2003 by Human Resource Canada consisting of certain goods and services. His 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.]

[21] I think it is obvious from this analysis that the conventional view of indigent status, discussed more fully later, falls short of providing the relief necessary to achieve the time-honoured compromise struck in the *Statute of Henry VII*.

[22] The idea of twinning the right of the executive to charge court fees with the power of the judiciary to relieve against them so as to remove a barrier to justice found contemporary expression in *Polewsky v. Home Hardware Stores Ltd.* (2003), 66 O.R. (3d) 600, 229 D.L.R. (4th) 308 (Div. Ct.). There the Divisional Court held

that without an *in forma pauperis* procedure, the Ontario Small Claims Court scheme was constitutionally deficient. The court ruled as follows:

> [77] It will be apparent from these reasons that we have concluded that, apart from the *Charter*, there is a common law constitutional right of access to the Small Claims Court. We do not say that this right is unimpeded or unrestricted. It must be subject to the exercise of judicial discretion on issues of merit and financial circumstances that trigger the right to proceed *in forma pauperis*. To the extent that no such provision exists in the *Courts of Justice Act*, the *Rules of the Small Claims Court*, the *Administration of Justice Act* or Ontario Regulation [432/93], we say that there will have to be a statutory amendment to give effect to the findings of this court. We do not say that each one of the aforementioned statutes must be amended. It will be up to the legislature to decide which of the statutes is to be amended to give effect to the disposition of this appeal. We do not say that an immediate amendment is required but it should be done within a reasonable period of time and not later than 12 months from the date of the release of these reasons. We reiterate that even if there had been a statutory provision allowing him to proceed *in forma pauperis*, this appellant would not have met the requirements because of the evidentiary deficiencies above noted. The appeal is therefore allowed in accordance with these reasons. This is not a case for costs. The Appeal Book is endorsed accordingly.
>
> [Emphasis added.]

[23] Counsel for the AGBC acknowledges the necessity for an indigency exemption in his Reply Factum and in his oral submissions. I quote an excerpt from the reply factum:

> 65. The international instruments relied on by WCLF affirm that the presence of a judicial discretion, like that provided by the British Columbia indigency exemption, is an adequate, indeed encouraged, and internationally compliant means of ameliorating any alleged disadvantage based on income by the existence of substantial awards of costs:
>
> > 7.2 … the Committee considers that the imposition by the Court of Appeal of substantial costs award, without the discretion to consider its implications for the particular authors, or its effect on access to court of other similarly situated claimants, constitutes a violation of the authors' rights under … the Covenant. The Committee notes that, in the light of the relevant amendments to the law governing judicial procedure in 1999, the State party's courts now possess the discretion to consider these elements on a case by case basis. [Emphasis of AGBC.]
> >
> > Anni Äärelä and Jouni Näkkäläjärvi v. Finland (2001), Communication No. 779/1997 (4 February 1997),

> CCPR/C/73/D/779/1997, (UN Human Rights Committee); cited at WCLEAF, para. 53
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> 66. In its Conclusions and Recommendations related to court fees and costs, the *Report of the Special Rapporteur* urged states to adopt measures "to ensure that legal, administrative and procedural fees relating to access to justice are waived for those who cannot afford them, including in small claims cases." [Emphasis of AGBC]. British Columbia has had such a measure, guaranteed by law in the form of received English Law, the *Statute of Henry VII*, since colonial times and later incorporated into the Rules of Court.
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> *Report of the Special Rapporteur on Extreme Poverty and Human Rights to the General Assembly of the United Nations*, August 9, 2012, pp. 18 and 22; cited at WCLEAF, paragraph 53

[24] As I see it, the real issue in this case is whether the current exemption is up to the mark, and if it is not, what should be done. Before turning to that issue, I wish to deal with the case of *Pleau v. Nova Scotia (Supreme Court, Prothonotary)* (1999), 43 C.P.C. (4th) 201, 186 N.S.R. (2d) 1 (S.C.), which may have inspired the judge to embark upon a constitutional inquiry.

Pleau v. Nova Scotia (Supreme Court, Prothonotary)

[25] In *Pleau*, Mr. Justice MacAdam distinguished between filing charges at the Registry and hearing fees and jury deposit fees. He determined that the former is permissible, the latter are not. He explained the difference in this way:

> [120] Apart from, and in addition to the "degree" test, there is the "pith and substance" of the Hearing Fee as opposed to the remaining "Court Fees". All of the others relate to the process or procedure in getting to court. Only the Hearing Fee relates to the time in court. Although justified as a charge for court facilities and staff, it is in "pith and substance" a charge for time in court. The fee places a charge on the time required to present one's case. It may not have been designed as such, but its effect is to put a "price on accessing the courts", a price on justice.
>
> [121] It is for that reason that even a modest Hearing Fee is unacceptable. Although there are many financial consequences in launching a civil lawsuit, one of them must not be the time in court.
>
> [122] Also, the permitted fees must not be increased either in size or number so as to then constitute an undue "impediment, impairment or delay in accessing the courts." Our system of justice is not, and cannot be, financed by "user fees". Although, for reasons already reviewed, "user fees" providing some reimbursement in respect to the costs of some services are

> permissible, user fees intended or calculated to totally reimburse the costs are extremely unlikely to be acceptable.
>
> (9) To the extent some or all of the fees may be valid, they are not applicable to existing litigation, only to proceedings commenced after October 15, 1998.

In the present case, the trial judge relied heavily on MacAdam J.'s reasoning.

[26] I doubt very much the proposition that hearing fees *per se*, without regard to their impeding effect, can survive *Christie* at para. 17, quoted earlier. What makes hearing fees constitutionally suspect is in their potential to impede persons who cannot afford them. Wealthy individuals and corporations may not like paying the fees but they are unlikely to alter their litigation strategy because of them. In that sense, the government efficiency objective is invidious because the fees impinge only on the economically disadvantaged. Only they, not the well-to-do, will be discouraged from pursuing their rights in a hearing of sufficient length to do justice to the issues. However, an effective exemption defeats the invidious purpose but allows the cost recovery objective to be achieved.

Indigency

[27] If the legitimacy of the Crown hearing fees depends on an exemption which effectively removes barriers to access, then what of the present arrangements?

[28] The trial judge rejected the argument that the indigency rule saves the hearing fees. The title in the current Rule 20-5 is "Persons Who Are Impoverished". The judge found that the terminology covered the poor but not others of modest means, who are nonetheless impeded by the hearing fees. He had other objections as well, such as the indignity of forcing persons to claim poverty as supplicants for charity, which, he believed, perpetuated inequality in relation to better funded litigants, particularly the Crown. Further objections are set out in these passages from the reasons:

> [396] The AGBC obviously knows this, but, as we have seen, 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.
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> * * *
>
> [398] The hearing fees are not discretionary expenditures. They are manifestly fixed at a level that is intended to deter use of the courts, within a broader scheme having the objective of minimizing the cost to government of maintaining the court system (see para. 314 herein). 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.

[29] The objections voiced by counsel for the CBABC to indigency as a curative device are listed in her factum:

> 92. The constitutional defects, in particular, the equality failings of Hearing Fees, cannot be cured through the indigency exemption for several interrelated reasons:
>
> (a) litigants who cannot demonstrate indigency are still negatively affected by the access to justice barriers created by Hearing Fees and their structural defects;
>
> (b) the process is an affront to the dignity of litigants by requiring them to come before the court, explain why they are indigent and beg the court to publicly acknowledge this status and excuse the payment of the fees;
>
> (c) it is based on the "choice theory" and a concomitant theory that there is a bright line of financial wherewithal that dissipates the access to justice barrier; and
>
> (d) practically, the exemption provisions do not work.

[30] The respondents are united in urging the Court to leave it to the government to enact a fees regime that respects the constitutional right of access rather than engaging in a re-writing exercise to make the exemption more inclusive.

[31] I am reluctant to take the course suggested by the respondents. Cost recovery has been a legitimate government objective for centuries and our Constitution assigns administration of the superior courts to the province. It is a

drastic step to strike down an otherwise valid enactment for want of a saving provision that falls short of the mark. A more surgical response is to remedy the deficiency by reading in the under-inclusive indigency provision in the Rules to include people who are "in need": see *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 718. "In need" recognizes the fact that some litigants, while not destitute or impoverished, are still in need of relief or assistance in order to have their case heard before a superior court.

[32] *Schachter v. Canada* is the leading case on constitutional remedies. Chief Justice Dickson in *B.C.G.E.U.* noted at 229 that "the rule of law is the very foundation of the *Charter*". Section 52(1) of the *Constitution Act, 1982*, states that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. In effecting a constitutional remedy under s. 52(1), Chief Justice Lamer for the majority in *Schachter* stated that the first step is to properly define the extent of the *Charter* inconsistency. In this case, the constitutional inconsistency consists of an under-inclusive exemption from hearing fees, which restricts it to people who would be defined as impoverished. As I stated earlier, an enlarged interpretation of the indigency provision is necessary to uphold the constitutionality of hearing fees and remove a barrier to court access.

[33] The next step is to determine the appropriate remedy for a constitutional violation, which can include severance, reading down or reading in provisions into the Rules. Reading in is the most appropriate remedy in this case. Striking down the hearing fees or the exemption in its entirety would be undesirable for the reasons already given. This violation stems from an exemption which omits people who, while not impoverished, cannot afford the hearing fees. The effect of this omission limits their access to the courts, which violates the rule of law. The most effective way to deal with this omission is to read in the words "or in need" to Rule 20-5.

[34] Reading in those words is a minimal intrusion into the Crown's function in enacting subordinate legislation and it respects the Crown's intention to provide a form of economic relief.

[35] To the extent that the hearing fees have the potential to interfere with the core judicial function of running a trial, which I think they do, the courts should respond to the interference. Judges must not shy away from dealing with such incursions. The remedy I propose in this case is a measured response to the problem.

[36] The idea of a "core-jurisdiction" of the judiciary is in the judgment of Madam Justice McLachlin (as she then was) in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, where the issue was whether the power to punish for contempt was overtaken by young offender legislation:

> [37] Commenting on the constitutional jurisprudence regarding courts, Cromwell, [T.A. Cromwell, "Aspects of Constitutional Judicial Review in Canada" (1995), 46 *S.C. L. Rev.* 1027], concludes (at p. 1032):
>
> > Thus, through generous interpretation of the constitutional provisions governing appointment and independence of provincial superior court judges and a restrictive reading of the constitutional limits of jurisdiction on the Federal Court, the primacy of the provincial superior courts in constitutional judicial review has been maintained. The basic proposition is that the Canadian conception of constitutional judicial review is deeply committed to the supervisory role of the provincial superior courts, that is, the general jurisdiction trial courts in each province.
>
> In 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. Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected. In Canada, the provincial superior court is the only court of general jurisdiction and as such is the centre of the judicial system. None of our statutory courts has the same core jurisdiction as the superior court and therefore none is as crucial to the rule of law. To remove the power to punish contempt *ex facie* by youths would maim the institution which is at the heart of our judicial system. Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment.
>
> [Emphasis added.]

[37] I deal next with the dignity of the litigant. If the exemption is focused on affordability rather than socio-economic status, then I fail to see how the applicant for exemption is subject to humiliation in seeking relief. According to the economic evidence in this case, the applicant will find himself or herself in the company of many similarly situated people in our community.

[38] It follows from what I have said that I think the language of the exemption, cast in terms of indigency and impoverishment, is archaic and unresponsive to current social conditions. The approach must shift from labelling to a more functional appreciation of affordability. This is so that someone like Ms. Vilardell should be entitled to an exemption, even though she does not fit the stereotype of a poverty-stricken person. She still found herself legitimately in need of the court's assistance in order to pursue her claim. She is a professionally qualified veterinarian (although not in British Columbia) and her husband, from whom she is separated, is a university professor. The judge found as fact that the hearing fees, which Ms. Vilardell was required to undertake to pay, would have approached the family's net income for a month.

[39] It has been demonstrated that the burden of hearing fees falls most heavily on women in family litigation, Aboriginal persons, those with disabilities and recent immigrants. Such persons should be made aware that the hearing fees will not obstruct their pursuit of justice if they cannot afford them. This may prevent them from abandoning their claim or suffering the anxiety of taking on an obligation they cannot handle during the trial. A useful step in that direction would be to amend Form 40, which extracts an undertaking to pay hearing fees when the case is set for trial, to make the undertaking subject to an exemption.

[40] The antidote proposed, an enlarged scope for exemption to include people who are "in need" under Rule 20-5 of both the new *Supreme Court Civil Rules* and the *Supreme Court Family Rules*, may not be out of step with changes the Crown has already made in the recent overhaul of the Rules. Compare the two exemption provisions. Subsection (1) of the old rule reads:

Appendix C
Schedule 1

* * *

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

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

The new rule in the *Supreme Court Civil Rules* and the *Supreme Court Family Rules* (with the words "proceeding" and "family law case" interchanged) reads:

> Rule 20-5 – Persons Who Are Impoverished
>
> Court may determine indigent status
>
> (1) If the court, on application made in accordance with subrule (3) before or after the start of a proceeding [family law case], finds that a person receives benefits under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act* or is otherwise impoverished, the court may order that no fee is payable by the person to the government under Schedule 1 of Appendix C in relation to the proceeding [family law case] unless the court considers that the claim or defence
>
> (a) discloses no reasonable claim or defence, as the case may be,
> (b) is scandalous, frivolous or vexatious, or
> (c) is otherwise an abuse of the process of the court.
>
> [am. B.C. Regs. 119/2010, Sch. A, s. 34 (a); 112/2012, Sch. A, s. 4 (b).]
>
> [Emphasis added.]

[41] Granting an automatic exemption to recipients of employment or disability insurance suggests a more generous approach than was previously taken. The enlarged scope of the exemption in Rule 20-5, then, should be read as saying "impoverished or in need". The phrase is intended to cover those who could not meet their everyday expenses if they were required to pay the fees. Courts will continue to use their discretion to determine whether a litigant is impoverished or in need to the point that but for the hearing fees, they would be able to pursue their claim, thus qualifying for an exemption.

[42] Ms. Vilardell's application for relief remains outstanding. Ordinarily we would send the matter back to the trial court for decision, but this is the only remaining loose end and the case has been subject to considerable delay. Her counsel asked

that we deal with it and since no one objects, I would allow the application and exempt her from the fees.

[43] In the result, I would allow the appeal and set aside the order striking the hearing fees rule. The rule is to be interpreted and applied in the manner indicated. I would also grant Ms. Vilardell's application to be relieved from paying the fees.

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Madam Justice Garson"

Appendix "A"

APPENDIX C

SCHEDULE 1

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

FEES PAYABLE TO THE CROWN

(Unless otherwise provided by statute)

* * *

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

Appendix "B"

Court Rules Act

SUPREME COURT CIVIL RULES

[includes amendments up to B.C. Reg. 112/2012, July 1, 2012]

Appendix C — Fees

Schedule 1

[am. B.C. Reg. 119/2010, Sch. A, ss. 56 and 57.]

Fees Payable to the Crown

(Unless otherwise provided by statute)

* * *

Hearings

9	For each day spent in whole or in part at a hearing, unless the attendance on that day is for reasons for decision only, payable by the party who files the notice of application, appointment or other document by which the hearing was set, unless the court orders payment by another party	For the first 3 days: 0 For each of the 4th to 10th days: 500 For each day over 10: 800
10	For each day spent in whole or in part at trial, unless the attendance on that day is for judgment only, payable by the party who files the notice of trial, unless the court orders payment by another party	For the first 3 days: 0 For each of the 4th to 10th days: 500 For each day over 10: 800

Appendix "C"

From 2012 BCSC 748

[141] The AGBC first reviewed the history of the indigency exemption. Inasmuch as I cannot improve upon the AGBC's recital of this history and accept it as fact, I reproduce this portion of the submissions:

> 28. In 1494 the [*Statute of Henry VII*, 11 Henry VII, c. 12] (A Means to Help and Speed Poor Persons in Their Suits) was enacted providing a means by which poor persons could sue and defend against suit in *forma pauperis.*
>
> 29. The *Statute of Henry VII* provides in part:
>
> > ... That where the King our Sovereign Lord ... willith and intendeth indifferent Justice to be had and ministered according to his Commons Laws, to all his true Subjects, as well as to the Poor as Rich, which poor Subjects be not of Ability ne Power to sue according to the Laws of this Land for the redress of Injuries and Wrongs ... be it ordained and enacted ... That every poor Person or Persons, which have ... Cause of Action or Actions against any Person .... shall have by the Discretion of the Chancellor of this Realm, ... Writ or Original and Writs of Subpoena ... therefore nothing paying to your Highness for the Seals of the same, nor to any Person for the writing of the same Writ and Writs to be hereafter sued ...
>
> 30. The *Statute of Henry VII* was introduced into this country on the 19th day of November, 1858, as part of the received civil law of England not being "from local circumstances inapplicable" thereto as the *B.C. English Law Ordinance Act of 1867* expresses it.
>
> > *Bland v. Agnew* (1933), 47 B.C.R. 7 (BCCA) per Martin J.A.
>
> 31. The *Statute of Henry VII* has been applied by the courts since before confederation in 1871 to permit poor persons to sue and defend against suits without paying the fees established by the Rules of Court where a litigant with a meritorious case was truly unable to pay those fees. The role played by the *Statute of Henry VII* has now been supplanted by an express provision in the Rules of Court dealing with indigency Status (Rules of Court Appendix C Schedule 1 S1 B.C. Reg. 221/90, amended by B.C. Reg 75/98 enacted on March 20, 1998).
>
> > *Bland v. Agnew op. cit.*
> > *B.C. Jickey Club v. Standen (1983),* 48 B.C.L.R. 161 (BCCA)
> > *McKenzie v. Henshaw* (1984), 42 C.P.C. 289 (B.C. Cty. Ct.)
> > Appendix "G" Rules of Court Appendix C, B.C. Reg. 221/90
>
> 32. That provision states:
>
> > S1 (1) If the court, on summary application before or after the commencement of a proceeding, finds that a person is indigent, the court may order that no fee is payable to the Crown by the person to commence, defend or continue the whole or any part of the proceedings 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.
>
> 33. The court routinely hears and determines in a summary fashion applications by litigants seeking a declaration of Indigent Status so as to be excused from the obligation of paying the prescribed fees to the Crown. The British Columbia Supreme Court has developed an application form, a blank affidavit and a draft order that can be used when making an application pursuant to the indigency exemption provision. The application and blank affidavit are provided to a litigant upon request. They are also provided to an individual who expresses to a court representative that they cannot afford fees payable to the Crown pursuant to Appendix C, Schedule 1. These applications are spoken to and orders are made in court, usually on an *ex parte* basis.
>
> [from the AGBC submission]

[142] The AGBC also traced the history of court fees. Again, and for the same reason as with the indigency submission, I reproduced the AGBC's submissions as written:

> 34. Recovery in the form of fees of the cost of running the courts in England and Wales has a very long history dating back to the 13th century. Fees have always been charged to users of the courts. Originally, fees were paid directly to the judges of the courts, who kept them personally, for the work they carried out.
>
> Affidavit of Shannon Davis #2 filed December 21, 2009, Exhibit "D" page 2
>
> *Statute of Henry VII op cit*
>
> 35. The *County Courts Act,* 1846 saw the creation of a court system similar to that in England today and the introduction of judicial salaries. The Act provided that court fees would cover the full cost of running the courts and, through this, the courts would be self-funding. The *County Courts Act, 1846* became the law in the Colony of Vancouver Island by operation of the common law and in the Colony of British Columbia on November 18, 1858, by proclamation of Governor Douglas. The reception of English Law on November 18, 1858, in the Colony of Vancouver Island was later confirmed by the *English Law Ordinance, 1867.*
>
> *Reynolds v. Vaughan* (1872), 1 B.C.R. (Pt. 1) 3 per Begbie C.J.
> *M v. S* (1877), 1 B.C.R. (Pt. 1) 25
> *County Courts Act, 1846* (U.K.) 9 & 10 Victoria, c. 95 s. 37.
>
> 36. On December 2, 1853, after receiving and tabling a letter from the Clerk of the Peace describing a scale of Fees adopted by the Justices by resolution for the carrying on of proceedings in Justices Court, the Governor in Council resolved that the Justices of the Peace be authorized to adopt in all their

future proceedings a Tariff of Fees and that an act be prepared forthwith to regulate fees in Office.

> Journals of the colonial Legislature of the Colonies of Vancouver Island and British Columbia 1851-1871, page 12.

37. In 1865, the Legislative Council of British Columbia during its Session from January to April passed Ordinance No. 22, *An Ordinance for regulating the amount and application of Fees to be taken in the Supreme Court of Civil Justice from suitors therein.* The Schedule to that Ordinance prescribes trial Hearing Fees of 1 pound per day from the plaintiff, and 15 shillings per day from the defendant for the first day and 10 shillings per day from each of the plaintiff and the defendant for subsequent days for a total of 1 pound per day.

> No. 22, *An Ordinance for regulating the amount and application of Fees to be taken in the Supreme Court of Civil Justice from suitors therein*.

38. In 1867, the *County Court Ordinance*, *1867* No. 95 was passed which adopted the Imperial *County Courts Act, 1846 (U.K.)* (para. 34 above) in the course of assimilating the procedure of the County Courts in all parts of the colony of British Columbia. Ordinance No. 60, passed in the same year Supreme Court Fees were prescribed, mirrored those in place in 1865 and, in particular, continued the Hearing Fees of 1 pound per day for the plaintiff, and 15 shillings per day for the defendant for the first day and 10 shillings per day from each of the plaintiff and the defendant for subsequent days for a total of 1 pound per day.

> No. 95 *An Ordinance to amend and assimilate the procedure of the County Courts in all parts of the Colony of British Columbia.*
>
> No. 60 *An Ordinance for regulating the amount and application of the Fees to be taken in the Supreme Court of Civil Justice from Suitors therein s.* 1.

39. From 1890 to 1906, the Appendix M to the Rules of Court did not include trial Hearing Fees in the Fees Payable to the Crown. In 1912, the Lieutenant Governor in Council re-imposed trial Hearing Fees in the amount of $5.00 per day or any part thereof. This was changed on December 2, 1914 to $5.00 per day for the first day to be paid before the trial or hearing was proceeded with and $1.00 per hour for every hour of trial or hearing after the first day.

> Supreme Court Rules, 1890 Appendix M Costs, Fees Payable to the Crown
>
> Supreme Court Rules, 1906 Appendix M. Costs, Schedule No. 5 Fees payable to the Crown
>
> Supreme Court Rules, 1912 Appendix M Costs, Schedule No. 5 Fees Payable to the Crown s. 16, amended by OIC dated December 2, 1914

40. The trial hearing fees have increased over the years in the following fashion:

i. 1968 – Hearing Fees of $10.00 for the first day of trial and $5.00 for each additional day or part thereof: Supreme Court Rules, 1968, Appendix M, Schedule 3, Fees Payable to the Crown, s. 2.

ii. 1976 – Hearing Fees of $30.00 for each additional day or part thereof after the fifth day: Supreme Court Rules, 1976, Appendix C, Schedule 1, Fees Payable to the Crown, s. 2.

iii. 1990 – Hearing Fees of $50.00 per half day or less, or $100.00 per day or any period less than a day but more than half a day: Supreme Court Rules, 1990, Appendix C, Schedule 1, Fees Payable to the Crown, s. 8.

iv. 1998 – Hearing Fees of $156.00 for a trail of half a day or less, and for trials extending beyond half a day, $412.00 for days one through five, $416.00 for days six through ten and $624.00 for each subsequent day: B.C. Reg. 74/98.

[from the AGBC submission]

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Vilardell v. Dunham,*
2013 BCCA 65err1

Date: 20130219
Docket: CA039971

Between:

Montserrat Vilardell

Respondent
(Plaintiff)

And

Bruce Dunham

Respondent
(Defendant)

And

Attorney General of British Columbia

Appellant
(Intervenor)

And

Canadian Bar Association – British Columbia Branch, and Trial Lawyers Association of British Columbia

Respondents
(Intervenors)

And

West Coast Women's Legal Education and Action Fund

Intervenor

Before: The Honourable Mr. Justice Donald
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Garson

On appeal from: Supreme Court of British Columbia, May 22, 2012
(*Vilardell v. Dunham*, 2012 BCSC 748, Vancouver Docket E081953)

Counsel for the Appellant:	G.H. Copley, Q.C. and V.L. Jackson
Counsel for the Respondent, Montserrat Vilardell:	J. F. Maclaren and R. W. Parsons
Counsel for the Respondent, Canadian Bar Association, British Columbia Branch:	S.D. Matthews, Q.C. and M.L. Buckley
Counsel for the Respondent, Trial Lawyers Association of British Columbia:	D. W. Roberts, Q.C.
Counsel for the Intervenor, West Coast Women's Legal Education and Action Fund:	F.V. Marzari and K. Govender
Place and Date of Hearing:	Vancouver, British Columbia January 21, 22 and 23, 2013
Place and Date of Judgment:	Vancouver, British Columbia February 15, 2013
Date of Corrigendum:	February 19, 2013

Corrigendum to Written Reasons by:
The Honourable Mr. Justice Donald

Mr. Justice Donald:

[1] In para. 18 of the reasons for judgment released February 15, 2013 (2013 BCCA 65), the words “at cost recovery” at the end of the sentence are deleted so that para. 18 now reads:

> [18] The Crown justifies the fees as legitimate efforts to recover costs and promote efficiency.

The Honourable Mr. Justice Donald