

**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

B E T W E E N :

VICTOR R. POLEWSKY

Plaintiff
(Appellant)

- and -

**HOME HARDWARE STORES LTD. and MARIE-FRANCE ARISMENDI
and WILLIAM KENNEDY and PINERY INN RESORT**

Defendants
(Respondents)

- and -

**THE ATTORNEY GENERAL OF ONTARIO and
THE ADVOCATES' SOCIETY**

Intervenors

**FACTUM OF THE INTERVENOR,
THE ADVOCATES' SOCIETY**

PART I - INTRODUCTION

1. This is an appeal by the Appellant, Victor Polewsky, from the Order of the Honourable Madame Justice Gillese of the Superior Court of Justice (as she then was), pronounced on October 12, 1999. By that Order, Madame Justice Gillese (the “**Motions Judge**”) dismissed Mr. Polewsky’s motion for a declaration that the Small Claims Court tariff fees (the “**Fees**”) are unconstitutional.

2. The Advocates’ Society intervenes in this appeal as a friend of the Court, pursuant to leave granted by the Honourable Mr. Justice Then on March 23, 2001. The Advocates’ Society is in agreement with Mr. Polewsky that the Fees are unconstitutional in that they violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and the Rule of Law. The Advocates’

Society further agrees with Mr. Polewsky that a Judge of the Small Claims Court has the jurisdiction to waive the Fees.

PART II - OVERVIEW

3. While Mr. Polewsky is one person who cannot afford the Fees, this is not a case about one person who has no money to pay court fees. It is a case about a system that creates barriers to access to the courts, and hence to justice, for persons living in poverty, without providing for relief in individual circumstances.

4. The Advocates' Society submits that this Court should find either that a Judge of the Small Claims Court has jurisdiction to waive the Fees, or, if not, that the Fees are unconstitutional, for the following reasons:

(a) The Rule of Law, which is an unwritten constitutional principle with normative effect, requires that the community be governed by Law. This, in turn, requires unimpeded access to the Courts. The Fees impede or deny access to the Courts by poor people. Accordingly, the Fees violate the Rule of Law.

(b) The Small Claims Court Judge's jurisdiction to waive the Fees must be considered in light of the Rule of Law, the *Charter*, and Canada's international obligations. Viewed in this light, a Judge of the Small Claims Court has such jurisdiction, either based on the doctrine of *in forma pauperis*, or based on the Court's power to dispense with compliance with its Rules in the interest of justice;

(c) The Fees violate section 15 of the *Canadian Charter of Rights and Freedoms* by failing to take account of the pre-existing disadvantage suffered by poor persons, and thereby depriving them of the equal benefit of the law; and

(d) The Fees violate section 7 of the *Charter* by depriving poor persons of their democratic right of access to the courts, in a manner not in accordance with the principles of fundamental justice.

PART III - FACTS

A. Legislative and Social Context

5. At time of the Motions Judge's Order, the jurisdiction of the Small Claims Court was limited to claims of \$6,000.00 or less. The Small Claims Court now has jurisdiction over all claims involving amounts of \$10,000.00 or less.

Reasons of Madame Justice Gillese, Appeal Book, Tab 3, p. 13
Courts of Justice Act, R.S.O. 1990, c. C.43, s. 23
O. Reg. 626/00, made under the *Courts of Justice Act*, s.1(1)

6. Mr. Polewsky's regular monthly income, derived from Canada Pension and social assistance payments, is \$959.12. His monthly expenses are \$1,222.59. He cannot afford to pay the required filing fee to set a matter down for trial.

Affidavit of Victor Polewsky, Appeal Book, Tab 18, p. 95

Reasons of Madame Justice Gillese, Appeal Book, Tab 3, p. 13

B. History of the Proceeding

7. Mr. Polewsky launched a number of Small Claims Court actions. In each action, he paid the required \$50 fee to commence the proceeding. When it came time to set the matters down for trial, Mr. Polewsky did not have the financial resources to pay the Fees. He brought a motion in Small Claims Court for an Order waiving the Fees, which was granted.

Polewsky v. Bank of Montreal, [1999] O.J. No. 2606 (Gen. Div. (Small Claims))
[hereinafter *Polewsky*]

8. Deputy Judge Shields heard Mr. Polewsky's original motion for an Order waiving the Fees. Deputy Judge Shields found that s. 15 of the *Charter* should be interpreted to ensure equal access to the law, and that the Fees constitute a barrier to court access which disproportionality affect poor people. Accordingly, he held that the Fees violate s. 15 of the *Charter*. In so doing, Deputy Judge Shields made the following comment:

The ability of individuals to access the Court system is in fact a value fundamental to a free and democratic society. It is interesting to note that, if the Court could find in *Andrews v. The Law Society of British Columbia* that non-citizens could be considered relatively powerless, then one can only imagine the plight of the poor in the society, where access to the Court system, and the protection of their rights, depended upon their ability to pay fees without any resort to a mechanism to avoid these fees or have them reduced in appropriate circumstances.

Polewsky, supra at paras. 23, 25-37

9. Mr. Polewsky subsequently brought similar motions in several other actions in which he was involved, which were consolidated and heard in the Ontario Superior Court of Justice by the learned Motions Judge.

Reasons of Madame Justice Gillese, Appeal Book, Tab 3, p. 13
Orders of Mr. Justice McDermid, dated June 21, 1999, Appeal Book, Tabs 4-6,
pp. 31-39

10. Mr. Polewsky argued before the Motions Judge that a Judge of the Small Claims Court has the discretion and jurisdiction to waive the Fees in cases of financial hardship, or alternatively, that access to the Courts is a constitutionally guaranteed right and that the Fees infringe that right and violate s. 15 of the *Charter*.

Reasons of Madame Justice Gillese, Appeal Book, Tab 3, pp. 13-14

11. The Motions Judge dismissed Mr. Polewsky's motion. She found that, in the absence of an express statutory power, a Small Claims Court Judge has no jurisdiction to waive the Fees. On the constitutional issue, she found that there is no constitutional right of unrestricted access to the civil courts, and that the Fees do not violate s. 15 of the *Charter*, since poor people are not an analogous group.

Reasons of Madame Justice Gillese, Appeal Book, Tab 3, pp. 15, 19, 20-21, 23-30

12. Although Mr. Polewsky did not argue before the Motions Judge that the Fees violate s. 7 of the *Charter*, she considered s. 7 in *obiter*. The Motions Judge held that the protection of s. 7 is limited to a person's physical and mental integrity and does not protect civil or economic rights.

Reasons of Madame Justice Gillese, Appeal Book, Tab3, pp. 19-20

13. Mr. Polewsky sought leave to appeal from Madam Justice Gillese's Order, which was granted by Mr. Justice Misener on January 13, 2000.

Reasons of Mr. Justice Misener, Appeal Book, Tab 8, p. 49

14. Mr. Justice Misener held that there were reasonable grounds for believing that the Motions Judge had erred in finding that the Fees do not violate s. 7 of the *Charter*. He stated that there was a good argument that the Fees deprive poor people of liberty and security by depriving them of the benefit of the Rule of Law. Misener J. further held that it was arguable that Gillese J. had erred in her application of s. 15 of the *Charter* and that a good argument could be made that poor people are a discrete and insular minority who have suffered social, political and legal disadvantage.

Reasons of Mr. Justice Misener, Appeal Book, Tab 8, pp. 47-49

PART IV - ISSUES AND LAW

A. The Fees impede access to the courts and violate the rule of law

15. The Advocates' Society submits that the Rule of Law, which has constitutional status, requires that the community be governed by law. In order for the community to be governed by law, access to the courts must be unfettered. This basic constitutional right of unimpeded access to the courts has been recognized by the Supreme Court of Canada and by senior courts in other countries. By impairing the ability of indigent persons to exercise this constitutional right, the Fees violate the Rules of Law.

16. The Rule of Law, which is enshrined in the Preamble to the *Constitution Act, 1982*, is one of the fundamental and organizing principles of the Constitution. The Rule of Law is an unwritten constitutional principle which reflects Canada's "commitment to an orderly and civil society in which all are bound by the enduring rules, principles and values of our Constitution as the supreme source of law and authority."

Constitution Act, 1982

Reference re Secession of Quebec, [1998] 2 S.C.R. 217 at 239-240 [hereinafter *Secession*]

Manitoba Language Rights Reference, [1985] 1 S.C.R. 721

Lalonde v. Ontario (2001), 56 O.R. (3d) 505 (C.A.) at 547 [hereinafter *Lalonde*]

17. The Rule of Law has three essential elements: the law is supreme over government officials as well as private individuals; the relationship between the state and the individual is governed by law; and the "creation and maintenance of a positive legal order is the normative basis for civil society". In other words, the community must be governed by law.

Lalonde, supra

18. The unwritten constitutional principles, including the Rule of Law, have normative force. They provide a basis upon which courts may fill in gaps in the express written text of the Constitution. Moreover, they give rise to legal rights which may impose substantive obligations on government and provide a basis to invalidate legislation. Even where the express written text of the Constitution does not itself create an enforceable right, these unwritten constitutional values must be considered in determining the legality of government action.

Secession, supra at 249

Lalonde, supra at 549-551, 563

19. The principle of respect for and protection of minorities is another unwritten constitutional principle that comprises a “structural feature of the Canadian Constitution”. This structural feature shapes the other unwritten constitutional principles, including the Rule of Law. The Advocates’ Society submits that poor people are a “discrete and insular minority” in Canadian society and therefore, protection of their rights is a fundamental constitutional value. The Fees violate poor people’s rights, thereby contravening this value.

Lalonde, supra at 549

20. The requirement that the community be governed by law requires that access to the courts not be impeded, either by physical means or by fees which “impede, impair or delay” access. In the words of the late Chief Justice Dickson:

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.

B.C.G.E.U. v. British Columbia, [1988] 2 S.C.R. 214 at 230

Pleau v. Nova Scotia (Supreme Court, Prothonotary), [1998] N.S.J. No. 526 (N.S.S.C.) at para. 95

21. The fact that a plaintiff is seeking to commence an action is no answer to the deprivation of access to the Court. Resort to the judicial system is no more a choice for a plaintiff seeking to enforce his or her rights than it is for a defendant called upon to defend him or herself; for both, the legal system is the best, and often the only, means of asserting his or her rights. As the Supreme Court of the United States has stated, “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has”.

Griffin v. Illinois, 351 U.S. 12 (1956) at 19

22. The absolute necessity of free access to the courts has been recognized by courts in other jurisdictions. In *Boddie v. Connecticut*, the Supreme Court of the United States found that fees similar to the Fees in this case violated the right to due process. In that case, the appellants sought access to the state divorce court. The Court held that due process did not permit a state to deny to its citizens, solely because of an inability to pay fees, access to its courts for dissolution of their marriages.

Boddie v. Connecticut, 401 U.S. 371 (1971) at 374

23. The Supreme Court of the United States has also found that other costs involved in filing and processing cases can violate a citizen's constitutional rights if they prevent access to justice. In *Griffin v. Illinois*, the Court held that under the joint mandate of the equal protection and due process clauses, the state must provide impoverished criminal appellants with a free trial transcript if it is necessary for the appeal.

Griffin v. Illinois, supra

24. In England, the Courts have recognized that a citizen's right to unimpeded access to the courts to enforce his or her civil rights is a common law constitutional right which can only be abrogated by clear and express statutory language. This "basic right" has been acknowledged by English courts as fundamental to a civilized society:

Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are the courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled....[emphasis added]

Berner Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp., [1981] 1 All E.R. 289 (H.L.) at 295
R. v. Lord Chancellor, ex parte Witham, [1997] 2 All E.R. 779 (Q.B.) at 787
Halsbury's Laws of England (4th ed. reissue), Vol. 8(2), para. 119

25. In *Airey v. Ireland*, the European Court of Human Rights found that the denial of legal aid to an indigent person is a denial of the right to effective access to the courts, as guaranteed by Article 6(1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*. The Court rejected the argument that the government could not be held responsible for a failure to act (in that case, to provide legal aid), stating that "hindrance in fact can contravene the Convention just like a legal impediment". Moreover, the Court found that in order to fulfill its duties under the Convention, a state may be required to take positive action.

Airey v. Ireland (1979), 2 E.H.R.R. 305 (ECtHR) at 316

26. Recognizing that fees can effectively render this right of access illusory, the United Kingdom has provided for exemptions in cases of indigence. County Court Fees Order 1999 sets out the schedule of fees payable in the County Court, in which most minor civil claims are heard. That Order provides that any person receiving social assistance is entitled to be exempt from

court fees. The Order further permits the Lord Chancellor to reduce or remit fees in cases of undue financial hardship.

County Court Fees Order 1999, as amended, made under *County Courts Act, 1984*, SI 1999/689, s. 6

County Court Fees (Amendment) Order 1999, made under *County Courts Act, 1984*, SI 1999/2548, s. 2

27. The Rule of Law is the mark of a civilized society. It makes the creation of a positive legal order the normative basis of society. A society violates the Rule of Law when it allows the institutions of that positive legal order to exclude certain of its members.

28. It is clear in this case that Mr. Polewsky does not have the means to pay the Fees. His inability to pay the Fees means that he cannot enforce his rights in court, contrary to the Rule of Law. The Fees have put our justice system out of reach of Mr. Polewsky and the millions like him who live in poverty. The Advocates' Society submits that such a violation of the constitutionally entrenched right of access to the courts cannot be permitted.

B. A Judge of the Small Claims Court has the jurisdiction to waive the Fees

29. The Advocates' Society submits that the Rule of Law, and the principle that legislation should be interpreted in conformity with the *Charter* and Canada's international obligations, dictate that a Small Claims Court Judge's jurisdiction includes the power to waive fees in cases of indigence. That jurisdiction is grounded in the express wording of Rule 2.02 of the Small Claims Court Rules, and the doctrine of *in forma pauperis*.

30. Several accepted interpretive principles support the jurisdiction of a Small Claims Court Judge to waive the Fees:

(a) Legislation which is remedial, such as Rule 2.02 of the Small Claims Court Rules, must be given a broad and purposive interpretation which facilitates the achievement of its objects. Where there is ambiguity in the language of social legislation, the legislation should be given a liberal interpretation and any doubt resolved in favour of the person seeking a benefit under the legislation.

Abrahams v. Attorney General of Canada, [1983] 1 S.C.R. 2 at 10

Wedekind v. Director of Income Maintenance Branch of the Ministry of Community and Social Services (1994), 21 O.R. (3d) 289 (C.A.) at 297

Interpretation Act, R.S.O. 1990, c. I. 11, s. 10

(b) Where legislation confers a discretionary power, that power must be exercised in accordance with the *Charter* and with constitutional values, including equality rights.

Slaight Communications Inc. v. Davidson (1989), 59 D.L.R. (4th) 416 (S.C.C.) at 444-445

(c) Domestic legislation must be read, whenever possible, in conformity with Canada's international commitments. Those commitments include the Universal Declaration of Human Rights, which prohibits discrimination on the basis of property, and provides in Article 8 that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817
Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d. Sess. Supp. No. 13, UN Doc. A/810 (1948) 71, Art. 2, 8
See also: *International Covenant on Economic, Social and Cultural Rights*, UN Doc. A/6316 (1966) 993 UNTS 3, Art. 2(2), *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 UN GAOR Supp. (n. 16) 52, UN Doc. A/6316 (1966), 999 UNTS 71, Art. 14(1)

(d) The Rule of Law is a fundamental constitutional principle which has normative legal force and must be considered in determining the validity of government action. In order to conform to the Constitution and the values underlying it, legislation must conform to the Rule of Law.

Lalonde, supra at 549-551, 563

31. The *in forma pauperis* doctrine derives from a 1495 English statute, *A means to Help and Speed Poor Persons in their Suits* (the "**1495 Act**"). The 1495 Act bestowed upon the Chancellor the discretion to waive court fees payable by "Poor Persons". Mr. Polewsky argued before Gillese J. that the 1495 Act was part of the law of England at the time that English law was received in Ontario in 1792. As noted in paragraph 26, above, the Lord Chancellor continues to have the power to waive fees in cases of indigence.

A Means to Help and Speed Poor Persons in their Suits (UK) (1495) Henry VII, c. 12
Reasons of Madame Justice Gillese, Appeal Book, Tab 3, pp. 17-19

32. The Motions Judge held that the *in forma pauperis* doctrine does not apply in Ontario, since express statutory language in the *Courts of Justice Act* was required for *in forma pauperis* proceedings. The Advocates' Society submits that the lack of express statutory language is not determinative.

33. In *Pearson v. Canada*, the Federal Court, also a statutory court with no express power to waive fees, has recognized its power to allow for proceedings *in forma pauperis*. That power derives from Rule 55 of the Federal Court Rules, which states that, “[i]n special circumstances, on motion, the Court may dispense with compliance with any of these Rules”. The same interpretation of that Rule by the Tax Court of Canada was upheld on appeal by the Federal Court of Appeal.

Pearson v. Canada, [2000] F.C.J. No. 1444 (T.D.) at paras. 4-6
Moss v. Canada, [1997] T.C.J. no. 712 (T.C.C.), affirmed [1999] F.C.J. No. 656 (C.A.)
Federal Court Rules, 1998, SOR/98-106, made under the *Federal Court Act*, R. 55

34. The Courts in *Pearson* and *Moss* found that the *in forma pauperis* rule is a substantive, rather than a procedural, rule, as it affects substantive rights and that the absence of an *in forma pauperis* procedure breaches the Rule of Law. Accordingly, the Rule of Law must infuse this Court’s determination of whether a Judge of the Small Claims Court has the power to waive the Fees.

Pearson v. Canada, *supra* at para. 15
Moss v. Canada, *supra* at para. 8

35. Rule 2.02 of the Small Claims Court Rules provides that “[i]f necessary in the interest of justice, the Court may dispense with compliance with any rule at any time”. One of those rules requires the payment of a fee to set a matter down for trial. Accordingly, within its own Rules, the Court has jurisdiction to waive its fees in the interests of justice. This power is analogous to, indeed clearer than, the power of the Federal Court to dispense with compliance with its Rules in “special circumstances”.

Rules of the Small Claims Court, O. Reg. 258/98, made under the *Courts of Justice Act*, as amended, Rules 2.02, 13.01(7)

36. The Advocates’ Society submits that the Rule of Law dictates that a Judge of the Small Claims Court has the power to waive fees in cases of poverty. If that power does not derive from the doctrine of *in forma pauperis*, it can be found in the Small Claims Court’s own Rules.

C. **The Fees deny poor persons the equal benefit of the law, thereby violating section 15 of the Charter**

37. The Supreme Court of Canada has recently stated that an important factor in determining whether a group is entitled to the protection of s.15 of the *Charter* is whether the members of the group are subject to historic disadvantage. A number of Canadian courts have recognized that

poor people as a group are subject to tremendous social, political, legal and economic disadvantage. The Fees fail to provide a mechanism for waiver in cases of poverty, thereby depriving poor people of an advantage which is available to other members of society. Given that access to the justice system is a fundamental interest, the failure to take account of this pre-existing disadvantage amounts to discrimination.

38. Three questions are involved in a s. 15 analysis:

- (a) does the law:
 - (i) draw a formal distinction between the claimant and others on the basis of personal characteristics; or
 - (ii) fail to take into account the claimant's disadvantaged position, resulting in differential treatment between the claimant and others on the basis of personal characteristics;
- (b) was the claimant subject to differential treatment on the basis of one or more enumerated or analogous grounds; and
- (c) does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15 to remedy prejudice, stereotyping and disadvantage?

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, at 523 [hereinafter "*Law*"]

39. A s. 15 claim must be considered from the perspective of the claimant, "and from no other perspective". The evaluation of whether legislation is demeaning to a claimant's dignity must be conducted from the point of view of a reasonable, dispassionate, informed person, with similar attributes to the claimant.

Law, supra at 532-533

40. The Supreme Court has repeatedly stated that the effects of a law are crucial in considering whether it violates s. 15 of the *Charter*. The court must consider not only the impact a law is intended to have, but the impact it actually has on the lives of those who are subject to it. The right to equality protected by s. 15 is a substantive concept, not merely a formal one.

Law, supra at 517

i. Distinction or Differential Treatment

41. In determining whether a s.15 violation exists, the Court need not find an express legislative distinction, where the claim is one of adverse effect discrimination. In such a case, it

is often the failure to make a distinction, which takes into account the true characteristic of a disadvantaged person or group, that triggers s. 15.

Eaton v. Brant County Board of Education, (1997) 142 D.L.R. (4th) 385 at 405-406

42. The learned Motions Judge correctly found in the present case that the failure to make a distinction by allowing a waiver of Fees for poor persons resulted in differential treatment between the claimant and others. Therefore, the first part of the s.15 test is met.

ii. Poverty as an Analogous Ground of Discrimination

43. The primary question here is whether recognizing a particular ground as analogous would further the purpose of s. 15, namely, protection of human dignity. The question is whether a particular characteristic or combination of traits has the potential to violate human dignity.

Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203 [hereinafter “*Corbiere*”], at 250
Law, supra at 554
Egan v. Canada, [1995] 2 S.C.R. 513, [hereinafter “*Egan*”], at 599

44. The analogous grounds inquiry, like the other two stages of the s. 15 analysis, must be undertaken in a purposive and contextual manner. The “nature and situation of the individual or group at issue, and the social, political, and legal history of Canadian society’s treatment of that group” must be considered: specifically, whether persons with the characteristics at issue are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked. As stated by Wilson J. in *Andrews*,

... [the determination] is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 152
[hereinafter “*Andrews*”]
Law, supra at 519, 525, 554

45. Courts have previously held that the state of being a poor person constitutes an analogous ground for the purpose of s.15 of the *Charter*. Poor persons have also been found by Courts to have historically suffered disadvantage.

Federated Anti-Poverty Groups of B.C. v. British Columbia, [1991] B.C.J. No. 3047 (B.C.S.C.)

Falkiner v. Ontario (Ministry of Community and Social Services), (1996), 140 D.L.R. (4th) 115 (Ont. Div. Ct.) per Rosenberg J. at 130-139, 153

Falkiner v. Ontario (Ministry of Community and Social Services), (2000), 188 D.L.R. (4th) 52 (Div. Ct.)

Schaff v. Canada, [1993] T.C.J. No. 389 at para. 52

Dartmouth/Halifax County Regional Housing Authority v. Sparks (1993), 101 D.L.R. (4th) 224 (N.S.C.A.)

46. The mere fact that a group may be heterogenous is not in itself a bar to finding an analogous ground. All of the enumerated groups under s. 15 are themselves heterogeneous; there are more differences between women, for example, than similarities among them. The same is true of members of any particular racial minority. Section 15 does not require that the members of a group all be the same; it requires only that their membership in the group is based upon a shared personal characteristic. The poor are a group with a shared personal characteristic - the fact that they are poor. The poor, although different in many ways, share this one characteristic in the same way that women, who are different in many ways, share the characteristic of gender.

Corbiere, supra at 223

47. The Supreme Court of Canada in *Law* clearly stated that an important factor in the s. 15 analysis is whether the claimant is already disadvantaged. Clearly, poor people constitute a group whose members are subject to tremendous disadvantage in almost every aspect of life. In fact, the Ontario Court of Appeal has recently found that social assistance recipients are a historically disadvantaged group, and noted that social assistance recipients suffer economic disadvantage which often co-exists with other forms of disadvantage. Social assistance recipients are a sub-group of poor people and the Appellant is both poor and a social assistance recipient.

Falkiner v. Director, Income Maintenance (2002), 59 O.R. (3d) 481 (C.A.) at 507-508, 510

iii. Discriminatory Impact

48. A distinction based on enumerated or analogous grounds is discriminatory if it violates the purpose of s. 15. That purpose was summarized in *Law*, as follows:

...[T]he purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society.

Law, supra at 529

49. The equality guarantee in s. 15 is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. In determining whether a distinction is discriminatory, the primary inquiry “concerns the manner in which a person legitimately feels when confronted with a particular law”. Does the law enhance the self-worth and respect of the individual, or does it cause him or her to feel marginalised, ignored, or devalued? “Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?”

Law, supra at 529

50. In *Law*, the Supreme Court unanimously held that in analysing a s. 15 claim, one must take into account certain contextual factors, having regard to the purpose of s. 15 in protecting human dignity. The relevant factors include: pre-existing disadvantage, stereotyping, prejudice, or vulnerability; the correspondence between the ground of distinction and the actual need, capacity, or circumstances of the claimant and others; the ameliorative purpose of the legislation (if any); and the nature and scope of the interest affected.

Law, supra at 534-541

51. Groups or individuals that are generally subject to unfair treatment in society because of their characteristics or circumstances are already demeaned in dignity, and further differential treatment of them is more likely to have a discriminatory impact, since it often perpetuates or increases the existing disadvantage.

Law, supra at 534
Corbiere, supra at 257

52. In general, the more important and significant the interest affected by a law, the more likely it will be that differential treatment affecting this interest will amount to a discriminatory distinction within the meaning of s. 15. Discrimination is likely to be present where the distinction in question restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society. The court must consider the economic, social and constitutional significance of the interest in question.

Law, supra at 540
Corbiere, supra at 263-264
Egan, supra at 555-556

53. There is arguably no right which is more fundamental to full membership in Canadian society than the right to participate in its democratic institutions. The justice system is one of those institutions. The Supreme Court of the United States has described the legal system as the most fundamental characteristic of an organized and cohesive society.

Boddie v. Connecticut, supra

54. The existence of the Fees perpetuates the historic disadvantage suffered by poor people by depriving them of the ability to exercise a fundamental right which other members of Canadian society can exercise at will - the right to access to the courts to seek redress for legal wrongs and to enforce legal rights.

55. Given that the interest at stake - access to the justice system- is a fundamental one in a free and democratic society, the failure to take account of the pre-existing disadvantage suffered by those living in poverty amounts to discrimination. The lack of a mechanism for the waiver of court fees deprives poor persons of an advantage - access to justice - that is available to those who are not poor, and further exacerbates their disadvantaged position in society. The Supreme Court of Canada has held that a government may be required to take positive steps to ensure that disadvantaged groups have equal access to services provided to the general public. Viewed in light of the Supreme Court's statement, the failure to take positive steps to allow for waiver of the Fees violates the equality rights of the poor.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R.
624 at 681 [hereinafter "*Eldridge*"]

D. The Fees impair the right to security of the person, and are not in accordance with the principles of fundamental justice

56. The Advocates' Society submits that the right to effective, unfettered access to the courts is an essential component of the right to liberty and security of the person protected by s. 7 of the *Charter*. The Fees deprive poor people of their right to liberty and security of the person by imposing an unsurmountable barrier to access to the courts. This deprivation cannot be in accordance with the principles of fundamental justice, because those principles include the Rule of Law, which requires that access to the courts not be arbitrarily restricted, as well as the principle that the law is not arbitrary or discriminatory.

57. In determining whether s. 7 has been violated, the court must first consider whether the Fees affect the life, liberty or security of person of the Appellant. If so, the court must then consider whether the Fees accord with the principles of fundamental justice.

i. Security of the Person

58. Life, liberty and security of the person are independent interests. They are capable of a wide range of meaning and their interpretation must be "a generous rather than a legalistic one."

R. v. O'Connor (1995), 130 D.L.R.(4th) 235 at 288 (S.C.C.)

R. v. Morgentaler, [1988] 1 S.C.R. 30 [hereinafter "*Morgentaler*"] at 51-52

59. The Supreme Court of Canada has held that s. 7 protects those interests which are fundamentally related to physical and psychological integrity, dignity and autonomy. Moreover, s. 7 may impose positive obligations on government.

New Brunswick (Minister of Finance and Community Services) v. G.(J.), [1999]

3 S.C.R. 46 [hereinafter "*G.(J)*"] at 76, 88

Rodriguez v. B.C. (A.G.), [1993] 3 S.C.R. 519 at 585 [hereinafter *Rodriguez*]

60. The Supreme Court has also left open the possibility that s. 7 may protect certain economic rights. In *Irwin Toy*, the Court held that "corporate-commercial economic rights" must be distinguished from "such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter" which may be protected.

Irwin Toy, [1989] 1 S.C.R. 927 at 1003-1004

61. Recognizing the right of all persons, regardless of income, to have effective access to the courts as an element of s. 7 is consistent with Canada's international treaty obligations, including Article 8 of the *Universal Declaration of Human Rights*, Article 2(2) of the *International*

Covenant on Economic, Social and Cultural Rights and Article 14(1) of the *International Covenant on Civil and Political Rights*. The Advocates' Society submits that this Court must take an interpretive approach to s. 7 that is consistent with Canada's international human rights obligations.

B. Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 *Journal of Law and Social Policy* 117 at 145-160

62. Life, liberty and security of the person have been described as essential aspects of a democratic society, animated by the values embodied in the common law and in the *Charter*. In particular, they must be interpreted in light of the *Charter* equality guarantee, since it has been said that "the section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*". Threats to life, liberty and security of the person must be particularly scrutinized, therefore, when they impinge on the interests of disadvantaged groups.

G.(J), *supra* at 112
Andrews, *supra* at 185

63. The Supreme Court of Canada has recently confirmed that life, liberty and security of the person may be engaged by state action in the civil as well as the criminal context.

B. (R) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315 at 368
G. (J), *supra*

64. In *G.(J.)*, the Supreme Court of Canada looked beyond the economic component of the claim to consider the importance of the non-economic interests involved. The Advocates' Society submits that this Court must go beyond the economic aspect of this claim and recognize the other interests at stake - namely, the democratic rights of persons living in poverty to access to our judicial system in the same manner as any other member of society. It is submitted that this democratic right is fundamental and is an aspect of security of the person in a democratic society.

G. (J), *supra*

65. The Fees interfere with this democratic, fundamental right by imposing a barrier to access to the judicial system which is prohibitive to poor persons. As a result of these prohibitive Fees, indigent or impoverished persons have no means of seeking redress for legal wrongs, and no

means of enforcing their legal rights. The right to access the Courts, while having an economic component, is a fundamental right in a civil society, tied to personal autonomy. The Advocates' Society submits that the Fees impair this right.

ii. Absence of Fundamental Justice

66. The principles of fundamental justice are those principles which are vital to our societal notion of justice. They must be interpreted broadly, in accordance with the purposes of *Charter* protection. They may be gleaned from all components of the legal system, including judicial processes, the common law, legislation and international comparisons.

Reference Re s.94(2) of the Motor Vehicle Act (1985), 24 D.L.R. (4th) 536 (S.C.C.) at 547-550
Rodriguez, supra at 590-599

67. The principles of fundamental justice include both procedural and substantive fairness. In the civil context, there must be a “balancing of the interests of the individual and the state”. The entire legal regime, including its purposes and practical operation, must be considered.

Reference Re s.94(2) of the Motor Vehicle Act, supra at 557
Canadian Aids Society v. Ontario (1995), 25 O.R.(3d) (Gen.Div.) at 397
Morgentaler, supra at 62 ff

68. The Rule of Law is one component of the principles of fundamental justice. As discussed above, the Rule of Law requires that access to the courts not be arbitrarily restricted. The Fees arbitrarily restrict access to the courts by creating an insurmountable barrier to access for those person living in poverty, without a corresponding means of providing relief in individual circumstances. Accordingly, the violation of the right to security of the person created by the Fees cannot be in accordance with the principles of fundamental justice.

69. The Advocates' Society submits that the principles of fundamental justice also include the principle that the law does not discriminate. By imposing a barrier to access to the courts which affects only those persons who are impoverished, the Fees discriminate against poor people.

70. The Advocates' Society further submits that it is a principle of fundamental justice that the law not be arbitrary. By depriving persons of access to the courts when that was not their intended effect, the Fees are arbitrary, and any deprivation of security of the person caused by the Fees cannot be in accordance with fundamental justice.

E. The Fees cannot be justified under section 1 of the *Charter*

71. A violation of *Charter* rights can only be saved if the purposes of the law are pressing and substantial, the law is rationally connected to those objectives, the rights are minimally impaired, and the law's positive effects outweigh the negative.

R. v. Oakes, [1986] 1 S.C.R. 103

72. Section 7 violations are not easily saved by section 1, since the rights protected by section 1 cannot usually be overridden by competing social interests, and since a violation of the principles of fundamental justice can rarely be a reasonable limit in a democratic society.

G. (J), *supra* at 92-93

73. The purposes of the Fees are to offset the costs of the Small Claims Court, to prevent frivolous claims and to encourage settlement. Those purposes are not of such pressing importance as to warrant overriding a *Charter* right. Financial considerations cannot be used to justify *Charter* infringements. Moreover, as noted in paragraph 56, above, governments may have to take positive steps, such as expending funds, to prevent a *Charter* violation.

Schacter v. Canada, [1992] 2 S.C.R. 679 at 709
Eldridge, *supra* at 685, 681

74. The violation in this case cannot be said to limit the right as little as possible, since provision could easily be made to allow for waiver of the Fees in cases of proven indigence. While requiring persons to prove indigence may lead to administrative difficulties, administrative inconvenience or utilitarian considerations cannot justify limiting a *Charter* right. As the Supreme Court has said, "the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so".

Re Singh and Minister of Employment and Immigration, [1985] 1
S.C.R. 177 at 218

75. The negative effect of the Fees is evident: they deprive poor persons of the ability to seek redress and enforce their legal rights through the justice system. The impact of this negative effect on poor people and on the administration of justice is extremely far reaching. The Advocates' Society submits that any positive administrative effects of the Fees cannot outweigh this negative effect.

PART V - ORDER REQUESTED

76. For all of the foregoing reasons, the Advocates' Society requests an Order:

- (a) declaring that the Small Claims Court tariff fees are unconstitutional; or
- (b) in the alternative, declaring that a Judge of the Small Claims Court has the jurisdiction to waive the fees in cases of indigence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: March 11, 2002
(revised September 24, 2002)

Raj Anand

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SCHEDULE “A” - LIST OF AUTHORITIES

1. *Polewsky v. Bank of Montreal*, [1999] O.J. No. 2606 (Gen. Div. (Small Claims))
2. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at 239-240
3. *Manitoba Language Rights Reference*, [1985] 1 S.C.R. 721
4. *Lalonde v. Ontario* (2001), 56 O.R. (3d) 505 (C.A.)
5. *B.C.G.E.U. v. British Columbia*, [1988] 2 S.C.R. 214
6. *Pleau v. Nova Scotia (Supreme Court, Prothonotary)*, [1998] N.S.J. No. 526 (N.S.S.C.)
7. *Griffin v. Illinois*, 351 U.S. 12 (1956)
8. *Boddie v. Connecticut*, 401 U.S. 371 (1971)
9. *Berner Vulken Schiffbau und Maschinnefabrik v. South India Shipping Corp.*, [1981] 1 All E.R. 289 (H.L.)
10. *R. v. Lord Chancellor, ex parte Witham*, [1997] 2 All E.R. 779 (Q.B.)
11. *Halsbury's Laws of England* (4th ed. reissue), Vol. 8(2), para. 119
12. *Airey v. Ireland* (1979), 2 E.H.R.R. 305 (ECtHR)
13. *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2
14. *Wedekind v. Director of Income Maintenance Branch of the Ministry of Community and Social Services* (1994), 21 O.R. (3d) 289 (C.A.)
15. *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.)
16. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817
17. *Pearson v. Canada*, [2000] F.C.J. No. 1444 (T.D.)
18. *Moss v. Canada*, [1997] T.C.J. no. 712 (T.C.C.), affirmed [1999] F.C.J. No. 656 (C.A.)
19. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497
20. *Eaton v. Brant County Board of Education*, (1997)142 D.L.R (4th) 385
21. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203
22. *Egan v. Canada*, [1995] 2 S.C.R. 513
23. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143
24. *Federated Anti-Poverty Groups of B.C. v. British Columbia*, [1991] B.C.J. No. 3047 (B.C.S.C.)
25. *Falkiner v. Ontario (Ministry of Community and Social Services)*, (1996), 140 D.L.R. (4th) 115 (Ont. Div. Ct.) per Rosenberg J.
26. *Falkiner v. Ontario (Ministry of Community and Social Services)*, (2000), 188 D.L.R. (4th) 52 (Div. Ct.)
27. *Schaff v. Canada*, [1993] T.C.J. No. 389

28. *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A.)
29. *Falkiner v. Director, Income Maintenance* (2002), 59 O.R. (3d) 481 (C.A.)
30. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624
31. *R. v. O'Connor* (1995), 130 D.L.R.(4th) 235(S.C.C.)
32. *R. v. Morgentaler*, [1988] 1 S.C.R. 30
33. *New Brunswick (Minister of Finance and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46
34. *Rodriguez v. B.C. (A.G.)*, [1993] 3 S.C.R. 519
35. *Irwin Toy*, [1989] 1 S.C.R. 927
36. B. Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 *Journal of Law and Social Policy* 117 at 145-160
37. *B. (R) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315
38. *Reference Re s.94(2) of the Motor Vehicle Act* (1985), 24 D.L.R. (4th) 536 (S.C.C.)
39. *Canadian Aids Society v. Ontario* (1995), 25 O.R.(3d) (Gen.Div.)
40. *R. v. Oakes*, [1986] 1 S.C.R. 103
41. *Schacter v. Canada*, [1992] 2 S.C.R. 679
42. *Re Singh and Minister of Employment and Immigration*, [1985] 1 S.C.R. 177

SCHEDULE "B" - TEXT OF STATUTES, REGULATIONS AND BY-LAWS

1. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 23
2. O. Reg. 626/00, made under the *Courts of Justice Act*, s.1(1)
3. *Constitution Act*, 1982
4. County Court Fees Order 1999, as amended, made under *County Courts Act, 1984*, SI 1999/689, s. 6
5. County Court Fees (Amendment) Order 1999, made under *County Courts Act, 1984*, SI 1999/2548, s. 2
6. *Interpretation Act*, R.S.O. 1990, c. I. 11, s. 10
7. *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d. Sess. Supp. No. 13, UN Doc. A/810 (1948) 71, Art. 2, 8
8. *International Covenant on Economic, Social and Cultural Rights*, UN Doc. A/6316 (1966) 993 UNTS 3, Art. 2(2)
9. *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 UN GAOR Supp. (n. 16) 52, UN Doc. A/6316 (1966), 999 UNTS 71, Art. 14(1)

10. Federal Court Rules, 1998, SOR/98-106, made under the *Federal Court Act*, R. 55
11. Rules of the Small Claims Court, O. Reg. 258/98, made under the *Courts of Justice Act*,
as amended, Rules 2.02, 13.01(7)

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