

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:

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 APPELLANT

(revised)

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PART I - INTRODUCTION

1.

- (a) The Appellant respectfully submits that poor people have a right to participate in the civil justice system. In particular, it is submitted that the Small Claims Court of Ontario is obliged to remove any barrier to their access to justice.
- (b) It is respectfully submitted that a Small Claims Court Judge has the jurisdiction to waive administrative fees charged by the Small Claims Court where those fees form an insurmountable barrier to a poor person's access to justice.
- (c) It is respectfully submitted that the failure to waive such fees for poor people amounts to a violation of s. 15(1) and s. 7 of the *Canadian Charter of Rights and Freedoms*.

2. The Appellant brought an Application before Superior Court Judge Gillese seeking a declaration that Rule 13.01(7) of the *Small Claims Court Rules* was unconstitutional and to no effect or, in the alternative, an Order that an indigent's relief must be read into the *Small Claims Court Rules* or, in the further alternative, an Order waiving the fee in his circumstances.

3. Gillese J. dismissed the motion on the following grounds:

- (a) a Small Claims Court Judge does not have jurisdiction to waive the Small Claims Court fees on the basis of poverty; and
- (b) the requirement to pay a fee does not breach either section 7 or section 15 of the *Canadian Charter of Rights and Freedoms*.

Polewsky v. Home Hardware Stores Ltd. (1999), 40 C.P.C. (4th) 330 (Ont. S.C.J.).

- 4. Misener J. granted leave to appeal to the Divisional Court, finding there was good reason to doubt the correctness of the Order and the proposed appeal involved a matter of such importance that leave should be granted.

Polewsky v. Home Hardware Stores Ltd. (2000), 71 C.R.R. (2d) 330 (Ont. S.C.J.).

PART II - FACTS

- 5. The Small Claims Court Tariff was amended in 1997 to provide for a \$50.00 fee for infrequent claimants to initiate a claim, a \$100 fee to set a matter down for trial, a \$40 fee to file a motion, and various other fees for examination, default and garnishment. Some fees are higher for frequent claimants. The Appellant is an infrequent claimant.

Small Claims Court Rules, Rule 13.01(7).

Small Claims Court -- Fees and Allowances, O. Reg. 432/93, as amended O. Reg. 214/97, 488/98, 17/00.

- 6. The Appellant lives on a disability pension of approximately \$900.00 per month. He has no means of paying the \$100.00 filing fee to set a matter down for trial. .

Affidavit of Victor Polewsky, filed.

7. The Small Claims Court is a branch of the Superior Court of Justice, created by the *Courts of Justice Act*, with jurisdiction for recovery of claims of less than \$10,000.00, as prescribed by Regulation from time to time.

Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 22(1), 23 (1).

O. Reg. 432/93, *supra*.

8. The Small Claims Court in Ontario has an established purpose and lengthy tradition of being the court of the common people. Since the days of King Henry VII through to the Small Claims Court of modern Ontario, the rights of the small claimant have found a venue in the substance and procedure under the jurisdiction of the Small Claims Court.

A.D. 1494 Anno II Hen. VII, c. 12.

An Act for the More Easy and Speedy Recovery of Small Debts, 32 Geo. 3, c. 6 at 396.

9. The modern Small Claims Court in the Province of Ontario is, in the words of the Ontario Law Reform Commission, "a poor man's court of equity" where simplified and flexible procedures at minimal cost afford the litigants a chance to justly recover their losses. The *Ontario Manual of Civil Litigation* summarizes the purpose of the Small Claims Court as "providing a forum for a fast, inexpensive and simple resolution of disputes" which is "accessible to ordinary persons."

Ontario, Report on the Administration of Ontario Courts, Part III (Toronto: Ministry of the Attorney-General, 1973) at 341.

Ontario Manual of Civil Litigation, (Toronto: Carswell, 1996) at para. 37.1.

Reference may also be made to:

Xerox Canada Inc. v. Neary (1984), 47 O.R. (2d) 776 (Provincial Court (Civil Division)).

Provincial Court (Civil Division) Project Act, S.O. 1979, c. 67, s. 2 (repealed).

Small Claims Court Act, R.S.O. 1970, c. 439 (repealed).

Small Claims Court, (Toronto: Ministry of the Attorney-General) (excerpted in K. Hildebrandt et al., "The Windsor Small Claims Court: An Empirical Study of Plaintiffs and Their Attitudes" (1982) 2 *Windsor Yearbook of Access to Justice* 87).

How To Make Small Claims Court Work For You, (Toronto: Ministry of the Attorney-General, 2001).

Johanson et al v. Williamson et al (1977), 18 O.R. (2d) 585 (Small Claims Court).

10. Of the people who need the Small Claims Court, the poor are in special need of its accessibility and simplicity, since they are least able to afford to walk away from a small loss or damage:

[C]laims with low dollar values are not necessarily small to the claimants, and...this phenomenon will be more prevalent in lower-income groups. While all small claimants are prejudiced when the jurisdiction in which they live has no small claims court, it is the poor who suffer most.

C.S. Axworthy, "A Small Claims Court for Nova Scotia - Role of the Lawyer and Judge" (1978), 4 *Dalhousie L.J.* 311 at 311.

11. The Small Claims Court, where more than 75 *per cent* of civil actions are heard in Ontario, is the forum in which "the appearance and the fact of justice is impressed first hand on the vast majority of citizens involved in a civil dispute. The principle of 'access

to justice', which is central to the objectives and practice of the Small Claims Court, demands that no person should be compelled to abandon a *bona fide* claim because of difficulty in attending to procedural requirements."

Small Claims Court briefing paper, (Toronto: Ministry of the Attorney General, 1976) (excerpted in R.B. Spevakow, "Small Claims For Alberta: Some Recommendations" (1979), 17 Alta. L.R. 244 at 246).

Gothard v. Ahmed, [1999] O.J. No. 2075 (Gen. Div.) (QL) at para. 4.

Barroetavena v. Dr. Ernst J. Schmidt Inc., [1994] B.C.J No. 1593 (B.C. Provincial Court) (QL) at para. 12.

Mount Royal Painting & Decorating Inc. v. Central Interiors Inc., [1995] O.J. No. 4031 (Ontario Ct. of Justice (General Division)) (QL) at para. 24.

Artisan Floor Co. v. Lam (1993), 76 B.C.L.R. (2d) 384 (British Columbia Supreme Court).

PART III - ISSUES

12. The Appellant respectfully submits that the following issues are raised in the current appeal whether:

- (a) the learned Superior Court Judge erred in deciding that a Small Claims Court Judge does not have jurisdiction to waive filing fees with respect to poor people;

- (b) the learned Superior Court Judge erred in deciding that Rule 13.01(7) of the *Small Claims Court Rules*, which requires the payment of fees, does not violate s. 15(1) of the *Canadian Charter of Rights and Freedoms* with respect to poor people;
- (c) the learned Superior Court Judge erred in deciding that Rule 13.01(7) of the *Small Claims Court Rules*, which requires the payment of fees, does not violate s. 7 of the *Canadian Charter of Rights and Freedoms* with respect to poor people; and
- (d) if Rule 13.01(7) of the *Small Claims Court Rules*, which requires the payment of fees, violates either s. 15 or s. 7 of the *Canadian Charter of Rights and Freedoms* with respect to poor people, whether such fees are a reasonable and demonstrably justified limit pursuant to s.1 of the *Charter*.

PART IV – THE LAW

(A) JURISDICTION

13. The Superior Court Judge found that judicial discretion did not extend to waive Small Claims Court fees. Her Honour adopted the reasoning in the decision *Magrath v. National Parole Board* [1979], 2 F.C. 757, and found that the absence of a provision to waive fees on the basis of hardship in the *Small Claims Court Rules* was a deliberate omission. Her Honour further concluded that s. 25 of the *Court of Justice Act* did not

confer the discretion to waive fees since the question of a filing fee was not relevant to the determination of the merits of the case.

Polewsky, supra.

14. The Appellant respectfully submits that a Small Claims Court Judge has jurisdiction to waive the fees in circumstances where a litigant would otherwise be deprived of the opportunity to access the Small Claims Court.
15. Rules 1.03(1), 1.03(2), 1.04 and 2.02 of the *Small Claims Court Rules*, and s. 25 of the *Courts of Justice Act* provide a Small Claims Court Judge with wide discretion to construe the rules "liberally", to "secure the just determination of every proceeding on its merits", and to "make such order as is considered just and agreeable to good conscience". In addition, "if necessary in the interest of justice, the court may dispense with compliance with any rule at any time".

Ontario, *Rules of the Small Claims Court*, rr. 1.03(1), 1.03(2), 1.04, 2.02.

Courts of Justice Act, supra, s. 25

16. The *Small Claims Court Rules* and the *Courts of Justice Act* should be given a purposive interpretation, and such a fair, large and liberal construction and interpretation as best ensures the attainment of the objects of the *Rules* and the *Act*.

R. Sullivan, ed., *Dreidger on the Construction of Statutes*, 3d ed. (London: Butterworths, 1994) at 35.

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

17. The purpose of the Small Claims Court, and the *Rules* under which it operates, is to provide an avenue of justice and redress for the common man. For many people, the Small Claims Court is the only place where Her Majesty's justice touches them. It is the only place they can go, or would have reason to go, when they need the help of law and equity. Without the Small Claims Court, people can be cheated or damaged with impunity by unscrupulous operators and tortfeasors who would know their victims have no means of accessing justice. "The splendid thing" about this court, observes Reginald Heber Smith, is that "it does Justice where before there was no Justice at all."

Reginald Heber Smith, *Justice and the Poor*, (1909) (cited in Justice M.A. Zuker, *Ontario Small Claims Court Practice*. (Toronto: Carswell, 2001-2002) at 1-2).

18. It is submitted that the Motion Court Judge erred in failing to interpret the *Small Claims Court Rules* and *Courts of Justice Act* in a manner that reflects constitutional and civil values. Where a legislative provision on a reasonable interpretation of its history and on the plain reading of its text is subject to two equally persuasive interpretations, the Court should adopt that interpretation which accords with *Charter* values. This is particularly so where the *Small Claims Court Rules*, as distinct from any other court rules in Ontario or federally, instruct a Small Claims Court Judge to make orders in accordance with "good conscience". "Good conscience", in this context, means "good *judicial* conscience" and embodies the *Charter* values such as the Rule of Law, equality, and access to fundamental justice.

R. v. Zundel (1992), 95 D.L.R. (4th) 202 at 273-274 (S.C.C.) *per* McLachlin J. (as she then was).

Reference may also be made to:

Hills v. Canada (Attorney General) (1988), 48 D.L.R. (4th) 193 (S.C.C.).

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

19. The English Court (Queen's Bench Division) has recognized that the payment of court filing fees for a poor person is a bar to access to justice, and offends a "common law constitutional right." Laws J., writing for the Court, commented that a citizen's right of access to the courts was "as near an absolute right as I can envisage" and may be wider and more fundamental than the right to freedom of expression. Access to the courts may only be denied by the government if it persuades Parliament to pass legislation which specifically permits the executive to turn people away from the court door.

R. v. Lord Chancellor, ex parte Witham, [1997] 2 All E.R. 779 at 783, 787-788 (Q.B.D.).

R. v. Secretary of State for the Home Department and others, ex parte Saleem, [2000] 4 All E.R. 814 (C.A.).

20. It is respectfully submitted that this Honourable Court ought to adopt the approach of the English courts in interpreting legislation which impacts on access to justice. In particular, legislation should be presumed to promote access to the courts unless it expressly states to the contrary. Accordingly, it is submitted that Gillese J. erred in concluding that because there was not a specific provision for a waiver of fees, the intention of the legislature was to exclude it.

de Smith Woolf and Jowell, *Judicial Review of Administrative Law* (5th ed. 1995) at 5-017.

R. v. Lord Chancellor, ex parte, supra.

R. v. Secretary of State for the Home Department and others, ex parte Saleem, supra.

21. The waiver of fees is part of the inherent common law jurisdiction of a trial judge to control the trial proceedings in a manner consistent with the interests of justice. So long as the Small Claim Court Judge does not act outside of his or her statutory jurisdiction, a Small Claims Court Judge has and may exercise real control of the Court's processes.

Re Lachowski and Federated Mutual Insurance Co. (1980), 29 O.R. (2d) 273 at 277 (Divisional Court).

Graves v. Avis Rent a Car System Inc. (1993), 21 C.P.C. (3d) 391 at 393-394 (Gen. Div.)

22. Canadian courts in other jurisdictions have recognized the right of a litigant to proceed *in forma pauperis*.
23. In *Feuiltault v. Canada*, Lamarre Proulx T.C.J. found discretion to allow an *in forma pauperis* procedure in Rule 9 of the *Tax Court Rules*, which provides that "the Court may, only where and as necessary in the interests of justice, dispense with compliance with any Rule at any time." Further jurisdiction was found in Rule 4(1) of the *Tax Court Rules* which provides that the *Rules* are to be "liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits." The right to proceed without payment of the filing fee was a substantive right.

Feuilaunt v. Canada, [1993] 1 C.T.C. 2385 (T.C.C.).

24. In *Moss v. Canada*, Bell T.C.J. found that the right to proceed to an appeal without paying the fee is a substantive right, and that the test of rule waiver is "if the rule in question affects the individual's rights it is substantive in nature." Bell T.C.J. concluded that Rule 9 of the *Tax Court Rules* provides that "in the interests of justice" the fee should be waived.

Moss v. Canada (1997), 51 D.T.C. 1493 at 1495 (T.C.C.).

25. In *Pearson v. Canada*, Muldoon J. noted *Magrath* but distinguished it for failing to consider Rule 55 of the *Federal Court Rules* which states that "in special circumstances, on motion, the Court may dispense with compliance with any of these Rules." Muldoon J. found that Rule 55 makes it clear that the Court has discretion to dispense with compliance with Rules pertaining to fees.

Pearson v. Canada (2000), 195 F.T.R. 31 (F.C.T.D.).

26. In *Reid v. Canada*, an application to proceed *in forma pauperis* was granted to the impecunious litigant. Bell T.C.J., distinguished his earlier decision in *Moffat v. Her Majesty The Queen*, 94 D.T.C. 1408, where he had followed *Magrath* in a different context, i.e., a judge's discretion did not cover the absence of a rule regarding summary judgments. In *Reid*, Bell T.C.J. held that a judge's discretion to waive a court fee is a crucial discretion where the imposition of a court fee would deny the litigant access to justice:

In the present case, if the Applicant is unsuccessful, he will be denied the ability to present his case in Court. This would not

serve the interests of justice.

Reid v. Canada, [1995] 2 C.T.C. 2926 (T.C.C.).

27. The Supreme Court of Canada has set the standard for the legitimacy of the principle of the poor being granted access to the Court and specifically recognizes appeals *in forma pauperis*.

Rules of the Supreme Court of Canada, r. 47.

28. A Small Claims Court Judge has the widest possible discretion to ensure that every case proceeds to a "just determination....agreeable to good conscience" to the extent that a Small Claims Court Judge may dispense with compliance with "any rule at any time". A filing fee imposed by the court may go to the heart of a just determination of the case. The merits of the case can only be presented upon the payment of the fee. If the Small Claims Court Judge is denied the discretion to waive the fee, then the Judge cannot hear the case at all. An *in forma pauperis* procedure is fundamental to the fair disposition of a matter. It is unconscionable for the *Small Claims Court Rules* to compel a Small Claims Court Judge to refuse to hear a case because a party is too poor to pay an entrance fee.
29. It is submitted that the Legislature did not intend to create and invest in a Small Claims Court system with a broad jurisdiction, greatly simplified procedures and paperwork, a helpful bench, simple-language instruction booklets, translators and relaxed and expansive rules, all in the name of accessibility and justice, only to have poor people excluded by the imposition of an unaffordable and un-waiveable administrative fee.

(B) SECTION 15

30. The Appellant respectfully submits that the payment of fees pursuant Rule 13.01(7) of the *Small Claims Court Rules* violates his right to equal protection and equal benefit of the law guaranteed by s.15(1) of the *Charter of Rights and Freedoms*.

Canadian Charter of Rights and Freedoms, section 15(1).

31. The Supreme Court of Canada has directed that a purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee and to avoid the pitfalls of a formalistic or mechanical approach.

Law v. Minister of Human Resources Development (1999), 170 D.L.R. (4th) 1 at 6-7 (S.C.C.).

32. Accordingly, a court that is called upon to determine a discrimination claim under s.15(1) should make the following three broad inquiries:

1. Does the impugned law draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or failed to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of personal characteristics;

2. Is the claimant subject to differential treatment on one or more enumerated and analogous grounds; and

3. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group characteristics, or which otherwise has the effect of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration.

Law, supra at 38.

33. At its root, the purpose of s.15(1) is to assure human dignity by the remedying of discriminatory treatment. A court must adopt both a comparative approach and to examine the contextual factors to determine whether s.15(1) has been infringed.

Law, supra at 39.

34. The court must also consider whether the legislation has the effect of demeaning a claimant's dignity, from the claimant's perspective. The focus of the inquiry is both subjective and objective. Some of the factors influencing the determination of whether s.15(1) has been infringed are:

- (a) Pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group at issue;

- (b) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity or circumstances of the claimant or others;
- (c) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and
- (d) The nature and scope of the interest affected by the impugned law.

Law, supra at 40.

35. It is submitted that Gillese J. erred by requiring the Appellant to adduce conclusive evidence as to the social, political and legal history of Canadian society's treatment of those in poverty, or evidence that the impoverished members of Canadian society have been consistently and routinely subjected to discrimination. A claimant is not required to adduce data or other social science evidence that is not generally available in order to show a violation of the claimant's dignity or freedom. The court may (and often does) make an appropriate determination on the basis of judicial notice and logical reasoning alone whether the impugned legislation infringes s.15(1). A court may take judicial notice of notorious and undisputed facts, or of facts which are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy.

Law, supra at 41.

36. The preliminary issue in this case is whether the *Small Claims Court Rules* and specifically the requirement to pay a fee pursuant to Rule 13.01(7), which applies without distinction

to all persons, fails to take into account the Appellant's already disadvantaged position within Canadian society. If so, there is a differential treatment for the purposes of s.15(1).

37. On its face, the *Small Claims Court Rules* do not make a distinction between poor people and the Canadian population as a whole. Both poor people and all others are required to pay the prescribed fees. The Appellant contends that, by requiring him to pay such fees, he is unable to access the Small Claims Court and the justice system to the same extent as others in Canadian society. Accordingly, Rule 13.01(7) has a substantively differential effect on poor people in that it denies a poor person access to a poor person's court.

38. The Supreme Court of Canada has consistently held that s.15(1) of the *Charter* protects against this kind of "adverse effects" discrimination.

Law Society British Columbia v. Andrews (1989), 56 D.L.R. (4th) 1 at 32 (S.C.C.) *per* Wilson J.

Egan v. Canada (1995), 124 D.L.R. (4th) 609 at 645-647 (S.C.C.).

Eldridge v. British Columbia (Attorney General) (1997), 151 D.L.R. (4th) 577 at 616-619 (S.C.C.).

39. The failure to make reasonable accommodation for poor people to access the Small Claims Court and, indeed, the justice system results in the relegation and banishment of poor people from full participation in Canadian society and the justice system.

Eldridge, supra at 618.

Eaton v. Brant County Board of Education (1996), 142 D.L.R.
(4th) 385 at 406 (S.C.C.).

40. The Superior Court Judge accepted that the requirement to pay fees pursuant to the *Small Claims Court Rules* made it more onerous for the Appellant to access the civil justice system than for those persons with greater financial means. It is submitted that this disadvantage and differential treatment denies the Appellant equal benefit of the law.

Polewsky, supra.

41. If it is established that the Appellant is subject to differential treatment for the purposes of s.15(1), the Court must next determine whether the differential treatment constitutes substantive discrimination. In so determining, the Court must first consider whether "poverty" is analogous to those grounds specifically enumerated in s.15(1).

Law, supra at 38.

42. A ground may qualify as analogous to those listed in s.15(1) if persons characterized by the trait in question are, among other things, a "discrete and insular minority", "lacking in political power", "vulnerable to having their interests overlooked and their rights to equal concern and respect violated", and "vulnerable to becoming a disadvantaged group" on the basis of that trait. The fundamental consideration is whether a characteristic -- in this case, poverty -- may serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual.

Law Society British Columbia, supra at 32.

Miron v. Trudel (1995), 124 D.L.R. (4th) 693 at 703 (S.C.C.).

43. The Appellant respectfully submits that poverty is analogous to the prohibited grounds of discrimination listed in s. 15(1).

44. Ontario Courts have recognized that poor people, and specifically people on social assistance, are vulnerable to stereotyping, stigmatization, and exclusion.

Falkiner v. Ontario (Ministry of Community and Social Services) (1986), 140 D.L.R. (4th) 115 (Ont. Gen. Div.) *per* Rosenberg J., dissenting, at 138-139, 152.

Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch) (2000), 188 D.L.R. (4th) 52 (Ont. Div. Ct.) at 86.

Falkiner v. Ontario (Ministry of Community and Social Services) [2002] O.J. No. 1771 (Ont. C.A.) at paras. 86-87.

45. Although the *Charter* does not protect economic rights, the Appellant respectfully submits that the consideration of poverty as an analogous ground is not precluded by other decisions of this Court.

46. In *Dunmore v. Ontario (Attorney General)*, although Sharpe J. (as he then was) rejected economic disadvantage as sufficient to establish agricultural workers as an analogous ground under s.15(1) of the *Charter*, His Honour recognized that economic disadvantage may be an important indicator of discrimination. The Divisional Court in *Falkiner v.*

Ontario (Ministry of Community and Social Services, Income Maintenance Branch), did not feel itself bound by *Dunmore*, noting that an attack upon the fundamental dignity and worth of individuals was distinguishable from an exclusion from collective bargaining rights. Moreover, *Dunmore* was reversed on different grounds on appeal to the Supreme Court of Canada.

Dunmore v. Ontario (Attorney General) (1997), 37 O.R. (3d) 287 (Gen. Div.), upheld (1999), 182 D.L.R. (4th) 471 (Ont. C. A.), rev'd by the Supreme Court of Canada, December 20, 2001.

Falkiner, supra at 90.

47. In *Masse v. Ontario (Ministry of Community and Social Services)* (1996), O'Driscoll J. rejected poverty and the class of social assistance recipients as an analogous ground of discrimination. However, this view was not supported by a clear majority of the Divisional Court. Justice O'Brien found there was no evidence to establish the necessary characteristics of such a group; Corbett J., dissenting in part, concluded that the status of sole support parents on social assistance did constitute an analogous ground.

Masse v. Ontario (Ministry of Community and Social Services) (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.), leave to appeal to Court of Appeal dismissed April 30, 1996, leave to appeal to Supreme Court of Canada dismissed December 5, 1996.

48. It is submitted that while access to social services for the poor is critical, access to justice is a foundational pillar of a free and democratic society.

British Columbia Government Employees' Union v. British Columbia (Attorney General) (1988), 53 D.L.R. (4th) 1 at 25 (S.C.C.) per Dickson C.J.C.

R. v. Lord Chancellor, ex parte Witham, supra.

R. v. Secretary of State for the Home Department and others, ex parte Saleem, supra.

49. The Appellant further submits that the differential treatment on the basis of poverty is discriminatory, by imposing on him a burden which has the effect of perpetuating or promoting the view that the Appellant, as a poor person, is less capable or worthy of recognition or value as a human being or as a member of Canadian society.
50. It is submitted that the payment of an administrative fee imposed by Rule 13.01(7) of the *Small Claims Court Rules* impinges on the human dignity of poor people, and constitutes discrimination in the substantive sense. The payment of the fee exacerbates and reinforces the pre-existing disadvantage and social status of poor people: a group that is already vulnerable to having its needs and concerns overlooked.

(C) SECTION 7

51. The Appellant respectfully submits that the payment of fees pursuant to Rule 13.01(7) of the *Small Claims Court Rules* violates his security of the person as guaranteed by s.7 of the *Charter of Rights and Freedoms*.

Canadian Charter of Rights and Freedoms, section 7.

52. The right to security of person means not only protection of one's physical integrity but also the provision of necessities for its support. Section 7 of the *Charter* may include

economic rights, fundamental to human life or survival.

Singh v. Minister of Immigration (1985), 17 D.L.R. (4th) 422 at 459-460 (S.C.C.).

Irwin Toy v. Quebec (1989), 58 D.L.R. (4th) 577 at 632-633 (S.C.C.).

53. For a poor person, "security of the person" must include the right to access the civil justice system, and particularly the Small Claims Court. A poor person does not "choose" to bring an action for civil wrongs. "Self help" remedies are unacceptable in our society, and there is a legal and moral compulsion to seek redress in our court. Without access to justice in the Small Claims Court, a poor person may be swindled with impunity. This is a fatal blow to a poor person's democratic rights and his or her security of person.

Pleau v. Nova Scotia (1998), 186 N.S.R. (2d) 1 (N.S.S.C, Prothonotary).

54. It is respectfully submitted that "security of the person" must also mean that a poor person has a right to the benefit of the Rule of Law. The Court has an obligation to ensure that right is recognized and protected.

55. The Rule of Law is a cornerstone principle of our constitutional order, set out in the Preamble to the *Canadian Charter of Rights and Freedoms*. The Rule of Law requires that disputes be resolved according to the law, and not according to power or force. All people in Canada are subject to and entitled to the benefit of the Rule of Law.

Reference re Secession of Quebec (1998), 161 D.L.R. (4th) 385 at 447 (S.C.C.).

56. Access to the courts is a "foundational pillar" protecting the rights and freedoms of our citizens, and integral to the Rule of Law.

B.C.G.E.U., supra at 12, 27-28.

R. v. Lord Chancellor, ex parte Witham, supra.

R. v. Secretary of State for the Home Department and others, ex parte Saleem, supra.

57. Access to the Court is not limited to physical passage into the courtroom or building. Chief Justice Dickson adopted the British Columbia Court of Appeal statement regarding access to the court:

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]

B.C.G.E.U., supra at 12.

"The High Court's power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. 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 courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain a remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by

some other citizen, the defendant."

Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp., [1981] 1 All E.R. 289, [1981] AC 909 as per Lord Diplock, as cited in *R. v. Lord Chancellor, ex parte Witham* at 784.

58. It is submitted that otherwise reasonable court fee structures that create insurmountable financial obstacles for poor people violate the Rule of Law by interfering with a poor person's right to access the Rule of Law, and *a fortiori* violate the Appellant's right to security of the person.
59. Courts have ruled that financial obstacles to access to the courts may also contravene the Rule of Law. In *Pearson v. Canada*, Muldoon J. held that the absence of a *forma pauperis* rule of procedure in itself breaches the Rule of Law. In *Pleau v. Nova Scotia*, it was held that otherwise reasonable fees lose their constitutional validity should they in purpose or effect "impede, impair or delay" access to the courts.
- Pearson, supra* at para. 15.
- Pleau, supra* at para. 104.
60. A person has a constitutional right of access to the courts, including as a plaintiff to obtain a remedy to which he claims to be entitled in consequence of a breach of his legal or equitable rights by a defendant. Access to civil justice is a constitutional right, and impeding access would amount to a breach of the Rule of Law.

R. v. Lord Chancellor, ex parte Witham, supra, at 784.

61. The question is not whether there is an unrestricted constitutional right to litigate in the civil courts. At issue is the right not to be barred from the civil courts by insurmountable procedural obstacles imposed by the civil courts themselves. It is submitted that a fee that cannot be waived under any circumstances, in a court that was designed and maintained for the purposes of dealing with the small, unrepresented, unsophisticated, poor claimant, creates exactly that sort of bar.

62. The Appellant, in being denied access to the Small Claims Court, has been deprived of security of the person, and such deprivation does not accord with the principles of fundamental justice. There can be no fundamental justice without access to justice.

(E) SECTION 1

63. Section 1 of the *Charter* allows for a right or freedom to be infringed if it is reasonable limits prescribed by law and can be demonstrably justified in a free and democratic society.

64. The Attorney General has not demonstrated that any attempt has been made in the levying of this fee to affect the impoverished litigants' rights as little as possible.

R. v. Oakes (1986), 26 D.L.R. (4th) 200 (S.C.C.).

65. The simple inclusion of a discretionary provision would improve such a balance. It should not be presumed that poor people institute frivolous lawsuits, or that the size of

their claims is not worth pursuing, or that their claims clutter the court system which was designed to serve them. The proper exercise of judicial discretion to waive fees will remedy the violation of s. 15 (1) and s. 7 created by the preclusive charges levied against the poor by the *Small Claims Court Rules*.

66. The Appellant respectfully submits that the Divisional Court should Order that a Small Claims Court Judge has discretion to waive court fees, and such discretion can be "read into" the *Small Claims Court Rules* and the *Courts of Justice Act*.

67. In *Schacter v. Canada and Vriend v. Alberta*, the Supreme Court determined that it was appropriate for the court to "read in" corrective provisions when it was reasonable to assume that the legislator would have adopted such provisions if it had been known that the absence of such provisions jeopardizes the entire objective sought to be achieved.

Vriend v. Alberta (1998), 156 D.L.R. (4th) 385 at 445 (S.C.C.).


Schacter v. Canada (1992), 93 D.L.R. (4th) 1 at 19-20 (S.C.C.).

68. It is respectfully submitted that the present case fits these conditions. It is reasonable to presume that the Legislature of Ontario would prefer to preserve the fee structure and "read in" a discretionary provision for waiver of fees, than to abandon the entire fee structure.

PART V – ORDER REQUESTED

69. For all of the foregoing reasons, the Appellant requests that this Honourable Court declare that a Small Claims Court Judge has the jurisdiction to waive the court fees imposed by Rule 13.01(7) of the *Small Claims Court Rules* regarding poor people or, in the alternative, that the court fees be declared unconstitutional pursuant to s. 52 of the *Constitution* or, in the alternative, that a discretionary provision for waiver of fees be "read into" the *Small Claims Court Rules*, and the fee be waived in the Appellant's circumstances, in conjunction with any of the above dispositions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

PER: 

Ronald D. Manes

Daina I. Groskaufmanis

CERTIFICATE

Counsel for the Appellant certifies that an Order under subrule 61.09(2) has been obtained and the Record has been requisitioned from St. Thomas, Ontario to the Divisional Court in Toronto, Ontario.

Counsel for the Appellant requires 2 hours for oral argument, not including reply.

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SCHEDULE "A"

List of Authorities Referred to

1. *Polewsky v. Home Hardware Stores Ltd.* (1999), 40 C.P.C. (4th) 330 (Ont. S.C.J.)
2. *Polewsky v. Home Hardware Stores Ltd.* (2000), 71 C.R.R. (2d) 330 (Ont. S.C.J.)
3. Ontario, *Rule of the Small Claims Court*, Rule 13.01(7)
4. *Small Claims Court -- Fees and Allowances*, O. Reg. 432/93, as amended O. Reg. 214/97, 488/98, 17/00
5. *Courts of Justice Act*, R.S.O. 1990, c. C.43
6. A.D. 1494 Anno II Hen. VII, c. 12
7. *An Act for the More Easy and Speedy Recovery of Small Debts*, 32 Geo. 3, c. 6
8. Ontario, *Report on the Administration of Ontario Courts, Part III* (Toronto: Ministry of the Attorney-General, 1973)
9. *Ontario Manual of Civil Litigation*, (Toronto: Carswell, 1996)
10. *Xerox Canada Inc. v. Neary* (1984), 47 O.R. (2d) 776 (Provincial Court (Civil Division))
11. *Provincial Court (Civil Division) Project Act*, S.O. 1979, c. 67 (repealed)
12. *Small Claims Court Act*, R.S.O. 1970, c. 439 (repealed)
13. *Small Claims Court*, (Toronto: Ministry of the Attorney-General) (excerpted in K. Hildebrandt et al., "The Windsor Small Claims Court: An Empirical Study of Plaintiffs and Their Attitudes" (1982) 2 *Windsor Yearbook of Access to Justice* 87)
14. *How To Make Small Claims Court Work For You*, (Toronto: Ministry of the Attorney-General, 2001)
15. *Johanson et al v. Williamson et al* (1977), 18 O.R. (2d) 585 (Small Claims Court)
16. C.S. Axworthy, "A Small Claims Court for Nova Scotia - Role of the Lawyer and Judge" (1978) 4 *Dalhousie L.J.* 311

17. *Small Claims Court briefing paper*, (Toronto: Ministry of the Attorney General, 1976) (excerpted in R.B. Spevakow, "Small Claims For Alberta: Some Recommendations" (1979) 17 Alta. L.R. 244
18. *Gothard v. Ahmed*, [1999] O.J. No. 2075 (Gen. Div.) (QL)
19. *Barroetavena v. Dr. Ernst J. Schmidt Inc.*, [1994] B.C.J No. 1593 (B.C. Provincial Court) (QL)
20. *Mount Royal Painting & Decorating Inc. v. Central Interiors Inc.*, [1995] O.J. No. 4031 (Ontario Ct. of Justice (General Division)) (QL)
21. *Artisan Floor Co. v. Lam* (1993), 76 B.C.L.R. (2d) 384 (British Columbia Supreme Court)
22. Ontario, *Rules of the Small Claims Court*, Rules 1 and 2.
23. R. Sullivan, ed., *Dreidger on the Construction of Statutes*, 3d ed. (London: Butterworths, 1994)
24. *Interpretation Act*, R.S.O. 1990, c. I.11
25. Reginald Heber Smith, *Justice and the Poor*, (1909) (cited in Justice M.A. Zuker, *Ontario Small Claims Court Practice* (Toronto: Carswell, 2001-2002))
26. *R. v. Zundel* (1992), 95 D.L.R. (4th) 202 (S.C.C.)
27. *Hills v. Canada (Attorney General)* (1988), 48 D.L.R. (4th) 193 (S.C.C.)
28. *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.)
29. *R. v. Lord Chancellor, ex parte Witham*, [1997] 2 All E.R. 779 (Q.B.D.)
30. *R. v. Secretary of State for the Home Department and others, ex parte Saleem*, [2000] 4 All E.R. 814 (C.A.)
31. de Smith Woolf and Jowell, *Judicial Review of Administrative Law* (5th ed. 1995)
32. *Re Lachowski and Federated Mutual Insurance Co.* (1980), 29 O.R. (2d) 273 (Divisional Court)
33. *Graves v. Avis Rent a Car System Inc.* (1993), 21 C.P.C. (3d) 391 (Gen. Div.)
34. *Feuilaault v. Canada*, [1993] 1 C.T.C. 2385 (T.C.C.)

35. *Moss v. Canada* (1997), 51 D.T.C. 1493 (T.C.C.)
36. *Pearson v. Canada* (2000), 195 F.T.R. 31 (F.C.T.D.)
37. *Reid v. Canada*, [1995] 2 C.T.C. 2926 (T.C.C.)
38. *Rules of the Supreme Court of Canada*, Rule 47
39. *Law v. Minister of Human Resources Development* (1999), 170 D.L.R. (4th) (S.C.C.)
40. *Law Society British Columbia v. Andrews* (1989), 56 D.L.R. (4th) (S.C.C.)
41. *Egan v. Canada* (1995), 124 D.L.R. (4th) 609 (S.C.C.)
42. *Eldridge v. British Columbia (Attorney General)* (1997), 151 D.L.R. (4th) 577 (S.C.C.)
43. *Eaton v. Brant County Board of Education* (1996), 142 D.L.R. (4th) 385 (S.C.C.)
44. *Miron v. Trudel* (1995), 124 D.L.R. (4th) 693 (S.C.C.)
45. *Falkiner v. Ontario (Ministry of Community and Social Services)* (1986), 140 D.L.R. (4th) 115 (Ont. Gen. Div.)
46. *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (2000), 188 D.L.R. (4th) 52 (Ont. Div. Ct.)
47. *Falkiner v. Ontario (Ministry of Community and Social Services)* [2002] O.J. No. 1771 (Ont. C.A.)
48. *Dunmore v. Ontario (Attorney General)* (1997), 37 O.R. (3d) 287 (Gen. Div.), upheld (1999), 182 D.L.R. (4th) 471 (Ont. C. A.), rev'd by the Supreme Court of Canada, December 20, 2001
49. *Masse v. Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.), leave to appeal to Court of Appeal dismissed April 30, 1996, leave to appeal to Supreme Court of Canada dismissed December 5, 1996
50. *British Columbia Government Employees' Union v. British Columbia (Attorney General)* (1988), 53 D.L.R. (4th) 1 (S.C.C.) *per* Dickson C.J.C.
51. *Singh v. Minister of Immigration* (1985), 17 D.L.R. (4th) 422 (S.C.C.)

52. *Irwin Toy v. Quebec* (1989), 58 D.L.R. (4th) 577 (S.C.C.)
53. *Pleau v. Nova Scotia* (1998), 186 N.S.R. (2d) 1 (N.S.S.C, Prothonotary)
54. *Canadian Charter of Rights and Freedoms*
55. *Reference re Secession of Quebec* (1998), 161 D.L.R. (4th) 385 (S.C.C.)
56. *R. v. Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.)
57. *Vriend v. Alberta* (1998), 156 D.L.R. (4th) 385 (S.C.C.)
58. *Schacter v. Canada* (1992), 93 D.L.R. (4th) 1 (S.C.C.)

SCHEDULE "B"

Text of all relevant provisions of statutes, regulations and by-laws

1. *Small Claims Court Rules*, Rule 1.03(1), 1.03(2), 1.04, 2.02, 13.01(7)

1.03(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits in accordance with section 25 of the *Court of Justice Act*.

1.03(2) If matters are not provided for in these rules, the practice shall be determined by analogy to them and the court may, at any stage in a proceeding, make any order that is just.

1.04 When making an order under these rules, the court may impose such terms and give such directions as are just.

2.02 If necessary in the interest of justice, the court may dispense with compliance with any rule at any time.

13.01(7) At or after a pre-trial conference, the clerk shall provide the parties with a notice stating that the parties must request a trial date if the action is not disposed of within 30 days after the pre-trial conference, and pay the fee required for setting the action down for trial.

2. *Small Claims Court -- Fees and Allowances*, O. Reg. 432/93, as amended O. Reg. 214/97, 488/98, 17/00

This is the English version of a bilingual regulation.

1. (1) The fees set out in Schedule 1 are payable to clerks of the Small Claims Court. O. Reg. 214/97, s. 1.

(2) In this section and Schedule 1,

"claim" does not include a defendant's claim; ("demande")

"claimant" includes an individual, a sole proprietorship, a partnership, an unincorporated organization and a corporation. ("réclamant") O. Reg. 214/97, s. 1; O. Reg. 488/98, s. 1 (1).

(3) For the purposes of Schedule 1, a claimant who files a claim in a Small Claims Court office on or after January 1 in any calendar year and who has already filed 10 or more claims in the same office in that calendar year is a frequent claimant. O. Reg. 488/98, s. 1 (2).

(4) For the purposes of Schedule 1, a claimant who is not a frequent claimant under subsection (3) is an infrequent claimant. O. Reg. 488/98, s. 1 (2).

2. The fees and allowances set out in Schedule 2 are payable to bailiffs of the Small Claims Court. O. Reg. 432/93, s. 2.

3. The fees and allowances set out in Schedule 3 are payable to witnesses appearing before the Small Claims Court. O. Reg. 432/93, s. 3.

Schedule 1

CLERK'S FEES

1.	Filing of a claim by an infrequent claimant	\$ 50.00
2.	Filing of a claim by a frequent claimant	145.00
3.	Filing of a defendant's claim	50.00
4.	Filing a notice of motion served on another party, a notice of motion without notice or a notice of motion for a consent order (except a notice of motion under the <i>Wages Act</i>)	40.00
5.	Filing a defence	25.00
6.	Issuing a summons to a witness	10.00

7.	Receiving for enforcement a process from the Ontario Court (Provincial Division) or an order or judgment as provided by statute	25.00
8.	Issuing a certificate of judgment	10.00
9.	Issuing a writ of delivery, a writ of seizure and sale or a notice of examination	35.00
10.	Issuing a notice of garnishment	50.00
11.	Preparing and filing a consolidation order	75.00
12.	Forwarding a court file to Divisional Court for appeal	20.00
13.	Issuing a certified copy of a judgment or other document, per page	2.00
14.	Transmitting a document other than by first class mail	Cost of transmission
15.	For the inspection of a court file,	
	i. by a solicitor or party in the proceeding	no charge
	ii. by a person who has entered into an agreement with the Attorney General for the bulk inspection of court files, per file	1.00
	iii. by any other person, per file	10.00
16.	Making a photocopy of a document not requiring certification, per page	1.00
17.	Preparing records of orders, per name	2.00
18.	In an application under the <i>Repair and Storage Liens Act</i> ,	
	i. on the filing of,	
	A. an application	100.00
	B. a notice of objection	35.00
	C. a waiver of further claim and a receipt	no charge
	ii. on the issuing of,	
	A. an initial certificate	35.00
	B. a final certificate	35.00
	C. a writ of seizure	35.00

19.	Fixing of a date for trial by an infrequent claimant	100.00
20.	Fixing of a date for trial by a frequent claimant	130.00
21.	Entering of a default judgment by an infrequent claimant	35.00
22.	Entering of a default judgment by a frequent claimant	50.00

O. Reg. 214/97, s. 2; O. Reg. 488/98, s. 2; O. Reg. 17/00, s. 1.

Schedule 2

BAILIFF'S FEES

1.	For up to three attempts, whether or not successful, to serve a claim, third party claim, summons to witness, notice of examination or notice of garnishment, for each person to be served	\$20.00
2.	Enforcing a writ of delivery, whether or not successful and regardless of the total number of attempts	30.00
3.	Enforcing a writ of seizure and sale of personal property, whether or not successful and regardless of the total number of attempts,	
	i. where no sale is necessary	30.00
	ii. where a sale is necessary	50.00
4.	Enforcing a writ of seizure under the <i>Repair and Storage Liens Act</i> , whether or not successful and regardless of the total number of attempts	30.00
5.	Enforcing a writ of delivery or a writ of seizure and sale of personal property, removing property seized, advertising the sale of personal property, including obtaining assistance in seizing, securing or	

retaining property

Reasonable
disbursement
s necessarily
incurred,
including
appraisers'
fees

O. Reg. 432/93, Sched. 2.

Schedule 3

FEES AND ALLOWANCES TO WITNESSES

- | | | |
|----|--|--|
| 1. | For attendance in court, unless item 2 applies, per day | \$ 6.00 |
| 2. | For attendance in court by a barrister, solicitor, physician, surgeon, engineer or veterinary surgeon who is not a party to the action, to give evidence of a professional service rendered or to give a professional opinion, per day | 15.00 |
| 3. | For travel to court | Reasonable travelling expenses actually incurred, but not exceeding the kilometre allowance set out in Regulation 11 of the Revised Regulations of Ontario, 1990 |

O. Reg. 432/93, Sched. 3.

3. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s.22(1), s.23(1), s.25

22.-(1) The Small Claims Court is continued as a branch of the Superior Court of Justice under the name Small Claims Court in English and Cour des petites créances in French.

23.-(1) The Small Claims Court,

- (a) has jurisdiction in any action for the payment of money where the amount claimed does not exceed the prescribed amount exclusive of interest and costs; and
- (b) has jurisdiction in any action for the recovery of possession of personal property where the value of the property does not exceed the prescribed amount.

25. The Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience.

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

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

5. *Rules of the Supreme Court of Canada, Rule 47*

47.(1) Leave to appeal in forma pauperis may be granted by making a motion before the Court, a Judge or the Registrar.

(2) A motion in forma pauperis shall be supported by an affidavit from the appellant stating that his net assets, exclusive of his family home and the subject matter of the proceeding, do not exceed \$5,000 and that he is unable to provide security.

(3) Where an appellant is granted leave to appeal in forma pauperis, he shall not be required to give security as provided by section 66 of the Act or to pay any fees to the Registrar.

(4) Leave to defend or intervene in an appeal in forma pauperis may be granted by the Court, a judge or the Registrar.

(5) A motion referred to in subsection (4) shall be supported by an affidavit from the respondent or intervener stating that his net assets, exclusive of his family home and the subject matter of the proceeding, do not exceed \$5,000.

6. *Canadian Charter of Rights and Freedoms, s.1, s.7, s.15*

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limited prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

VICTOR R. POLEWSKY -and- HOME HARDWARE STORES LTD. et al. -and- THE ATTORNEY GENERAL OF ONTARIO et. al.
Plaintiff/ Appellant Defendants/ Respondents Intervenor

Court File No. 53-2001

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT ST. THOMAS

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