Court File No. 35315

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA and CANADIAN BAR ASSOCIATION – BRITISH COLUMBIA BRANCH

APPELLANT
(RESPONDENTS)

- and –

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(APPELLANT)

- and –

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PART I: OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. In *Scott v Scott* Lord Halsbury stated that "every court of justice is open to every subject of the King",[1] a recognition of the public nature of our courts. State-imposed financial barriers to the justiciability of legal issues also undermine the fundamental constitutional principle, grounded in the rule of law, that all Canadians have the right to seek justice in our courts. Pragmatic considerations, such as the role that legal costs play in the accessibility of our courts to diverse and vulnerable minorities, are integral to the rule of law. Superficial remedies such as a strained interpretation of an indigency exception, or the reading in of a broader, yet undefined, concept of "in need," lack the contextual depth to properly cure the constitutional wrong represented by the significant barrier to access to justice in this case.

PART II: POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

2. The Asper Centre's positions with respect to the questions are as follows.

   (a) The hearing fees in issue are unconstitutional as they infringe a right of access to justice and thereby offend the rule of law.

   (b) That unconstitutionality cannot be relieved by reading in the phrase "or in need" immediately following the word "impoverished".

PART III: STATEMENT OF ARGUMENT

A. The Rule of Law: Access to Our Justice System

The Rule of Law as a Constitutional Principle

3. This Court has recognized that the reference to "the rule of law" in the preamble to the *Constitution Act, 1982*[2] reflects "an unwritten postulate which forms the very foundation of the Constitution of Canada."[3] The preamble identifies the organizing principles of the Constitution and "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text."[4]

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[1] *Scott v Scott*, [1913] UKHL 2, 1913 AC 614 at 619.
[2] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[3] *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at 752, 19 DLR (4th) 1 [*Manitoba Language Rights*].
[4] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 SCR 3 at para 99, 150 DLR (4th) 577 [*Remuneration of Judges*].

4. This Court has explicitly relied on the reference in the *Constitution Act, 1867*, to "a Constitution similar in principle to that of the United Kingdom" as the basis for holding that the rule of law is a fundamental principle of the Canadian Constitution.[5] In *Reference re Remuneration of Judges,* the Court held that the "commitment to the rule of law expressed in the preamble to the Charter" guaranteed judicial independence from provincial legislatures.[6]

5. Although the rule of law is an abstract concept, this Court has acknowledged that it "may in certain circumstances give rise to substantive legal obligations".[7] Governments are bound to obey these obligations, just as they are other constitutional provisions.

Access to Justice Flows from the Rule of Law

6. This Court has articulated some of the threshold requirements that are necessary to maintain the rule of law. In *Imperial Tobacco*, the Court confirmed that "the rule of law embodies three principles: the preclusion of arbitrary exercises of power; the creation and maintenance of an actual order of positive laws; and the expectation that the state-individual relationship will be regulated by law."[8] Judicial independence flows "by necessary implication" from the rule of law.[9] One aspect of the rule of law is the "constitutional principle that the exercise of all public power must find its ultimate source in a legal rule",[10] and maintenance of this aspect of the rule of law necessarily requires an independent judiciary.[11]

7. The requirement of access to justice similarly flows from the rule of law. In order for "the relationship between the state and the individual [to be] regulated by law", individuals must have access to regulation by law.[12] Accordingly, the rule of law necessarily prohibits the state from impeding access to justice. As Justice Dickson noted in *BCGEU*, "there cannot be a rule of

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[5] *Manitoba Language Rights*, *supra* note 3 at 729.
[6] *Remuneration of Judges*, *supra* note 4 at para 325. The rule of law requires that judicial independence be maintained through security of tenure; judicial control over the administrative decisions that bear directly and immediately on the exercise of judicial functions ; and judicial salaries can only be reduced, increased, or frozen with recourse to an independent, effective and objective commission (*Re Remuneration; Valente v The Queen*, [1985] 2 SCR 673 at paras 31, 52 24 DLR (4th) 161 [*Valente*]).
[7] *Reference re the Secession of Quebec*, [1998] 2 SCR 217 at para 54 161 DLR (4th) 385 *[Re Secession]*
[8] *R v Imperial Tobacco Canada* Ltd, 2005 SCC 49 at para 58, 257 DLR (4th) 193 [*Imperial Tobacco*]; See also Melina Buckley, "Searching for the Constitutional Core of Access to Justice" (2008) 42 SCLR 567.
[9] *Imperial Tobacco*, *supra* note 8 at para 58; See also *Manitoba Language Rights*, *supra* note 3 at 748.
[10] *Remuneration of Judges*, *supra* note 4 at paras 10, 99.
[11] *Imperial Tobacco*, *supra* note 8 at para 66.
[12] *Re Secession*, *supra* note 7 at para 71.

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."[13]

8. This Court recently observed that "[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today."[14] The rule of law requires access to justice, because no law can be given effect if access to justice is denied. As Melina Buckley has observed, the "regulation of the relationship between the state and the individual by these laws can only be assured where there is real access to the courts."[15] "Without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined."[16] Similarly, in *Doucet-Boudreau*, this Court noted that "Canada has evolved into a country that is noted and admired for its adherence to the rule of law as a major feature of its democracy. But the rule of law can be shallow without proper mechanisms for its enforcement".[17]

9. Chief Justice McLachlin, in her forward to *Middle Income Access to Justice,* noted that "access to civil justice represents the most significant challenge to our justice system." Dean Sossin states: "Access to justice is also closely linked to the promotion of equity, fairness and the elimination of barriers to justice (whether physical, psychological, financial or social)."[18] In noting the significant barriers faced by low and middle income individuals, Professors Trebilcock, Duggan and Sossin in their Introduction to Middle Income Access to Justice, state: "Most conceptions of the rule of law assume equality before the law and hence access to law or the justice system as one of its fundamental predicates."[19]

10. Recourse to the courts is often a necessary measure of last resort for those who have little or inadequate access to governments and legislatures. The rule of law requires that courts be accessible, in both a tangible and intangible sense.[20] In *BCGEU*, the Court considered both

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[13] *British Columbia Government Employees' Union v British Columbia (AG)*, [1988] 2 SCR 214 at 228-9, 53 DLR (4th) 1 [*BCGEU*].
[14] *Hryniak v Maudlin*, 2014 SCC 7 at para 1.
[15] Melina Buckley, "Searching for the Constitutional Core of Access to Justice" (2008) 42 SCLR 567 [Melina Buckley].
[16] Melina Buckley, *supra* note 15.
[17] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 at para 31, 232 DLR (4th) 577.
[18] Lorne Sossin, *Research Priorities Report: Submitted to the Board of Governers of the Law Commission of Ontario*, Submitted to the Board of Governors Of the Law Commission of Ontario (2007) at 3.
[19] Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at 1.
[20] *BCGEU*, *supra* note 13 at para 29.

physical barriers to the courthouse, and the intangible barriers of "obligation of conscience not to break the picket line", as violating the required level of accessibility.[21] While lawyers' fees are often identified as the most significant cost for litigants, they do not prevent complete access to the courts in the manner that courts fees for hearing days do. Hearing fees absolutely prohibit those who are unable to pay from accessing the Courts. The effect of hearing fees is the same as any physical barrier – an absolute inability to access justice. Impact on an individual "whose access is impaired or denied is the same regardless whether the nature or source of the barrier is physical or economic."[22]

Purely budgetary concerns cannot block Charter rights

11. Goals of cost recovery and budgetary concerns of government are not valid reasons to infringe the constitutional principle of the rule of law. The guarantees of the Charter would be illusory if they could be ignored because it is "administratively convenient to do so".[23]

12. In *Re Remuneration*, this Court held that the Manitoba government could not justify closing the courts, and thereby absolutely inhibit access to the courts, solely on the basis of financial considerations.[24] Moreover, Chief Justice Lamer commented that the "closure of the courts did not minimally impair the right to be tried by an impartial and independent tribunal, because it had the **effect of absolutely denying access to the courts** for the days on which they were closed" [emphasis added].[25]

13. In *Singh* Justice Wilson expressed doubt that "utilitarian consideration[s] . . . [could] constitute a justification for a limitation on the rights set out in the Charter",[26] noting that "[t]he principles of natural justice and procedural fairness which have long been espoused by our courts... implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles.[27] Later, in *Schachter*, the Court confirmed that budgetary considerations cannot serve as a compelling objective that justifies limits on rights under section

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[21] *BCGEU*, *supra* note 13 at para 29.
[22] Melina Buckley, *supra* note 15.
[23] *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at para 70, 17 DLR (4th) 422 [*Singh*]. See also Hester Lessard, "Dollars Versus [Equality] Rights: Money and the Limits on Distributive Justice" (2012) 58 SCLR (2d) 299 at 320.
[24] *Remuneration of Judges*, *supra* note 4 at para 285.
[25] *Ibid.*
[26] *Singh*, *supra* note 23 at para 70.
[27] *Ibid.*

1 of the Charter.[28] Moreover, financial considerations are not a relevant consideration in the minimal impairment analysis when these concerns are the sole objective of the legislation.[29]

Criticism of Hearing Fees in the U.K. and Australia

14. In the United Kingdom, the right of effective access to courts has long been recognized as a fundamental human right.[30] The Lord Chancellor has a statutory duty to ensure that the courts operate efficiently and effectively and that appropriate services are provided.[31] The *Courts Act, 2003*, requires that the Lord Chancellor "must have regard to the principle that access to the courts must not be denied" when setting court fees.[32]

15. Article 6(1) of the *European Convention on Human Rights* has been interpreted to include a right of access to the court.[33] The Senior Judiciary of England recently condemned proposed court fee increases, emphasizing that "access to justice is a practical requirement, not a theoretical aspiration."[34] The Senior Judiciary notes that "[a]ccess to justice is a fundamental feature of any society committed to the rule of law. It is not a service which the State provides at cost, but an element of the State and its governance essential to the rule of law".[35]

16. In Australia, a recent Senate Inquiry found that rising court fees have inhibited access to justice.[36] The Law Council of Australia has observed that "filing fees in the federal courts have pushed justice out of reach for most people in the community who do not qualify for fee waiver

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[28] *Schachter v Canada*, [1992] 2 SCR 679 at 709, 93 DLR (4th) 1 [*Schachter*]; See also *Remuneration of Judges*, *supra* note 4 at para 285.
[29] *Re Remuneration*, *supra* note 4 at para 283. Although the court in *NAPE* articulated an "extreme financial emergency" exception for this principle, no such extreme budgetary emergency exists in the current context (*Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 at paras 1, 26, [2004] 3 SCR 381 [*NAPE*]).
[30] See *Raymond v Honey* [1983] 1 AC 1, HL(E); *R v Lord Chancellor, ex p Witham* [1998] QB 575, [1997] EWHC Admin 237.
[31] *Courts Act, 2003* (UK), c 39, s 1(1).
[32] *Ibid*, s 92(3).
[33] See *Golder v United Kingdom*, [1975] 1 EHRR 524, [1975] ECHR 1 at 36; *Airey v Ireland*, 32 Eur Ct HR Ser A (1979): [1979] 2 EHRR 305.
[34] Ministry of Justice, "Court fees: proposals for reform" (1 April 2014) online: Ministry of Justice <https://www.gov.uk/government/consultations/court-fees-proposals-for-reform>; Senior Judiciary of England and Whales, "The Response of the Senior Judiciary to the Ministry of Justice Consultation Paper – Court Fees: Proposals for Reform (Cm 8751)" (February 4, 2014), online: Judiciary of England and Whales <http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/senior-judiciary-response-court-fees-proposals-for-reform.pdf> [Senior Judiciary Response].
[35] Senior Judiciary Response, *supra* note 34.
[36] Senate Standing Committee on Legal and Constitutional Affairs "Impact of federal court fee increases since 2010 on access to justice in Australia", (17 June 2013), online: Parliament of Australia: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/courtfees/report/index> [Senate Inquiry].

or exemption as a result of financial hardship."[37] During the Senate Inquiry the Law Council argued: "[N]otwithstanding the importance of restoring fee waivers and exemptions, both for impecunious parties and the financial position of the courts, waivers and exemptions do not extend to the vast majority of working families and working poor, who do not qualify for legal aid and yet in many cases have no option other than to approach the courts to resolve their (often complex) legal problems."[38]

Canada's International Legal Obligations Regarding Access to Justice

17. Canada has an obligation under international law to maintain access to justice. Article 14 of the *International Covenant on Civil and Political Rights* requires that all persons must be granted, without discrimination, the right of equal access to the justice system.[39] The administration of justice must "effectively be guaranteed in all cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice."[40] The UN Human Rights Committee notes that "the imposition of fees that would de facto prevent their access to justice might also give rise to issues under article 14."[41]

B. Remedy: Reading-in or Reconstruction?

18. Rather than striking down the hearing fees rules, as ordered by the trial judge, the British Columbia Court of Appeal chose to effectively save the rules by enlarging the indigency exemption to include persons "in need". The Court of Appeal described this "reading in" as a "measured response to the problem." In fact, it is nothing of the sort. The remedy of "reading in" is an exceptional means to cure a constitutional defect. Here, the remedy amounted to what Professor Hogg has described as a "reconstruction" – attempting to salvage an unconstitutional

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[37] Law Council of Australia, Media Release, "Law Council says Inquiry fails to recognize impact of increased fees on court access" (19 June, 2013), online: Law Council of Australia <http://www.lawcouncil.asn.au/lawcouncil/index.php/2-uncategorised/279-law-council-says-inquiry-fails-to-recognise-impact-of-increased-fees-on-court-access>.

[38] Senate Inquiry, *supra* note 36 at para 2.29.

[39] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 8 (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); UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol 999, p 171, Article 14. (In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law).

[40] United Nations Human Rights Committee, General Comment No 32, CCPR/C/GC/32, 23 August 2007, [9] (General Comment No 32). NB: A general comment is an authoritative statement of the interpretation and application of a treaty provision by the body responsible for that treaty.

[41] *Ibid*, [11].

law by making changes "that are too profound, too policy-laden and too controversial to be carried out by a court."[42]

19. The issue of the limits of the use of "reading in" is in need of clarification by this Court. Recognized in *Schachter*,[43] and applied in *Miron v Trudel*[44] and *Vriend*,[45] the remedy was seen as a limited and appropriate response only in the context of the "clearest of cases". However, the application of the remedy has been more controversial in more recent cases such as *Canadian Foundation for Children, Youth and the Law*,[46] *Little Sisters Book and Art Emporium*,[47] *and Montreal v. 2952-1366 Quebec*,[48] where the Court divided on whether it was merely interpreting laws in a constitutionally valid way or engaging in "redrafting" or "radical surgery". Recently, in *R v Boudreault*,[49] Cromwell J., dissenting, was critical of the majority for "reading in" an element of an offence, although the majority did not describe it that way.

20. Limiting the scope of the "reading in" remedy is essential to maintain the separation of powers between the judicial and legislative branches of government. This Court recognized in *Ferguson* that "if it is not clear that Parliament would have passed the scheme with the modifications being considered by the court – or if it is probable that Parliament would not have passed the scheme with these modifications – then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere."[50] This statement is undoubtedly correct, but does not fully reflect the concerns with, and limits of, the extraordinary remedy of reading in.

21. The CBA has identified in its factum[51] the danger - realized by the Court of Appeal in this case – that courts will jump to the remedy of "reading in" without first addressing the scope of the unconstitutionality. Reading in without properly addressing constitutionality leads to *ad hoc* remedies that may not address the underlying constitutional flaw or flaws in the legislation. In this case, the solution crafted by the Court of Appeal simply substitutes one barrier for another,

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[42] Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at 40.1(i).
[43] *Schachter*, *supra* note 28.
[44] *Miron v Trudel,* [1995] 2 SCR 418, 124 DLR (4th) 693.
[45] *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 [*Vriend*].
[46] *Canadian Foundation for Children, Youth and the Law*, 2004 SCC 4, [2004] 1 SCR 76.
[47] *Little Sisters Book and Art Emporium*, 2000 SCC 69, 2000 2 SCR 1120.
[48] *Montreal v 2952-1366 Quebec*, 2005 SCC 62, [2005] 3 SCR 141.
[49] *R v Boudreault*, 2012 SCC 56, [2012] 3 SCR 157 at para 60.
[50] *R v Ferguson*, 2008 SCC 6 at para 51, [2008] 1 SCR 96.
[51] CBA factum paras 94-99.

and lacks the remedial precision that is necessary for the application of this extraordinary remedy.[52] Further, as the Court noted in *Bell ExpressVu*, seeking strained Charter-complaint interpretations has the effect of pre-empting resort to s. 1.[53] The application of exceptional fee waivers based on indigence or basic need overestimates the ability of parties to afford litigation. It is well-recognized that it is not only the poor but also the middle class that lacks sufficient financial resources to access the court system to vindicate their legal rights. This is evident in recent rulings on advanced costs,[54] and in *Doe v Canada,* where the Federal Court held a plaintiff of modest income to a test of impoverishment.[55] Clearly a more contextual approach is warranted, rather than an *ad hoc* quick fix.

22. An inherent problem with reading-in to save otherwise unconstitutional laws is that it is anti-democratic. However minor the change in wording devised by the Court, judges are venturing into writing, or re-writing legislation. And by doing so they venture beyond their function of interpreting legislation, and prevent the Legislature from responding to the constitutional problem as it sees fit.

23. The legitimacy of judicial review is not enhanced by "reading in", but by striking down unconstitutional legislation and referring matters back to legislatures. As Hogg and Bushell put it in 1997, "[w]here a judicial decision striking down a law on Charter grounds can be reversed, modified, or avoided by a new law, any concern about the legitimacy of judicial review is greatly diminished…The dialogue that culminates in a democratic decision can only take place if the judicial decision to strike down a law can be reversed, modified, or avoided by the ordinary legislative process."[56] As Iacobucci J. observed in *M v H*, reading in various details may deprive

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[52] CBA factum paras 108 and following; see also *Schachter*, *supra* note 28 at 705-707.
[53] *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at paras 62-64, [2002] 2 SCR 559; *Symes v Canada* [1993] 4 SCR 695 at 752, 110 DLR (4th) 470.
[54] See *Abdelrazik v Canada (Minister of Foreign Affairs and International Trade)*, 2008 FC 839; *Canada (Attorney General) v Telbani*, 2011 FC 945, aff'd (2012), Al Telbani v Canada (Attorney General), 2012 FCA 188; *Pictou Landing First Nation v Nova Scotia (Attorney General)*, 2014 NSSC 61; *Lenko v The Manitoba Hydro-Electric Board*, 2007 MBQB 39, 215 Man R (2d) 16; *Klychak v Samchuk*, 2012 ABQB 85; *Mahjoub v Canada (Citizenship and Immigration)*, 2012 FCA 296.
[55] *Doe v Canada*, 2005 FC 537, 273 FTR 60.
[56] The existence of this "dialogue" was clear in 1997, when Hogg and Bushell noted that legislative bodies had responded affirmatively by amending or enacting a new law in 44 of the 65 cases in which courts had invalidated a law (Peter Hogg & Allison Bushell, "The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75 at paras 8-9). In 2007 the continued existence of a dialogue remained clear, with 14 of 23 invalidations by the Supreme Court provoking some legislative

the State of the ability to come up with new statutory regimes, and may "amount to the making of ad hoc choices which…is properly the task of the legislatures, not the courts."[57]

24. A similar dialogue has now developed in the United Kingdom since the coming into force of the *Human Rights Act* 1998.[58] A 2013 report noted that of the 19 declarations of incompatibility, 11 had been remedied by later legislation, 4 were already remedied, 1 was under consideration, and 3 were remedied by a remedial order.[59] On the other hand, the British courts have been criticized for taking an overly deferential approach to legislation by purporting to "follow the intent of the legislature" to avoid making declarations of incompatibility,[60] which the House of Lords, in one of its first decisions under the Act, described as a "measure of last resort".[61] Such deference, Roach argues, causes UK courts to engage in creative and strained interpretations of statutes in the guise of preserving rights, but which runs "the risk of debilitating democracy by taking away much of the practical impetus for legislature and civil society to revisit the matter in light of the court's ruling." As Roach notes, the Canadian approach of striking down legislation is preferable.[62]

25. Hogg et al. are critical of the use of "reading down" for its avoidance of dialogue, noting "that there is usually a variety of corrective options available to the legislature, [and] the idea of dialogue would normally be offended by a strained "reading down" of an otherwise unconstitutional text by a court. The corrective law, if any, should not be designed by the court, but by the legislature."[63] Similar concerns exist where courts "read in". This does not mean it can never be done, but highlights that reading in should only be done in the clearest and narrowest of circumstances, such as, for example, as occurred in *Vriend*[64] where there was only

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response (Hogg, Bushell &Wright, "Charter Dialogue Revisited – or "Much Ado About Metaphors", (2007) 45 Osgoode Hall LJ 1 at 51 [Hogg, Bushell & Wright]).

[57] *M v H*, [1999] 2 SCR 6 at 142, 96 DLR (4th) 289.

[58] *Human Rights Act*, 1998 (UK), c 42.

[59] See Ministry of Justice, "Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2012-13" (October 2013) online at Ministry of Justice: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252680/human-rights-judgments-2012-13.pdf>.

[60] K.D. Ewing and Joo-Cheong Tham, "The Continuing Futility of the Human Rights Act" (2008) PL 668 at 670.

[61] *R v A*, [2001] UKHL 25 at para 44.

[62] Kent Roach, "The Rule of Law/Rule of Judges: Common Law Bills of Rights as Dialogue between Courts and Legislatures" (2005) 55 UTLJ 733 (Roach contrasts the Canadian approach of striking down the rape shield law in *R v Seaboyer*, [1991] 2 SCR 577, 83 DLR (4th) 193, with the English decision in *R v A*, *supra* note 61).

[63] Hogg, Bushell & Wright, *supra* note 56 at 13.

[64] *Vriend*, *supra* note 45.

one practical solution to the Charter violation.[65] Indeed, it is only in the context of what happened in *Vriend* that Hogg et al. opine that "reading in, which involves the addition of words to the statute, is arguably less intrusive, because the courts are aware of the radical nature of the remedy and use it only when there is really only one practical solution to the constitutional defect – the normal range of corrective options are not available."[66] While the Court may identify different options and solutions, it should not select one.[67] For example, there may be litigants such as large corporations, or categories of claims such as large scale commercial litigation, where hearing fees may be justified and will not prevent access to justice for Canadians.

26. It is appropriate, therefore, for this Court to clarify that the remedy of "reading in" to save otherwise invalid legislation should truly be reserved to those rarest and clearest of circumstances when the remedy is the only corrective measure that can address the breach, that it is not one of a number of options, and that it actually addresses the underlying constitutional infirmity. This approach properly recognizes the very limited scope of the remedy and the inappropriateness of its application in this case, where the proper result is to strike down the legislation rather than filling in the detail to "render legislative lacunae constitutional".[68]

PARTS IV & V: SUBMISSIONS ON COSTS AND ORDERS REQUESTED

27. The Asper Centre does not seek costs and asks that none be awarded against it. It seeks leave to make oral submissions.

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April 3, 2014

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[65] See also *H.J. Heinz Co. of Canada Ltd v Canada (Attorney General)*, 2006 SCC 13 at para 13, [2006] 1 SCR 441 per Deschamps, J., who noted that "Reading in would violate the established principle that 'the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording'", citing *Friesen v Canada,* [1995] 3 SCR 103 at para 27, 127 DLR (4th) 193, as cited in *Markevich v Canada*, 2003 SCC 9 at para 15, [2003] 1 SCR 94.

[66] Hogg, Bushell & Wright, *supra* note 56 at 13.

[67] The Court did this in *Charkaoui v. Canada* (*Citizenship and Immigration*), [2007] 1 SCR 350 at para. 87; Kent Roach argues that creative remedies such as reading in and reading down insulate court decisions from the full brunt of public and legislative consideration, or "democratic dialogue". They allow legislators to avoid having to "go back to the drawing board and rethink the issues," and are in practice an impediment to full democratic debate and dialogue about the treatment of rights that can follow a more forthright judicial invalidation of laws that violate rights (Kent Roach, "The Rule of Law/Rule of Judges: Common Law Bills of Rights as Dialogue between Courts and Legislatures" (2005) 55 UTLJ 733).

[68] *Hunter v Southam Inc*, [1984] 2 SCR 145 at para 44, 11 DLR (4th) 641.

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