IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Crowder v. British Columbia (Attorney General),* 2019 BCSC 1824

Date: 20191024
Docket: S194533
Registry: Vancouver

Between:

Gregory Crowder and Trial Lawyers Association of British Columbia

Petitioners

And

Attorney General of British Columbia

Respondent

And

The Advocates' Society

Intervenor

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Petitioners:	R.D.W. Dalziel J.M. Rice S. Silver
Counsel for the Respondent:	J.D. Hughes K. Wolfe
Counsel for the Intervenor:	C.P. Dennis, Q.C.
Place and Date of Hearing:	Vancouver, B.C. July 30 and 31, 2019
Place and Date of Judgment:	Vancouver, B.C. October 24, 2019

Introduction

[1] The petitioner, Gregory Crowder, is a claimant in a "vehicle action", as that term is defined in Rule 11-8 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the "*Rules*").

[2] The petitioner, Trial Lawyers Association of British Columbia, is an organization of trial lawyers with a membership of over 1500 legal professionals in British Columbia. It is a registered British

Columbia society.

[3] The respondent, Attorney General of British Columbia, has the management and direction of the Ministry of the Attorney General, pursuant to the *Attorney General Act*, R.S.B.C. 1996, c. 22.

[4] Pursuant to s. 6 of the *Court Rules Act*, R.S.B.C. 1996, c. 80 ("the *Act*"), the Attorney General is additionally responsible for recommending any rule that may be made by the Lieutenant Governor in Council under that statue.

[5] The Ministry of the Attorney General is the ministry that is responsible for the Insurance Corporation of British Columbia ("ICBC").

[6] The petitioners seek a declaration that Order in Council No. 40/2019 and Order in Council No. 131/2019 enacting and amending Rule 11-8 (the "Rule 11-8 Orders") are unconstitutional and of no force and effect, being contrary to s. 96 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict. c. 3*,* or alternatively that the Rule 11-8 Orders are not authorized by the *Act*. The petitioners also seek an order that the Rule 11-8 Orders be set aside and that they be awarded special costs in these proceedings.

[7] The Attorney General opposes the relief sought in the petition.

[8] The intervenor, The Advocates' Society, is a national organization of some 6000 Canadian lawyers whose members appear before courts and administrative tribunals across the country on all sides of civil, criminal, and administrative law matters. The petition is supported by the intervenor, although not for all of the reasons advanced by the petitioners.

Background

Rule-Making Authority

[9] Section 1 of the *Act* confers authority to make rules "governing the conduct of proceedings" in the Supreme Court to the Lieutenant Governor in Council.

[10] The constitutional underpinning of the *Act* derives from s. 92(14) of the *Constitution Act, 1867,* which confers upon the province legislative authority with respect to:

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

[11] During the pre-Confederation era, court rules appear to have been made by the judiciary. *The Supreme Courts Ordinance, 1869*, for instance, anticipated the merger of the two superior courts in the new United Colony of British Columbia, a union of the Vancouver Island Colony and the Mainland Colony, upon a vacancy in the office of the Chief Justice in either court. It provided that upon the vacancy there would be one superior court, the Supreme Court of British Columbia. The surviving Chief Justice was prospectively authorized by s. 13 to "make all such Orders, Rules, and Regulations

as he shall think fit, for the proper Administration of Justice in the said Supreme Court of British Columbia, and subject to such Orders, Rules, and Regulations, the then existing Rules and Regulations of the Supreme Court of the Mainland of British Columbia shall have full force and effect in the said Supreme Court of British Columbia".

[12] British Columbia joined Confederation in 1871, and became subject to the *Constitution Act, 1867*. In April 1879, British Columbia enacted the *Judicature Act, 1879*, S.B.C. 1879, c. 12. Section 17 of that Act provided that the Lieutenant Governor by Order in Council had the authority to make rules to be styled "Rules of Court" governing, *inter alia*, pleadings, practice and procedure in the Supreme Court. The *Supreme Court Rules, 1880* were enacted the following year.

[13] The *Administration of Justice Act, 1881*, S.B.C. 1881, c. 1 declared the *Supreme Court Rules, 1880* valid, and gave the Lieutenant Governor in Council authority to vary, amend or rescind any of the rules or to make new rules not inconsistent with that Act. That Act eventually came under judicial scrutiny in *Sewell v. British Columbia Towing Co.*, [1882] 1 B.C.R. (Pt. 1) 153 (the *"Thrasher case"*), where the legislation was challenged as *ultra vires* and unconstitutional.

[14] The Supreme Court of British Columbia sitting *en banc* in the *Thrasher case* unanimously held that provincial enactments and Orders in Council legislating rules governing court procedure were *ultra vires* the provincial legislature. The Court held that the provincial authority to legislate with respect to civil procedure as set out in s. 92(14) was confined to provincial courts as specified in that section, and that the Supreme Court was not a provincial court for the purposes of s. 92(14).

[15] In lengthy judgments, Chief Justice Begbie, Mr. Justice Crease and Mr. Justice Gray each held that the provincial legislature did not have the authority to diminish the jurisdiction of the Supreme Court, which included the authority to make rules of procedure. The Court held that the legislature could not enact rules to govern the procedure of the Supreme Court or delegate the power to do so to the Lieutenant Governor in Council. The Court also held that the authority conferred by s. 92(14) was simply a legislative function, and did not entitle the legislature to interfere with functions properly belonging to the executive or the judiciary.

[16] The *en banc* decision of the Supreme Court of British Columbia was reversed by the Supreme Court of Canada on a constitutional reference in the form of stated questions. In a decision absent any discussion or reasons, the Court held that the Supreme Court of British Columbia was a provincial court for the purposes of s. 92(14) of the *Constitution Act, 1867*, and that the legislature had authority to make rules governing the procedure of the court in all matters, limited only by s. 92(14), and could delegate that power to the Lieutenant Governor in Council. The Supreme Court of Canada also held that the various enactments in question were within the legislative authority of the province.

[17] Subsequent statutes governing the enactment of procedural rules have continued to vest rule making authority in the Lieutenant Governor in Council. Only a limited jurisdiction to amend tariffs with respect to costs was reserved for the Supreme Court: see, e.g., *Court Rules Act*, R.S.B.C. 1979, c. 77,

s. 3(3); *Court Rules of Practice Act*, R.S.B.C. 1960, c. 83, s. 4(7). Beyond that, the judiciary was seemingly left with no statutory role in the rulemaking process.

Rules Revision Committee

[18] Section 6 of the *Act* requires the Lieutenant Governor in Council to make rules only on the recommendation of the Attorney General made after consultation with the Chief Justice of the appropriate court. The concept embodied in s. 6 of the *Act* was first added to the legislation in 1982 by the *Attorney General Statutes Amendment Act, 1982*, S.B.C. 1982, c. 46, ss. 12 – 14.

[19] The Rules Revision Committee ("the Committee") was established for the purpose of advising the Attorney General with respect to proposed amendments to the *Rules* and to facilitate consultation with the Chief Justice.

[20] However, the Committee and its role are not formalized in the governing legislation, as is the case in some other jurisdictions. The comparable statute in Ontario, for example, is the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Sections 65-68 of that Act prescribe the composition of the Civil Rules Committee and Family Rules Committee, and their respective mandates.

Rule 11-8

[21] Rule 11-8 ("the impugned Rule") was enacted by the Lieutenant Governor in Council on February 11, 2019 by Order in Council No. 40. On March 22, 2019, the Lieutenant Governor in Council enacted Order in Council No. 131 to amend the transition provision contained in Rule 11-8(11).

[22] After Rule 11-8 was enacted, the Attorney General issued a press release in which he stated, "The rules committee did not recommend these changes and was not asked to approve these changes. These changes were a decision made by government."

[23] The impugned Rule defines a "vehicle action" as "an action that includes a claim for damages for personal injury, or death, that arises out of the use or operation of a vehicle as defined in the *Motor Vehicle Act"* (R.S.B.C. 1996, c. 318), and applies to all such actions. After February 1, 2020, the impugned Rule will apply to all actions, pursuant to Schedule 2 of Order in Council No. 40. Rule 11-8 applies to witnesses on issues of damages only, and not to liability witnesses.

[24] The particular sub-rules of Rule 11-8 that are at the heart of this petition are sub-rules 2, 3, 8, 10, and 11, which I set out here, for ease of reference.

> (2) This rule applies in the event of a conflict between this rule and another rule of these Supreme Court Civil Rules, other than Rule 15-1.
>
> (3) Except as provided under this rule, a party to a vehicle action may tender, at trial, only the following as expert opinion evidence on the issue of damages arising from personal injury or death:
>
> (a) expert opinion evidence of up to 3 experts;
>
> (b) one report from each expert referred to in paragraph (a).
>
> ...

(8) In a vehicle action, only the following amounts may be allowed or awarded to a party as disbursements for expert opinion evidence on the issue of damages arising from personal injury or death:

(a) the amount incurred by the party for up to 3 expert reports, whether or not the reports were tendered at trial, provided that each report was

(i) served in accordance with these Supreme Court Civil Rules, and

(ii) prepared by a different expert;

(b) the amount incurred by the party for

(i) a report allowed under subrule (4) or (5),

(ii) a report referred to in subrule (6) or (7), or

(iii) a report prepared by an expert appointed by the court under Rule 11-5 (1);

(c) the amount incurred by the party for an expert to give testimony at trial in relation to a report, referred to in paragraph (a) or (b), that was prepared by the expert.

…

(10) Subject to subrule (11), this rule applies to all vehicle actions, whether or not a notice of claim for the vehicle action was filed before the coming into force of this rule.

(11) The following exceptions apply in relation to a vehicle action for which a notice of claim was filed before February 11, 2019:

(a) the limits set out in subrule (3) do not apply

(i) to any report of an expert that was served in accordance with these Supreme Court Civil Rules before February 11, 2019, or

(ii) to the vehicle action if the trial date set out in the notice of trial filed in relation to the vehicle action is on or before December 31, 2019;

(b) the limits set out in subrule (8) do not apply

(i) to amounts that were necessarily or properly incurred for expert opinion evidence before February 11, 2019, or

(ii) to the vehicle action in the circumstances referred to in paragraph (a) (ii).

[25] The other sub-rules of Rule 11-8 allow parties to tender reports from additional experts by consent, in response to a report served on them by an opposing party, from a joint expert ordered by the court, or from an expert appointed by the court.

[26] Rule 11-8(3) cannot be read in isolation. It interacts with other rules in Part 11 of the *Rules.*

[27] Rule 11-3 allows for the appointment of a joint expert. Rule 11-3(1) provides:

If 2 or more parties who are adverse in interest wish to or are ordered […] to jointly appoint an expert, the following must be settled before the expert is appointed:

(a) the identity of the expert;

(b) the issue in the action the expert opinion evidence may help to resolve;

(c) any facts or assumptions of fact agreed to by the parties;

(d) for each party, any assumptions of fact not included under paragraph (c) of this subrule that the party wishes the expert to consider;

(e) the questions to be considered by the expert;

(f) when the report must be prepared by the expert and given to the parties;

(g) responsibility for fees and expenses payable to the expert.

[28] Under this Rule, if the parties are unable to agree on a particular joint expert, they can apply to the court for the appointment of a joint expert, and within 21 days of the receipt of the report of that expert, a party may apply for leave to tender the evidence of an additional expert.

[29] Under Rule 11-5, the court may, on its own initiative at any stage of an action, appoint an expert if it considers that expert opinion evidence may help the court in resolving an issue in the action. The expert must consent to the appointment after he or she has been made aware of the content of the Rule. The Rule then provides that the court, after consultation with the parties of record, must fix the expert's remuneration and:

> a) settle the questions to be submitted to any expert appointed by the court under this rule,
>
> b) give the expert any directions the court considers appropriate, and
>
> c) give the parties of record any directions the court considers appropriate to facilitate the expert's ability to provide the required opinion.

The Evidentiary Record

[30] The *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, provides that:

> 2(1) An application for judicial review must be brought by way of a petition proceeding.
>
> (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
>
> …
>
> (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

[31] The Attorney General contends that the petitioners' choice to proceed by way of petition, and to frame this proceeding as a judicial review, raises a preliminary procedural issue of the evidence that can be relied on by the petitioners in support of their petition.

[32] The Attorney General says that the impugned Rule changes are legislative in nature, and are included in subordinate legislation. The Attorney General thus asserts that extra-record evidence is admissible only on the narrow issues of law and jurisdiction, citing *David Suzuki Foundation v. British Columbia (Attorney General)*, 2004 BCSC 620 and *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont C.A.).

[33] The Attorney General argues that the evidence filed in support of the petition does not address either the legal or jurisdictional issues, nor, with the exception of the copy of Order in Council No. 131, could it be considered to properly form part of the record. Apart from the noted exception, the Attorney General argues that the evidence submitted by the petitioners does not fall within the scope of permissible extra-record evidence on this proceeding, and ought not to be considered.

[34] In the result, the Attorney General argues that to the extent the petitioners insist that their evidence is necessary, an application for judicial review brought by petition may not be the appropriate

procedure by which to advance this challenge.

[35] Based upon his objection to any effort on the part of the petitioners to adduce evidence to support their petition, the Attorney General says that absent such evidence the petitioners have failed to establish that the impugned Rule has the effect of deterring or otherwise impeding access to superior courts, and the decisions in *John Carten Personal Law Corp. v. British Columbia (Attorney General)* (1997), 40 B.C.L.R. (3d) 181 (C.A.) and *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 are dispositive of this matter.

[36] I accept that absent exceptional circumstances, the evidence that may be adduced in support of an application for judicial review of an administrative hearing process is limited to the record that was before the decision maker: *Sobeys West Inc. v. College of Pharmacists of British Columbia,* 2016 BCCA 41 at para. 52; *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at paras. 26, 34 - 40.

[37] I also accept that constitutional questions are ideally resolved on the basis of as extensive a factual record as is reasonable: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 59. A proper factual foundation is of fundamental importance: *MacKay v. Manitoba,* [1989] 2 S.C.R. 357; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21*; Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCCA 385.

[38] In *Babcock v. Canada (Attorney General)*, 2002 SCC 57 [*Babcock*], one of the authorities relied upon by the Attorney General, albeit for another point, Chief Justice McLachlin observed at para. 39:

> 39 As discussed, even language this draconian cannot oust the principle that official actions must flow from statutory authority clearly granted and properly exercised: *Roncarelli, supra*. It follows from this principle that the certification of the Clerk or minister under s. 39(1) may be challenged where the information for which immunity is claimed does not on its face fall within s. 39(1), or where it can be shown that the Clerk or minister has improperly exercised the discretion conferred by s. 39(1). "[T]he Court may entertain a proceeding for judicial review of the issuance of a certificate although it may not review the factual correctness of the certificate if it is otherwise in proper form": *Singh, supra*, at para. 43. The appropriate way to raise an argument that the Clerk has exercised her decision improperly is "by way of judicial review of the Clerk's certificate" (para. 50). The party challenging the decision may present evidence of "improper motives in the issue of the certificate" (para. 50), or otherwise present evidence to support the claim of improper issuance.
>
> [Emphasis added]

[39] The record upon which the impugned Rule was determined is in the hands of the Attorney General, who chose to lead no evidence on the petition before me. I am thus guided by the comments of Chief Justice Bauman in *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General),* 2018 BCCA 394, where he stated at para. 20:

> The appellant strongly urges that the Court rein in judicial review of the government's response to the JCC recommendations, arguing that looking "behind the public response to confidential cabinet communications" is not part of the task of the reviewing court under the *P.E.I. Reference* and *Bodner*. In my view, accepting the appellant's urging would artificially limit the scope of review to one based on what the government of the day decided to make public.

[Emphasis added]

[40] In *Twenty Ten Timber Products Ltd. v. British Columbia (Finance)*, 2018 BCSC 751 [*Twenty Ten Timber*], the Minister of Finance sought to adduce affidavit evidence concerning the filing of a Certificate under the *Forest Act*, R.S.B.C. 1996, c. 157. At paras. 26 – 27, Madam Justice Adair reasoned:

> 26 However, the process leading to the filing of the Certificate is not at all similar or comparable to the administrative processes involved in either *Sobeys* or *Stein*, both of which involved hearings at which evidence was submitted and a record was created. I agree with the submissions of the Minister that this was not an adjudicative hearing process in any sense, and it was not required to be under the *Forest Act*. The Affidavit No. 1 of Kristina Jacklin in particular shows what the Ministry knew about Twenty Ten's role in TSL A93113 before the November 16, 2017 letter was sent. In addition, the Minister's affidavits provide additional information to assist the court in understanding the issues on the judicial review.
>
> 27 In short, the affidavits filed by the Minister in response to the application for judicial review bear on the arguments that the Minister is entitled to make on this judicial review, and are relevant to the grounds raised on judicial review.

[41] Similar reasoning was employed by Madam Justice Shergill in *462284 B.C. Ltd. v. General Manager under the Liquor Control and Licensing Branch*, 2019 BCSC 93, where she wrote at paras. 36 – 38:

> 36 However, in *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353 at paras. 48-49 [SELI], the court held that the definition of "record of the proceeding" in the JRPA is not meant to define the scope of admissible evidence on an application for judicial review.
>
> 37 As noted by the court in *Sobeys West Inc. v. College of Pharmacists of British Columbia*,2016 BCCA 41 at para. 41 [*Sobeys*], leave to appeal ref'd [2016] S.C.C.A. No. 116, the definition of "record of the proceeding" in the *JRPA* "is clearly geared to tribunals that make adjudicative decisions at hearings". It thus has no direct application to the case at bar.
>
> 38 There is no dispute in this case that where there is no formal hearing, as was the case here, and the decision under review is an administrative decision, the record should include: the petitioner's application for relocation, the decision under review, as well as any additional correspondence that occurred between the petitioner and the LCLB between the filing of the first application and the decision rendered on the second application. Those communications have all been produced.

[42] I find that as in *Twenty Ten Timber* and *462284 B.C. Ltd.,* the process that led to the creation of the impugned Rule was not an adjudicative hearing process and I will therefore adopt the approach taken by Adair J. and rely on the non-hearsay evidence proffered by the petitioners.

Inadmissible Evidence in Support of the Petition

[43] Part of the evidence that the petitioners seek to rely upon are statements contained in an email exchange on February 11, 2019, between a Mr. Richard McCandless and a Ms. Lindsay Matthews respecting the Attorney General's announcement of the introduction of Rule 11-8. Ms. Matthews works in some capacity for ICBC.

[44] In his email to Ms. Matthews, Mr. McCandless asked:

> … The media is reporting that limiting the expert witness reports will save $400 million/year. Where does this number come from? If its your number please explain, as ICBC reported in the

> 2017 RR (RM 4.2) that the third-party disbursements were about $117 million and the defense (sic) disbursements were about $25 million.

[45] In her reply to Mr. McCandless, Ms. Matthews stated:

> We expect the savings from Rule of Court (sic) to be $400M for this fiscal year and about $30M going forward.
>
> The approximate breakdown of the savings is expected to be:
>
> > About half due to fewer reports (40% from the Plaintiff reports plus 10% from Defence reports)
> >
> > About half due to lower payments for damages – more expert reports make claims more expensive.

[46] The Attorney General does not dispute that s. 13(2) of the *Insurance Corporation Act*, R.S.B.C. 1996, c. 228 confers Crown agent status on ICBC. The fact that ICBC is for some purposes "an agent of government" does not make it "government": *Crocker and Nemmes v. ICBC*, 2006 BCSC 1177 at para. 12. I accept that ICBC remains a distinct entity, with its own civil personality: Karen Horsman and Gareth Morley, eds., *Government Liability: Law and Practice* (Ontario: Thomson Reuters, 2007) (loose-leaf updated 2019, release 33) at 1A.30.

[47] I have concluded that given ICBC's separate legal personality from government, the "party admissions" exception to the hearsay rule does not apply to render statements by ICBC representatives admissible against the Attorney General in this proceeding: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCSC 861 at paras. 80-83. In the result, I will not rely upon the exchange between Mr. McCandless and Ms. Matthews to determine the issues before me.

[48] The petitioners also rely on comments attributed to the Attorney General in a newspaper report in the Vancouver Sun dated February 11, 2019, by Mr. Rob Shaw that "[t]he expert report cap will save an estimated $400 million this fiscal year and $30 million a year thereafter."

[49] This is clearly a hearsay statement, and whilst the Attorney General did not deny making that statement, I find that I cannot rely upon it to determine the issues before me, and will not do so.

Admissible Evidence in Support of the Petition

[50] I am prepared to accept as admissible and to rely on the information contained in News Releases from the Attorney General's office.

[51] The petitioner Mr. Crowder commenced a "vehicle action" on October 24, 2017. He filed a notice of trial with a September 14, 2020 commencement date. He has served no expert reports. His action, and his ability to tender expert opinion evidence at his trial, with respect to damages, are accordingly captured by the impugned Rule.

[52] Mr. Crowder alleges that he was injured in a motor vehicle accident that occurred on May 30, 2017, when the vehicle he was driving was rear-ended by a tractor trailer unit, causing a chain

reaction that involved the collision of four other vehicles.

[53] In his notice of civil claim, Mr. Crowder alleges that he suffered a traumatic brain injury, injuries to his left eye and surrounding facial bones, soft tissue injuries to his neck, back, and legs, an injury to his jaw, chest pain and headaches, cognitive impairments, post-traumatic stress disorder and depression, and other related sequelae from those injuries.

[54] Mr. Crowder's counsel swore an affidavit in support of the petition in this matter. I accept that his affidavit was properly filed, and can be relied upon by me.

[55] Mr. Crowder's counsel has deposed that it is his view that the sophistication and diversity of Mr. Crowder's injuries requires discrete and sub-specialized medical expertise. In his counsel's view, Rule 11-8's three-expert limit makes it impossible for Mr. Crowder to discharge his burden of proof on the nature, duration and extent of his injuries, and his long-term prognosis, including his long-term function and the lifetime care he will need.

[56] Mr. Crowder's counsel deposed that he has obtained two medical expert reports for use at trial, one from a rehabilitation specialist and one from an otolaryngologist. He further deposed that prior to the introduction of Rule 11-8, Mr. Crowder had intended to obtain further expert opinions respecting his claim for damages from a neuropsychologist, a psychiatrist, a neurologist, a dentist, a plastic surgeon, an ophthalmologist, an occupational therapist, and an economist.

[57] Mr. Crowder's counsel further swore that the joint expert or court-appointed expert opinion option in Rule 11-8 will impose an additional hardship on Mr. Crowder, to the strategic benefit of the insured defendants, because he will be forced at an early stage to disclose to the defendants the expert opinion evidence he requires and the substance of that opinion.

[58] The fact that Mr. Crowder has not attempted to submit expert evidence in excess of Rule 11-8 in his vehicle action, nor attempted to avail himself of the *Rules* provisions for joint or court-appointed experts is of no assistance to the Attorney General. At best it is neutral, and the *Rules* must be interpreted in accordance with the rules that relate to statutory interpretation, as explained in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

[59] I accept that the impugned Rule will oblige Mr. Crowder to make strategic litigation decisions about the manner by which he adduces evidence of certain facts.

[60] I find that it is unnecessary to rely upon the petitioners' review of a sampling of cases where expert evidence was relied upon. I can and do take judicial notice that some cases to date have required three or more expert witnesses on damages, and some less. Often plaintiffs who bear the onus of proof on most damages issues call more evidence than do defendants.

Issues

[61] The petitioners' challenge to the impugned Rule is threefold:

a) the Rule 11-8 Orders are contrary to a convention that requires such changes to be proposed or approved by the Committee;

b) the Rule 11-8 Orders are not authorized by the *Act*; and;

c) the Rules 11-8 Orders are unconstitutional in that they contravene s. 96 of the *Constitution Act, 1867* by inhibiting the power of the Supreme Court of British Columbia to control its process and by denying access to the court to litigants.

[62] The intervenor is generally in favour of the petition for the second and third grounds advanced by the petitioners, although not entirely for the same reasons.

[63] The Attorney General asserts that the provincial legislature has plenary authority under s. 92(14) of the *Constitution Act, 1867* to make laws in relation to the administration of justice, including procedure in civil matters, and that so long as those laws are constitutional, they must be followed by the judiciary: *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48. The Attorney General submits the impugned Rule is consistent with the statutory purpose of the *Act* and does not infringe s. 96 of the *Constitution Act, 1867*.

[64] For the reasons that follow, I would allow the petition in part on the second and third grounds advanced by the petitioners.

Discussion

Are the Rule 11-8 Orders Contrary to a Constitutional Convention?

[65] The petitioners submit that, for it to be valid, the impugned Rule must proceed on a recommendation from the Attorney General which is itself valid. They cite *Att. Gen. of Canada v. Inuit Tapirisat et al.*, [1980] 2 S.C.R. 735 at 748 for the proposition that the Attorney General's recommendation is a statutory precondition to an amendment of the *Rules*. They argue the Attorney General's recommendation was invalid because there is a constitutional convention that all rules will be approved by the Committee, and Rule 11-8 was not approved by the Committee.

[66] The intervenor did not make any submissions on this issue.

[67] The Attorney General argues that the petitioners' convention argument constitutes a "collateral attack", because the petitioners have framed this proceeding as a judicial review of the Rule 11-8 Orders and not the Attorney General's recommendation. That primary objection aside, the Attorney General argues that his recommendation does not constitute non-conformance with a constitutional convention nor a failure to comply with a statutory precondition.

[68] Order in Council No. 40 represents that it was made "after consultation with the Chief Justice of the Supreme Court". There was no challenge by the petitioners with respect to the Attorney General's consultation in that regard.

Is this argument a collateral attack?

[69] As discussed by Chief Justice McLachlin in *Babcock* at para. 57:

> It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.

[70] In the light of this direction, I find that the petition is a direct attack on the impugned Rule, and should not be defeated on the basis that it is not.

[71] However, the Attorney General's point is not that the petition itself is a collateral attack. It is that the *convention argument* is a collateral attack because it is a challenge to the Attorney General's recommendation of Rule 11-8. This is improper, says the Attorney General, because the petitioners have expressly framed the proceeding as a judicial review of the Rule 11-8 Orders only. No other decision or statutory action (including, the Attorney General's recommendation) is subject to review in the petition proceeding.

[72] Given the conclusion that I have reached with respect to the petitioners' convention argument, I find that it is unnecessary for me to determine this issue.

Is there a constitutional convention that all rules will be approved by the Committee?

[73] In "Report of the Rules Revision Committee" (1999), 57 The Advocate 63 at 64, then Master J.W. Horn, a member of the Rules Revision Committee at that time, wrote:

> Pursuant to the *Court Rules Act*, the Lieutenant Governor in Council enacts the Rules of Court on the recommendation of the Attorney General after consultation with the Chief Justice.
>
> The Rules Revision Committee is a committee of the Attorney General whose members are appointed by the Attorney General on the advice of the Chief Justice. The Committee was formed when the 1977 Rules were brought into force and has met regularly since then. Usually a packet of amendments is proposed annually in May and promulgated in June or July.
>
> Successive Attorneys General have reiterated that they will not enact any amendments to the Rules of Court (other than those that concern filing fees) unless recommended by the Rules Revision Committee and that any representations received by the Attorney General, whether from the bench or from the bar or from any other source, will always be referred to the Rules Revision Committee for advice.

[74] The preamble to the *British Columbia Annual Practice,* by Dillon and Turriff, (Toronto: Thomson Reuters, 2018), includes a treatise entitled "A Short History of Rule-Making for Courts" by Mr. Ken McEwan, Q.C. which states:

> By convention, a Rules Revision Committee constituted by the Attorney General assists him or her in making recommendations to the Lieutenant Governor in Council for rule amendments. In practice, no rule amendments are recommended that have not been proposed by the Committee.

[75] However, the basis for this assertion is unstated, and may be based upon the comments of Master Horn referred to above.

[76] The petitioners contend that the convention discussed by Master Horn and Mr. McEwan exists, and is meant to reflect the overlapping legislative, executive, and judicial functions involved in the

making of rules for the conduct of judicial proceedings. They argue that it protects against executive overreach in what is fundamentally the function of the judiciary, therefore giving it a constitutional character.

[77] Neither Master Horn nor Mr. McEwan point to any overt concession by any Attorney General that no rule amendments, which have not been proposed by the Committee, would be recommended.

[78] The petitioners contend that the convention that no rule amendments are recommended by the Attorney General that have not been proposed by the Committee, is given legal force, and made an essential part of the promulgation process for rules of court, through s. 6 of the *Act*.

[79] I am unable to read s. 6 of the *Act* in that way. The relevant part of that section, for the purposes of the proceeding before me states:

> The Lieutenant Governor in Council must not make a rule under sections 1 to 4 unless the Lieutenant Governor in Council has received the recommendation of the Attorney General after the Attorney General has consulted with the following:
>
> …
>
> (b) the Chief Justice of the Supreme Court, in relation to rules governing the Supreme Court.

Conclusion on the First Ground Advanced in the Petition

[80] Ultimately, it is unnecessary for me to determine if the convention contended for by the petitioners exists. Even if it did, I find that it could have no legal force or effect.

[81] While a court may provide an advisory opinion on the existence of an alleged convention, it cannot enforce a convention through its mandatory jurisdiction: *Reference re Power of Disallowance & Power of Reservation (Canada)*, [1938] S.C.R. 71 at 78; *Re: Resolution to amend the Constitution,* [1981] 1 S.C.R. 753; *Alani v. Canada (Prime Minister)*, 2015 FC 649.

[82] While the constitution itself will be enforced by the courts, constitutional conventions carry only political sanctions and the remedy for a breach thereof lies outside the courts: *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217 at para. 98; *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General),* 2001 SCC 15 at para. 63.

Are the Rule 11-8 Orders Authorized by the *Act*?

[83] The petitioners submit the Rule 11-8 Orders are beyond the government's authority under the *Act*. They argue Rule 11-8 was an unreasonable exercise of the government's power under the *Act*, citing *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, as the applicable framework to determine the validity of regulations.

[84] The Attorney General submits Rule 11-8 is consistent with the object of the *Act* and the statutory mandate of the *Act*, citing *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 [*Katz*], for the applicable framework. The Attorney General argues that the petitioners have not discharged their burden of proof to show that Rule 11-8 is *ultra vires* the *Act.*

[85] The intervenor agrees with the analytical framework adopted by the Attorney General, but contends that, in enacting Rule 11-8, the Lieutenant Governor in Council "acted in excess of the powers delegated by" the *Act*, as the impugned Rule is inconsistent with the objective of the enabling statute or the scope of the statutory mandate. The intervenor argues that the three-expert limit created by the impugned Rule is not a matter of mere practice and procedure and that it prevents the proof of facts relating to damages, rather than creating its means.

What is the applicable analytical framework?

[86] I agree that *Katz* provides the applicable analytical framework. Like the petition before me, *Katz* involved a challenge to the Lieutenant Governor in Council's enactment of regulations pursuant to a valid statute. The issue thus to be determined is whether the impugned Rule is inconsistent with the objective of the *Act* or the scope of the statutory mandate: *Katz* at para. 24.

[87] In my view, when determining the validity of regulations, the starting point for the reviewing court is the "overarching purpose" of the enabling statute: *Katz* at paras. 30 and 32. In this petition, the enabling statute is the *Act*.

[88] The petitioners and the intervenor contend that the purpose of the *Act* and other court rules legislation is simply to "provide procedural guidelines for the conduct of litigation": *Morrissey v. Morrissey*, 2000 NFCA 67 [*Morrissey*] at para. 24.

[89] The Attorney General submits the object of the *Act* is to permit the creation of a regulatory structure that ensures the efficient and effective functioning and the "better administration of justice" in the three levels of court in British Columbia.

[90] As there is no "purpose" provision in the *Act* and the parties did not lead relevant authorities which establish the purpose of the *Act*, my analysis must be guided by the words of the *Act*.

[91] The Attorney General does not dispute that the *Act* does not expressly grant authority to the Lieutenant Governor in Council to interfere with substantive law.

[92] Even accepting the Attorney General's submission on the object of the *Act,* that submission still falls short of establishing that the object of the *Act* or the scope of the statutory scheme would permit changes to substantive law.

Is Rule 11-8* Ultra Vires *the Act?

[93] In *Katz*, Madam Justice Abella, for the Court, wrote that a successful challenge to the *vires* of regulations requires that they be shown to be "inconsistent with the objective of the enabling statute or the scope of the statutory mandate": *Katz* at para. 24, citing with approval *Waddell v. Governor in Council* (1983), 49 B.C.L.R. 305. Abella J. set out the applicable interpretive principles at paras. 25-28:

a) Regulations benefit from a presumption of validity;

b) This presumption places the burden on the challengers to demonstrate invalidity, and it favours an interpretive approach that "reconciles the regulation with the enabling statute so that, where possible, the regulation is construed in a manner which renders it *intra vires*";

c) The inquiry does not involve assessing the policy merits of the regulations to determine whether they are necessary, wise, or practically effective; and,

d) It is not an inquiry into the underlying "political, economic, social or partisan considerations".

[94] While regulations benefit from a presumption of validity, the test of conformity with the enabling statute "is not satisfied merely by showing that the delegate stayed within the literal, and often broad terminology of the enabling provision, when making subordinate legislation": *Waddell*, cited with approval in *Katz* at para. 24. The power-conferring language of a regulation is qualified by the overriding requirement that the subordinate legislation accord with the purposes of the enabling statute read as a whole.

[95] Both the petitioners and the intervenor argue that the impugned Rule is *ultra vires* the *Act* because it impinges on substantive rights. Both urge me to find that the impugned Rule impermissibly affects the content of proceedings, rather than their process.

[96] The petitioners contend that the impugned Rule is expected to, and will, change the outcome of cases adversely to plaintiffs.

[97] The petitioners recognize that s. 1 of the *Act* permits the Lieutenant Governor in Council to make rules that it "considers necessary or advisable governing the conduct of proceedings" in court, two particulars of which are that the rules may govern "practice and procedure" and "the means by which particular facts may be proved". They contend, however, that Rule 11-8 does not address a matter of mere "practice and procedure" and rather than creating a means by which facts may be proven, prevents the proof of facts relating to damages.

[98] The petitioners say that the power to regulate the "conduct of proceedings" is not a plenary power over the law of evidence and that substantive changes in the law of evidence are for the legislature to make, through the *Evidence Act*, R.S.B.C. 1996, c. 124 and other statutes. The petitioners contend that categorically barring the use of expert evidence that had been admissible at common law is such a change.

[99] The Attorney General contends that the impugned Rule does not effect a change to substantive law. The Attorney General argues that if a court needs additional expert evidence to resolve the issues, it may grant an application by a party for joint or court-appointed experts, or it may appoint an expert on its own initiative, or the parties may consent to additional joint experts or use other, non-expert, means to address damages.

[100] The intervenor submits that, through the impugned Rule, the Lieutenant Governor in Council has “pre-determined” what will constitute sufficient evidence on the issue of damages.

[101] The intervenor contends that the power to decide what will constitute sufficient evidence on the issue of damages arising from personal injury or death will have the effect of impinging on substantive rights, and thus is not within the authority conferred by the *Act*. The intervenor argues that a power to regulate practice or procedure cannot avail to limit the court’s jurisdiction or to alter its extent or nature. It relies on a series of cases where rules of civil procedure were invalidated on the basis that they were beyond the authority of their enabling statute.

[102] In *Morrissey*, the Court rendered invalid a rule of civil procedure which required disclosure to the opposing party of medical records otherwise protected against production as documents prepared for litigation. The Court stated at paras. 31 and 34:

> 31. The question then becomes whether, in doing so, the Legislature intended that the rules committee have the authority to declare that documents which by law would be subject to the litigation privilege must be provided to the other party.
>
> …
>
> 34. However, I am unable to conclude that the wording of s. 55(1)(e) of the *Judicature Ac*t is sufficiently clear to demonstrate an intention by the Legislature to deny the litigation privilege respecting medical reports which meet the dominant purpose test and which are not intended to be used at trial.

[103] In *Circosta et al v. Lilly* (1967), 61 D.L.R. (2d) 12 (Ont. CA), the Court invalidated a rule of civil procedure on the basis that it abrogated a substantive right of privilege at common law. The rule in issue purported to effect changes in the substantive law governing privilege over communications and documents prepared for the use of counsel. The Court stated at paras. 10-11:

> 10. While it may be said that the enactment is procedural in a broad sense in that it attempts to deal only with evidence and to declare whether that evidence shall be submitted to Court, nevertheless the Rule clearly purports to effect an alteration of the substantive law.
>
> 11. … Admittedly such a fundamental alteration of well-settled principles of law lies within the exclusive jurisdiction of the Legislature and can scarcely be held to come within the limited delegated authority which the Legislature had committed to the Rules Committee.

[104] In *Andrews v. Andrews and Roberts*, [1945] 1 D.L.R. 595 (Sask. C.A.), the Court invalidated a rule of civil procedure that provided that certain admissions of a matrimonial offence could not be accepted at trial as sufficient proof of the matrimonial offence, noting the distinction between questions regarding the competency or admissibility of evidence and questions as to the sufficiency or effect of evidence. At para. 17, the Court found that the rule placed “a formidable restriction upon the exercise by the learned Judge of the duty imposed upon” the judge. At para. 22, the Court stated that the “power to regulate practice or procedure cannot avail to limit the [court’s] jurisdiction or to alter its extent or nature … Such limitation or alteration can only be effected by statute.”

[105] In *Ostrowski v. Saskatchewan (Appeals Committee, Beef Stabilization Board)* (1993), 101 D.L.R. (4th) 511 (Sask. C.A.), the Court held that a rule of civil procedure purporting to place a six-month limitation period on an application for certiorari was *ultra vires* on the basis that the rule

exceeded the scope of the rule-making power conferred by legislation, which was limited to "regulating the pleading, practice and procedure in the court". The Court cited *Andrews* for the proposition that rule-making power "does not embrace the authority to 'limit the jurisdiction' of the Court, 'or to alter its extent or nature'". The Court found the arbitrary time limit imposed by the rule at issue fettered judicial discretion, concluding at para. 28:

> Viewed from the perspective of the judge hearing such application, the rule purports, as the product of the exercise of the administrative or subordinate legislative power of the Court, to circumscribe the judge's judicial powers – discretionary, superintending powers drawn from the royal prerogative and the common law – to hear and determine such applications and to grant or withhold the remedy as the judge sees fit having regard for the whole of the circumstances, including delay and its consequences, however long or short the delay.

[106] In *Schanz v. Richards* (1970), 72 W.W.R. 401 (Alta. M.), Master Quigley held inoperative a rule of civil procedure that required a plaintiff undergoing an independent medical examination to deliver to the defendant any equivalent report obtained by the plaintiff on the basis that it effected a change in substantive law. At the time, the enabling statute did not confer authority to make, amend, alter or repeal any existing substantive law. Master Quigley held that the "common law privilege cannot be abrogated by the making of a procedural or practice Rule". The legislation has since been amended to expressly allow for a change in substantive law.

[107] In *Canadian Reform Conservative Alliance Party, Portage-Lisgar Constituency Assn. v. Harms*, 2003 MBCA 112, notwithstanding that the rule-making power conferred by legislation embraced the power to alter substantive law, the Court invalidated a rule of civil procedure which deemed an unincorporated association to be a corporation, imbuing it with legal powers. The Court stated that, to be effective, a rule which has the effect of altering the substantive law must, in essence, be about court practice and procedure. The Court held that the rule at issue was about substantive law and only peripherally about practice and procedure:

> My conclusion is that sec. 92 means what it says - by its very wording it is restricted to rules of "practice and procedure." While the rules may "alter substantive law," the pith and substance of the rules must be procedural. If in fact the central point of the rule is not a matter of adjectival law but a fundamental alteration in substantive law, then it is beyond the ambit of the authority of the rules committee.

[108] The Attorney General does not dispute that, in British Columbia, the power to effect a change in substantive law has not been expressly granted to the Lieutenant Governor in Council under the *Act*. But in contrast to the above cases, the Attorney General submits that limiting the number of "adversarial expert" reports that can be tendered into evidence in a vehicle action does not constitute a substantive change to the law of evidence. The Attorney General points to the fact the *Rules* already restrict the admissibility of expert evidence not exchanged prior to the 84-day deadline prescribed by Rule 11-6(3), even if that evidence otherwise meets the common law test for admissibility, arguing that such restrictions fall squarely within the scope of the discretionary jurisdiction conferred on the Lieutenant Governor in Council under s. 1 of the *Act*.

[109] The Attorney General submits the impugned Rule does not create an absolute bar to the use of any expert evidence beyond the three adversarial experts that it permits. The Attorney General argues

the impugned Rule only limits the “form” in which additional expert evidence may be adduced, by requiring that additional experts be appointed by consent, jointly appointed, or appointed by the court.

[110] The Attorney argues, and I accept, that there is no substantive right to a particular mode of proof or rule of evidence; even “radical” or “revolutionary” changes to rules of evidence are matters of procedure: *Howard Smith Paper Mills Ltd. v. The Queen*, [1957] S.C.R. 403.

[111] The Attorney General further contends the fact that a rule’s application may affect, or even determine, the outcome of a case does not render it *ultra vires* the *Act*, referring to *Canadian Plywood Corp. Ltd., Re*, [1985] B.C.J. No. 171 (S.C.).

[112] In *Canadian Plywood Corp.*, His Honour Judge Cowan, sitting then as a Local Judge of the Supreme Court, dealt with an argument that a rule permitting the Court to grant an extension of time to vary an entered order was *ultra vires* because it purported to give the court jurisdiction to vary an order which conferred substantive rights. In rejecting that position, Cowan L.J.S.C. said:

> [13] As earlier indicated, it is my view that the substantive aspect of the order in issue here is the requirement that the respondents post security for costs in the amount specified. Ancillary to that order the court stipulated a time limit within which there was to be compliance with the order. I consider that that aspect of the order was a matter of the “practice” of the court. Accordingly, R. 3(2) is within the purview of the *Court Rules Act*.

[113] In response to the petitioners’ argument that changes to substantive law can only be accomplished through statutory amendment by the legislature, the Attorney General contends the legislature is not the only body that can pass legislation affecting the admissibility of expert reports, and the *Act* clearly establishes this. The Attorney General points out that s. 10 of the *Evidence Act*, which deals with expert evidence, pertains only to proceedings before certain administrative tribunals. The *Rules* are thus the sole legislative source governing evidence before the Supreme Court.

[114] There is no express authority in the *Act* which allows the Lieutenant Governor in Council to effect a change in substantive law through rules of civil procedure. In the absence of such express authority, these cases to which I have referred establish that rules of civil procedure cannot effect a change in substantive law.

[115] I find that the impugned Rule does effect a change in substantive law.

[116] Therefore, certain portions of the impugned Rule and the Orders creating them are *ultra vires* the *Act*, being inconsistent with the object of the *Act* and the scope of the statutory mandate: *Katz* at para. 24.

[117] In *B.R.A.C., System Board of Adjustment No. 435 v. Canadian Pacific Air Lines Ltd.* (1984), 55 B.C.L.R. 18 (C.A.), Lambert J.A. wrote at 35:

> In my opinion, the Rules can create new substantive law. But they are intended to be a collection of procedural rules for the enforcement of substantive rights that are derived from the true sources of substantive law, namely, the common law, equity, the Constitution and the statutes. It is only in exceptional cases that the Rules create new substantive law. And, in cases of ambiguity, the Rules should be interpreted in such a way as to restrict them to procedure.”

[Emphasis added]

[118] In *Northwest Organics, Limited Partnership v. Maguire*, 2013 BCSC 1328, aff'd 2014 BCCA 454, Mr. Justice Savage wrote at para. 77:

> 77 To the extent that the defendants rely on the *Rules*, and in particular on Rule 1-3, as the source for this change, they cannot succeed. Any rule that purports to change substantive law would surely be *ultra vires* the power of the Lieutenant Governor in Council (the "LGC") under the *Court Rules Act*. The rule making authority of the LGC is restricted, as I have noted, to addressing such matters as practice and procedure, means of proof, modes of evidence, appearances, applications, records and costs. The LGC has no authority under that *Act* to make changes to substantive law. Rule 1-3 makes this distinction clear by emphasizing that the ultimate object is determination of "every proceeding" (Rule 1-3(1)) or "a proceeding" (Rule 1-3(2)) "on its merits". I can find no authority under the *Court Rules Act* that would allow the LGC to revise or regulate substantive law. Therefore, by enacting Rule 1-3, the LGC cannot have altered the substantive law of defamation.
>
> [Emphasis added]

[119] I appreciate that these decisions predate the decision in *Katz*, which clarified that regulations benefit from a presumption of validity, but while it is not impossible for the *Rules* to create new substantive law, I conclude that the ability to use the *Rules* in this fashion must be the exception, and not usual practice, and should be limited as described by Lambert J. A. in *B.R.A.C.*

Conclusion on the Second Ground Advanced in the Petition

[120] I find that the effect of the impugned Rule is to change the substantive law of evidence that has guided this Court from its inception, and I find that this is not one of the exceptional cases referred to by Justice Lambert where the *Rules* may create new substantive law. Accordingly, I find that the Rule 11-8 Orders (and with it, the impugned Rule) are not authorized by the *Act*.

[121] However, as changes to the substantive law could be made under primary legislation such as the *Evidence Act*, I will now consider the third ground advanced by the petitioners.

Does Rule 11-8 Infringe the Core Jurisdiction of a Superior Court?

[122] The third ground advanced in the petition is the alleged contravention of s. 96 of the *Constitution Act, 1867.*

[123] The petitioners contend the provincial power to legislate for the administration of justice under s. 92(14) of the *Constitution Act, 1867* is subject to the principle that a superior court's core and inherent jurisdiction must be free of legislative encroachment, citing *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 [*MacMillan Bloedel*].

[124] The petitioners argue that the impugned Rule unconstitutionally infringes the superior court's core jurisdiction because it is a mandatory rule, eliminating judicial discretion, which impacts the court's process in a way that rises to the level of an impairment.

[125] The petitioners contend that the impugned Rule strikes at the integrity of the adjudicative process, while depriving the court of the power to control and protect that process, by:

a) impairing a party's right to be heard and to prove its case through otherwise admissible evidence;

b) specially benefitting defendants, in that the plaintiff bears the burden of proof of facts involving significant medical and economic complexity;

c) limiting plaintiffs' litigation privilege in respect of proof of damages;

d) compromising the adversarial system of civil litigation by requiring routine resort to court-appointed experts in personal injury cases; and,

e) purporting to eliminate judicial discretion to the contrary.

[126] The intervenor agrees that the impugned Rule is inconsistent with s. 96. It submits *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 [*Trial Lawyers*] establishes that s. 96 limits the legislative competence of the provincial legislature in respect of the *Act* specifically.

[127] The intervenor submits that its arguments made on the *vires* issue apply equally to the constitutional issue. The intervenor contends Rule 11-8 amounts to a "mandatory taking away of" the court's discretion on the sufficiency of evidence for an issue at trial, and that this impermissibly limits the court's jurisdiction contrary to s. 96.

[128] The Attorney General accepts that there are constitutional limits to the legislature's ability to make laws governing civil procedure if they interfere with the core powers central to the existence of a superior court as a court. Yet he says that the Supreme Court of Canada has confirmed that evidentiary rules, however "unconventional" and whether or not they circumscribe judicial discretion, do not interfere with the superior courts' core jurisdiction under s. 96.

[129] The Attorney General submits that the impugned Rule changes do not interfere with the core jurisdiction of the Supreme Court as the impugned Rule permits each party to a vehicle action to tender, as of right, opinion evidence from three experts on the issue of damages arising from personal injury or death, and permits the parties to adduce opinion evidence from an unlimited number of joint experts by consent or joint or court-appointed experts on application.

What is the "core jurisdiction" of a provincial superior court?

[130] Section 96 of the *Constitution Act, 1867* gives the federal government the power to appoint the judges of the superior, district and county courts in each province. While the bare wording of s. 96 refers only to judicial appointments, its broader import is to protect the "core jurisdiction" of the provincial superior courts from either federal or provincial abolition or removal: *MacMillan Bloedel* at paras. 15 and 37; *Trial Lawyers* at para. 30.

[131] In *MacMillan Bloedel*, the Court considered whether Parliament, through s. 47(2) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, could grant to the youth court exclusive jurisdiction over *ex facie*

contempt of court committed by a young person against a superior court. Chief Justice Lamer, for the majority, held that exclusive jurisdiction for *ex facie* contempt could not be so transferred.

[132] Chief Justice Lamer explained at para. 15:

> The superior courts have a core or inherent jurisdiction which is integral to their operations. The jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution. Without this core jurisdiction, s. 96 could not be said either to ensure uniformity in the judicial system throughout the country or to protect the independence of the judiciary. Furthermore, the power of superior courts to fully control their own process is, in our system where the superior court of general jurisdiction is central, essential to the maintenance of the rule of law itself.

[133] At para. 30, Lamer C.J. added:

> While inherent jurisdiction may be difficult to define, it is of paramount importance to the existence of a superior court. The full range of powers which comprise the inherent jurisdiction of a superior court are, together, its "essential character" or "immanent attribute". To remove any part of this core emasculates the court, making it something other than a superior court.

[134] Chief Justice Lamer found it was unnecessary to enumerate the precise powers which compose inherent jurisdiction, concluding at para. 38 that the power to punish for contempt *ex facie* is “obviously within that jurisdiction.” As such, the superior court’s jurisdiction could not be deprived.

[135] The parties agree that s. 96 guarantees the superior court’s ability to protect access to justice and the integrity of its process. The parties disagree about the proper characterization of the power falling within the protected “core” jurisdiction under s. 96 which is said to be infringed by the impugned Rule.

[136] The petitioners submit that the power which is infringed by the impugned Rule is the “authority of the superior court to protect the integrity of its process”. They argue that the impugned Rule results in an impairment to the court’s power to control its process.

[137] The Attorney General submits that the proper characterization of the power in issue is the superior court’s ability to ensure that it has before it relevant evidence, including opinion evidence, necessary to determine on the merits a claim for damages arising out of personal injury or death. He argues that proper characterization of the subject matter of the challenged power must be narrowly construed, considering the nature of the dispute: *R. v. Ahmad*, 2011 SCC 6 [*Ahmad*] at paras. 62-63.

[138] The Attorney General argues that the court’s s. 96 core jurisdiction is narrow, including only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within the legal system: *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186 at para. 56.

[139] The Attorney General contends the enactment of laws governing evidence in civil proceedings is a permissible exercise of the legislature’s power over the administration of justice under s. 92(14) and that the legislature has the power to restrict the ability of litigants to submit evidence. The *Rules*

may also limit a court's discretion to depart from them, and often do, citing *Brophy v. Hutchinson*, 2003 BCCA 21.

[140] Furthermore, the Attorney General contends the premise that underlies the petitioners' position – that the protected core jurisdiction of superior courts under s. 96 precludes limitations on the evidence that can be led at trial and on the court's discretion to control its process – has been rejected in *Babcock* and in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 [*Imperial Tobacco*]. The Attorney General asserts that the legislature can limit the nature and scope of evidence that is relevant and admissible at common law and may do so in the absence of judicial discretion, just as it may choose to grant discretion in particular circumstances.

[141] The Attorney General contends that *Babcock* rejected the argument that the protected s. 96 core jurisdiction of superior courts to control their own process is not subject to limitations on the evidence that could be led at trial. The Attorney General argues that *Ahmad* is to the same effect.

[142] I do not read *Babcock* as supporting such a broad proposition. It was a case about the disclosure of Cabinet confidences, in respect of which the superior courts operated since pre-Confederation without the power to compel. In considering whether the core jurisdiction of a superior court was infringed by s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, Chief Justice McLachlin held at paras. 59-60:

> 59 … Citing *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, the respondents argue that s. 39 impermissibly infringes on the core jurisdiction of a superior court because it interferes with courts' ability to control their own process. First, because the section operates to prevent a superior court from remedying an abuse of process, and second, because it denies evidence centrally relevant to the core factual questions in the litigation. The respondents contend that s. 39 deprives the judiciary of its role of review, a power which a superior court possesses under the common law of public interest.
>
> 60 As previously stated, there is a long common law tradition of protecting Cabinet confidences. In Canada, superior courts operated since pre-Confederation without the power to compel Cabinet confidences. Indeed, at the time of Confederation, no court had any jurisdiction regarding actions against the Sovereign: see *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551. Further, s. 39 has not substantially altered the role of the judiciary from their function under the common law regime. The provision does not entirely exclude judicial review of the determination by the Clerk that the information is a Cabinet confidence. A court may review the certificate to determine whether it is a confidence within the meaning provided in s. 39(2) or analogous categories, or to determine if the certificate was issued in bad faith. Section 39 does not, in and of itself, impede a court's power to remedy abuses of process.

[143] The petitioners distinguish *Babcock* and *Ahmad* by asserting that there is a "constitutionally meaningful distinction" between "preventing" the exercise of a superior court function and "guiding or structuring" the function. There is support in the authorities for their position.

[144] In *Bea v. The Owners, Strata Plan LMS 2138*, 2015 BCCA 31, the Court considered whether the trial judge's order for sequestration was available as a remedy for contempt under Rule 22-8. That rule confined the court's powers of punishment for contempt to imposition of a fine, an order of committal, or an order for security. At para. 29, Madam Justice Garson, for the majority, concluded that sequestration was available as a remedy under Rule 22-8. She emphasized that the constitutional

problem arose because the impugned rule imposed "mandatory procedural requirements" that interfered with the court's core jurisdiction, citing *MacMillan Bloedel* [emphasis in the original].

[145] In *Harder v. Poettcker*, 2016 BCCA 477 at para. 61, Mr. Justice Willcock, for the Court, cited *Bea* to distinguish between rules that "purport to restrict the court's core functions" and rules that "describe how discretion should be exercised". He found that the rules at issue, which had the "effect of structuring the court's exercise of its powers," did not "restrict the court in the exercise of its core functions".

[146] In response, the Attorney General argues Rule 11-8 preserves the very "residual power" that the petitioners say was dispositive of the s. 96 issue in *Babcock* and *Ahmad.* As I will explain below, I disagree.

[147] The Attorney General contends that there is no constitutional right to have one's civil trial governed by customary rules of civil procedure and evidence, arguing that the Supreme Court of Canada has clearly held that this is so when the asserted "right" is framed as a defence of judicial independence and the rule of law: *Imperial Tobacco* at para. 76. The Attorney General submits *Imperial Tobacco* is dispositive, even if the asserted right to a "fair" civil trial is reframed as a constitutional infringement.

[148] I do not read the paragraph relied upon by the Attorney General as so all encompassing. What was written there by Major J. was:

> 76 Additionally, the appellants' conception of a "fair" civil trial seems in part to be of one governed by customary rules of civil procedure and evidence. As should be evident from the analysis concerning judicial independence, there is no constitutional right to have one's civil trial governed by such rules. Moreover, new rules are not necessarily unfair. Indeed, tobacco manufacturers sued pursuant to the Act will receive a fair civil trial, in the sense that the concept is traditionally understood: they are entitled to a public hearing, before an independent and impartial court, in which they may contest the claims of the plaintiff and adduce evidence in their defence. The court will determine their liability only following that hearing, based solely on its understanding of the law as applied to its findings of fact. The fact that defendants might regard that law (i.e., the *Act*) as unjust, or the procedural rules it prescribes as unprecedented, does not render their trial unfair.
>
> [Emphasis added]

[149] In *Imperial Tobacco*, the Court considered a challenge to provisions of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 that shifted the onus of proof in respect of some elements of a claim and limited the compellability of health care records and related information. The challenge was framed as a violation of, *inter alia*, the principles of judicial independence and the rule of law.

[150] Mr. Justice Major held that judicial independence requires the executive and legislative branches of government to not impinge on the essential authority and function of the court. The critical question thus is "whether the court is free, and reasonably seen to be free, to perform its adjudicative role without interference from the executive or legislative branches of government": *Imperial Tobacco* at para. 47.

[151] Mr. Justice Major found there was no violation of judicial independence. The appellant had argued that the legislation violated judicial independence because it "contain[ed] rules of civil procedure that fundamentally interfere[d] with the adjudicative role of the court" by subverting the court's ability to discover relevant facts. He went on to find that the appellants' submissions misapprehended the nature and scope of the court's protected adjudicative role, cautioning at para. 54:

> None of this is to say that legislation, being law, can never unconstitutionally interfere with courts' adjudicative role. But more is required than an allegation that the content of the legislation required to be applied by that adjudicative role is irrational or unfair, or prescribes rules different from those developed at common law. The legislation must interfere, or be reasonably seen to interfere, with the courts' adjudicative role, or with the essential conditions of judicial independence. As McLachlin C.J. stated in *Babcock*, at para. 57:
>
> > It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.

[152] Mr. Justice Major also held that the legislation did not implicate the rule of law. The appellants submitted that the rule of law required, *inter alia*, legislation to not confer special privileges on the government and a "fair" civil trial. In dismissing the appellants' rule of law argument, Major J. concluded at para. 76, as set out above, that there is no constitutional right to have one's civil trial governed by customary rules of civil procedure and evidence.

Does Rule 11-8 encroach upon the superior court's power to control its process?

[153] I am prepared to accept the submission of the Attorney General that whether framed as issues of judicial independence and the rule of law or as infringement of the court's core jurisdiction under s. 96, the fundamental question is the same: does the legislation in issue interfere with the court's ability to hear and determine the cases that come before it?

[154] The Attorney General asserts that the impugned Rule does not affect the court's control over its process more than any other rule or law permitting or restricting the introduction of evidence in civil cases. For example, Rule 15-1 limits each party to one adversarial expert on the issue of damages in fast track vehicle actions.

[155] As the constitutionality of Rule 15-1 has not been tested, I am unable to place great reliance upon that reference, but accept that it is one example of a Rule that purports to restrict the introduction of evidence.

[156] The petitioners complain that the impugned Rule directly prevents proof of essential elements of a claim for damages, contrary to the right of a litigant to be heard. They refer to *Porto Seguro Companhia De Seguros Gerais v. Belcan S.A.*, [1997] 3 S.C.R. 1278 [*Porto Seguro*] where Madam Justice McLachlin, as she then was, wrote at para. 29:

> …the prohibition on expert evidence violates the principle of natural justice of the right to be heard, *audi alteram partem*. This principle confers the right on every party to litigation to bring forth evidence on all material points. Trial judges possess a discretion to limit evidence or exclude evidence where its relevance is outweighed by the prejudice it may cause to the trial process. But the principle that every litigant has a right to be heard goes against the exclusion of

> an entire category of evidence. To say that a litigant cannot call any expert evidence on matters that are at issue in the litigation is to deny the litigant's fundamental right to be heard.

[157] The Attorney General emphasizes that *Porto Seguro* involved an absolute prohibition on expert evidence, and that the petitioners acknowledged that the impugned Rule is not a complete bar to expert evidence. The Attorney General contends that there is no absolute bar to expert evidence because the impugned Rule only limits *adversarial* expert evidence. He asserts that so long as the expert is jointly appointed, appointed by consent, or appointed by the court, there can be an unlimited number of experts admitted at trial.

[158] I disagree. As I will explain below, I find that the impugned Rule does impede judicial discretion.

[159] The Attorney General's submission is not responsive to the petitioner's position. Their position is that the impugned Rule introduces an absolute and arbitrary prohibition on evidence that might well be necessary to enable a party to meet its onus of proof on matters at issue in the litigation.

[160] The intervenor contends that the impugned Rule reflects a pre-determination by the Lieutenant Governor in Council, to the exclusion of the trial judge, on what is sufficient by way of evidence on an issue at trial, because the trial judge may not permit a party to tender opinion evidence from more than three experts on the issue of damages arising from personal injury or death, except by consent of the parties.

[161] The intervenor argues that the practical effect of the impugned Rule is that the executive branch will deny to the Supreme Court the evidence it may need, and heretofore has relied upon, to decide complex and difficult cases.

[162] While the Attorney General may well be correct that there is no constitutional entitlement to a particular mode of trial, the petitioners' position is more nuanced. They do not argue for a trial by way of adversarial experts, regardless of efficiency or expense. Instead, they say that it should be left to the court to decide what and how evidence should be admitted as relevant and appropriate.

[163] There is support for their position in the authorities. In *GasTOPS Ltd. v. Forsyth*, 2012 ONCA 134, at para. 97, Mr. Justice Goudge commented that:

> 97 It is important to reiterate that the principle of proportionality is a vital prerequisite to an efficient and effective justice system. Counsel and especially the trial judge have a responsibility to manage the processes with this in mind.

[164] The impugned Rule does more than limit the court's discretion; it eliminates it, and that is the petitioners' complaint.

[165] The arbitrary limit of three expert witnesses to address damages, unless there is agreement to more by the parties or expert witnesses are chosen by the court could result in the very unfairness discussed by McLachlin J. in *Porto Seguro.*

[166] I find that the caution expressed by Mr. Justice Iacobucci and Madam Justice Arbour, for the majority, in *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, is also applicable in this case:

> … once legislation invokes the aid of the judiciary, we must remain vigilant to ensure that the integrity of its role is not compromised or diluted. Earlier in these reasons we endorsed a broad and purposive approach to the interpretation of s. 83.28. This interpretation is consistent not only with the presumption of constitutional validity, but also with the traditional role of the judiciary. The function of the judge in a judicial investigative hearing is not to act as "an agent of the state", but rather, to protect the integrity of the investigation and, in particular, the interests of the named person *vis-à-vis* the state.

[167] This principle is applicable to the petition before me because under the impugned Rule, the court would be asked to play an investigatory function by appointing expert witnesses, in contrast to its usual impartial, adjudicative role.

[168] As Mr. Justice Evans wrote in *Phillips v. Ford Motor Co. of Canada Ltd.*, [1971] 2 O.R. 637 at 661:

> Our mode of trial procedure is based upon the adversary system in which the contestants seek to establish through relevant supporting evidence, before an impartial trier of facts, those events or happenings which form the bases of their allegations. This procedure assumes that the litigants, assisted by their counsel, will fully and diligently present all the material facts which have evidentiary value in support of their respective positions and that these disputed facts will receive from a trial Judge a dispassionate and impartial consideration in order to arrive at the truth of the matters in controversy. A trial is not intended to be a scientific exploration with the presiding Judge assuming the role of a research director; it is a forum established for the purpose of providing justice for the litigants.

[169] I accept that rules that do not disable the court from interpreting or applying the law independently, weighing relevant evidence and awarding appropriate remedies, may not unacceptably compromise adjudicative independence. While it may be that certain rules impose a degree of constraint on the court's adjudicative function, *Imperial Tobacco* demonstrates the extent to which the legislature is permitted to shape the adjudicative framework.

[170] The Attorney General submits that the court retains residual discretion because it may appoint experts and that parties are not completely prevented from leading additional experts because they can be appointed by consent or jointly. Yet, these procedures existed before, and quite entirely apart from, Rule 11-8.

[171] The rules respecting court-appointed and jointly appointed experts were already in the *Rules* before the impugned Rule was enacted. So, the "residual discretion" relied upon by the Attorney General in his submissions is not created or preserved by the impugned Rule. In other words, Rule 11-8 does not *add* anything to the rules of civil procedure; its effect is only to *take away* judicial discretion.

[172] Instead, the impugned Rule places the court in a role that it should not be placed in. Transferring the responsibility of ensuring that there is relevant evidence upon which to decide the issues in a personal injury case from the parties to the court does, in my view, intrude upon what has,

to date, been the core function of the court: to decide a case fairly upon the evidence adduced by the parties.

[173] The Attorney General's submission that more reliance ought to be placed on court-appointed experts misconstrues the role and the ability of the court.

[174] The use of court-appointed expert witnesses is inconsistent with the traditional means of litigating legal disputes in Canada. In *R. v. Mian*, 2014 SCC 54, with reference to a criminal prosecution, Mr. Justice Rothstein wrote at para. 38:

> Our adversarial system of determining legal disputes is a procedural system "involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker" (*Black's Law Dictionary* (9th ed. 2009), *sub verbo* "adversary system"). An important component of this system is the principle of party presentation, under which courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present" (*Greenlaw v. United States*, 554 U.S. 237 (2008), at p. 243, *per* Ginsburg J.).

[175] Unless and until the evidence that the parties have chosen to lead has been adduced, the court has no way of determining what further evidence might be needed, and no way of obtaining that evidence if it is thought to be required.

[176] If it is thought that the court would engage in a planning exercise with counsel prior to trial in order to determine what evidence is needed, it would require judges to depart from their traditional non-adversarial role, and consider how a case might be best presented, contrary to the principle of party presentation.

[177] If the expectation is that the court would identify the needed evidence once counsel have led the evidence that they have chosen to place before the court, then it is practically unworkable. It would lead to adjournment of trials, scheduling difficulties affecting other cases and litigants, and could be unfair to a party that would have to deal with evidence thought necessary by the court with little or no notice.

[178] I am also not persuaded that joint experts are a satisfactory replacement for expert witnesses chosen and instructed by the parties. Like court-appointed experts, joint experts depart from the principle of party presentation.

[179] Court-appointed and joint appointed experts also raise issues around litigation privilege. In *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 at para. 63, Mr. Justice Gascon described litigation privilege as serving an overriding "public interest" to "ensure the efficacy of the adversarial process" by maintaining a "protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" thus promoting "access to justice" and the "quality of justice".

[180] Finally, the petitioners advanced a number of other bases upon which to find that the impugned Rule infringed s. 96, including that Rule 11-8 specifically prejudices plaintiffs and is uniquely for the

benefit of a single litigant. I found these arguments to be less persuasive.

[181] I do not accept that the impugned Rule has the potential to prejudice only plaintiffs. Where the burden of proof rests upon defendants the same principles should apply, and a defendant facing such a burden of proof is entitled to or constrained from the same ability to call evidence as a plaintiff where that party faces the burden of proof.

[182] While the impugned Rule in its present form addresses only motor vehicle claims, it does not necessarily benefit only ICBC. There are out of province automobile insurers who must litigate in British Columbia, and those who have insufficient insurance limits to satisfy the claims against them must defend themselves against damage claims.

[183] In addition, it is clear that the impugned Rule will apply to all injury claims when the further amendments come into force on February 1, 2020. In the result, the argument that the impugned Rule will benefit a single litigant is not persuasive.

[184] While I accept the submission of the Attorney General that the impugned Rule does not prevent the court from receiving expert evidence entirely, I find that instead of leaving it to the litigants to meet their burden of proof by adducing the necessary evidence, it places a duty on the court to ensure that it has sufficient expert evidence before it determines a proceeding on its merits.

[185] Considering the totality of the submissions and the evidence before me, I find that the impugned Rule compromises and dilutes the role of the court, and encroaches upon a core area of the court's jurisdiction to control its process.

***Does Rule 11-8 deny access to justice*?**

[186] Section 96 provides some degree of constitutional protection for access to justice: *Trial Lawyers* at para. 39. This is the case even though there is "no express right of general access to superior courts for civil disputes in the text of the Constitution": *Trial Lawyers* at para. 92.

[187] The petitioners argue the right of access to the superior court is denied when a legislative measure creates undue hardship for litigants in obtaining access to justice, citing *Trial Lawyers*. They submit the Rule 11-8 Orders create undue hardship in obtaining access to justice for plaintiffs by obliging plaintiffs, in absence of agreement with defendants, to undertake the additional financial and practical burdens of the court-appointed expert process and by adversely changing the rules applicable to proof of claims already commenced.

[188] The Attorney General argues that within the framework of s. 96, access to justice engages the issue of whether legislation prevents people from accessing the superior courts. In this context, the Attorney General says the concept of access to justice entails access to an independent trier of fact to have a dispute determined according to law, but it does not include access to the courts by way of a particular mode or process of adjudication: *Trial Lawyers*; *Trial Lawyers Association of British*

Columbia v. British Columbia (Attorney General), 2017 BCCA 324, leave to appeal ref'd [2017] S.C.C.A. No. 446.

[189] The Attorney General argues further that even if the impugned Rule did impede access to the courts, the right of access to the courts encompassed within s. 96 is not absolute; not every limit on access to the courts is automatically unconstitutional: *Christie* at para. 17; *Silbernagel v. Ritchie* (1996), 20 B.C.L.R. (3d) 62 (S.C.), aff'd [1997] B.C.J. No. 2015 (C.A.); *Hryniak v. Mauldin,* 2014 SCC 7.

[190] Having argued that the efficacy of a legislative measure is irrelevant, the Attorney General asserts that changes to trial procedure that provide a less expensive and more expeditious procedure in appropriate cases enhance, rather than impede, the quality of and access to justice which he contends are consistent with the recommendations that preceded the introduction of the *Rules* in 2010 and the practice in other common-law jurisdictions.

[191] Arguing, *in terrorum*, the Attorney General contends that a finding that the impugned Rule offends s. 96 would have the effect of undermining access to justice, as such a finding would constitutionalize an expensive and inefficient trial procedure and preclude legislatures from modifying civil procedure to respond to the reality of modern trial practice in an effort to better serve the goals of accessible dispute resolution.

[192] The Attorney General submits that limitations on the use of adversarial experts in favour of joint or court appointed experts are common in other jurisdictions, up to and including an outright prohibition on adversarial experts.

[193] While it is true that other jurisdictions have adopted approaches similar to the impugned Rule, none have eliminated judicial discretion to depart from a numerical limit. Where there is a limit on the number of expert witnesses that can be called in other Canadian jurisdictions, other than with leave of the court, all but Alberta, Saskatchewan and the federal Parliament have effected those limits by amendments to their respective Evidence Acts.

[194] While this alone is an insufficient basis upon which to declare the impugned Rule unconstitutional, it is a factor to be considered. The core jurisdiction of the court under s. 96 is intended to provide "uniformity in the judicial system throughout the country": *MacMillan Bloedel* at para. 15.

[195] I have concluded that it is unnecessary for me to make a finding on this point, as I have already found that the impugned Rule infringes s. 96 for the reasons stated above, namely, that it infringes on the court's core jurisdiction to control its process.

Conclusion on the Third Ground Advanced in the Petition

[196] I find that the impugned Rule infringes on the court's core jurisdiction to control its process, because it restricts a core function of the court to decide a case fairly upon the evidence adduced by

the parties. The effect of the impugned Rule is to require the court to play an investigatory function in place of its traditional non-adversarial role, contrary to the principle of party presentation.

Remedy

[197] The petition is allowed in part.

[198] I declare that the Rule 11-8 Orders are, in part, contrary to s. 96 of the *Constitution Act, 1867*, and thus unconstitutional and of no force or effect. In the result, sub Rules 11-8 (3), (4), and (5) are set aside. In the result sub Rules 11-8(10) and (11) must also be set aside.

[199] I will entertain written submissions with respect to the costs of these proceedings. If the petitioners or the Attorney General wish to make such submissions, the petitioners should do so within two weeks of the date of these reasons for judgment, and the Attorney General may reply to those submissions within two weeks of his receipt of those submissions. The petitioners will then have the right to reply to the submissions of the Attorney General one week after they receive those submissions.

[200] The intervenor agreed not to seek its costs, and will therefore not need to make submissions with respect thereto.

"The Honourable Chief Justice Hinkson"