Trial Lawyers of British Columbia v British Columbia: *Section 96 Comes to the Access to Civil Justice Debate*

J Gareth Morley*

You can bemoan or you can celebrate, but you cannot deny that the *Canadian Charter of Rights and Freedoms* fundamentally changed Canadian criminal procedure.¹ In contrast, until recently, civil proceduralists could confidently ignore constitutional law. All attempts to constitutionalize principles of civil justice had been rebuffed by the courts.² That appears to be how the framers of the *Charter* wanted it. The Legal Rights set out in sections 7 through 14 of the *Charter* speak of deprivation of “life, liberty and security of the person”, “arrest” and “detention”, being charged with an “offence” or of “punishment and treatment”. Those caught up in the criminal justice system are precisely the kind of unpopular minority the framers thought needed protection from populist majoritarianism. On the other hand, the *Charter* demonstrates no desire to interfere with the long tradition of provincial autonomy and experimentation with civil justice. As a result, the Court early on decided that even where the Legal Rights are unclear, they do not apply to civil litigation.

But the Supreme Court of Canada’s decision in *Trial Lawyers Association* means that those interested in civil procedure, and its possible reform, can no longer ignore the Constitution without risk.³ The Court held that a right of access to superior courts is protected by section 96 of the *Constitution Act, 1867*, as informed by the unwritten principle of the rule of law. British Columbia’s hearing-fee scheme — in place since

before Confederation — was held to be unconstitutional because its exemption for the “impoverished” was found not to be wide enough to protect that right for middle-class would-be litigants.⁴ This comment will argue that the impact could be significant, since all issues in civil and family procedure can be reconceived in terms of access to courts. Unfortunately, the constitutionalization of civil procedure is unlikely to improve the systemic problems that deny middle class Canadians the realistic option of a day in court.

Hearing Fees

Court fees payable by litigants to the government are set out in a schedule to B.C.’s Supreme Court Civil Rules and Supreme Court Family Rules. These include fees for filing pleadings and other court documents, using court rooms for examinations for discovery, and for obtaining and searching documents. British Columbia also charges for hearing time: currently, the first 3 days are free, the next 7 days cost \$500 each and after 10 days, each additional day costs \$800. The fees are set to recover the provincially-funded cost of court time, i.e., excluding the salary of the judge, which is paid by the federal government under section 100 of the *Constitution Act, 1867*.⁵ The party setting the matter down for hearing (usually the plaintiff) must commit to pay the fee. At the time the litigation that became the *Trial Lawyers Association* case began, a party could ask

to be exempted from all or part of the hearing fee (or any other court fee) on establishing the party was “indigent”. In 2010, as part of a general reform of the civil rules, the term “indigent” was modernized to “impoverished,” but it does not appear that any policy change was intended.

The hearing fees, and the “indigency exemption” were longstanding. English common law courts funded themselves through hearing fees since they were founded under Henry II. At least since the time of Henry VIII, indigent litigants could apply to be exempted from these fees. British Columbia inherited the system in the colonial era. The inflation of the 1960s and 70s reduced the real impact of the fees to an essentially nominal amount. In the late 1990s, though, the BC government decided to reduce its budget for court services by 10%, a cut that could be offset by new revenue generated within the court system. In 1998, court fees were revised to reflect a goal of cost recovery for the civil system (family law services provided in provincial courts were exempted). The “indigency” rule remained the same, other than the linguistic change in 2010 already referred to.

The policy rationale for hearing fees, as with other user fees, is twofold. First, it is to offset the cost of the program to the general budget. This provides a secure level of funding, while permitting the government to pursue other priorities. Second, a price provides a means of reconciling supply and demand, other than queuing and central allocation. In the case of civil litigation, which can be initiated by anyone, mismatches between supply of and demand for trial time result in delays. Theoretical arguments have been made by economists that hearing fees will help reduce delay,⁶ an argument accepted by economist experts called by both sides in this case, although there is little empirical evidence on point.

One argument against hearing fees (and court fees in general) is that they have a disproportionate impact on those with less income or wealth. The province has always said that this issue was addressed by the exemption for the indigent/impoverished, but critics argued that hearing fees are an obstacle to middle-class peo-

ple who cannot really be said to fit within those terms.⁷ Even if we agree with this objection, we might still want to charge hearing fees to well-funded corporate or institutional litigants. A more fundamental objection to hearing fees is that they improperly “commodify” the court process by putting a “price on justice.” In this view, court hearings, even in civil matters, should not be treated as a typical public service that may be subject to user fees, but as a foundational democratic commitment.

The Case Below

Once it got to the Supreme Court of Canada, the *Trial Lawyers Association* case was a battle between institutions. A number of Attorneys General faced off against the Trial Lawyers Association of British Columbia, the BC Canadian Bar Association and a few sympathetic intervenors. The issues were how best to address the crisis of access to justice for middle- and working-class Canadians and about the scope of constitutional judicial review to resolve issues deliberately left out of the *Charter*.

But it started as an ordinary family law dispute between a middle-class couple. The parties were parents of a young daughter (five years old at the time of trial in February-March 2009) whose relationship ended. The plaintiff, Montserrat Vilardell, claimed an interest in part of a home owned by the defendant, Bruce Dunham, as a result of their relationship, and sought to move with their daughter to Europe. Mr. Dunham held a tenure track position as a statistics professor at the University of British Columbia, and resisted the move. Ms. Vilardell was qualified to practice as a veterinarian in the European Union. In Vancouver, they shared joint custody of their daughter.

As is so common in these cases, neither party was represented by a lawyer. Ms. Vilardell spent \$23,000 in savings on legal fees. The trial took 10 days, much of which was taken up with evidence submitted by Mr. Dunham about their relationship that the trial judge considered unnecessary. At the outset of the trial, Ms. Vilardell asked to be relieved of the obligation to pay the hearing

fee. The trial judge adjourned that application until after he ruled on the merits. He found for Mr. Dunham, ruling that the daughter would stay in British Columbia and that Ms. Villardell had no interest in his house.⁸ He then invited the Attorney General, the British Columbia Canadian Bar Association and the Law Society of British Columbia to make submissions as to the constitutionality of hearing fees. The Trial Lawyers Association of BC was substituted for the Law Society by consent.

The Attorney General took the position that if Ms. Villardell could not afford to pay the fees without undue hardship, she was “indigent” and therefore entitled to an exemption. On the other hand, if she could afford to pay the fees, she was not being denied access to justice and no constitutional issue arose. The BC CBA and Trial Lawyers Association argued that charging for court time offended the unwritten constitutional principle of the “rule of law,”⁹ and also made arguments based on section 96 of the *Constitution Act, 1867* (which requires that superior, county and district court judges be federally appointed), as well as sections 7 and 15 of the *Charter*. They raised both the affordability and commodification arguments.

The Attorney General responded that the *Charter* does not protect ordinary civil litigation, and that section 96 was a structural guarantee of jurisdiction for federally-appointed courts, not a freestanding right of access. With respect to the unwritten principle of the rule-of-law, the Attorney General emphasized the decision in 2005’s *Imperial Tobacco*, which suggested that the legislature is free to enact laws within the framework of the written constitution.¹⁰

The trial judge ruled decisively for the BC CBA and Trial Lawyers Association, relying primarily on the commodification argument.¹¹ In his view, access to civil courts is a part of the common good for which the province could not charge. He dismissed concerns about court efficiency as “misplaced.” (para. 425). Provincial concern for efficiency amounted to designing the system to restrict access (para. 309). While the trial judge referred to section 96, he relied primarily on an argument from the underlying

principle of the “rule of law” (and, to a lesser extent, “democracy”). This was the basis of his distinction between hearing fees and filing fees, which he did not think *per se* violated the constitution.

The British Columbia Court of Appeal partially overturned the trial judge’s decision.¹² Without much comment, that Court rejected the commodification argument. On the other hand, they agreed that hearing fees were constitutionally suspect if they impede persons who cannot afford them from pursuing hearings of sufficient length to do justice to the issues (para. 26). The Court of Appeal therefore decided to read in the phrase “or in need” to the rule exempting “otherwise impoverished” persons. The Court of Appeal based its decision entirely on the unwritten principles of the constitution. The Court of Appeal exempted Ms. Villardell from paying the hearing fees under its judicially-amended rule.

The Case in the Supreme Court of Canada

The BC CBA and the Trial Lawyers Association sought, and obtained, leave to appeal to the Supreme Court of Canada in order to restore the trial judgment.

The Attorney General’s position was more difficult. From a policy perspective, the province had no objection to the Court of Appeal’s new rule. The province was concerned to charge hearing fees for those who could afford them. The province wanted to maintain the ability to use fees to fund and efficiently allocate court resources, and wanted to turn the discussion of “access to justice” away from a focus on traditional litigation in traditional courts. At the same time, the province did not want its fees to provide a barrier to those who genuinely could not pay them and was content to leave it to the discretion of the judiciary as to where to draw that line. But at the jurisprudential level, the Attorney General was concerned about expanding the use of the unwritten principles of the Constitution to invalidate legislation.

We therefore argued that “access to justice” is a common-law, but not constitutionally-

entrenched, right. As an individual right, it must be subject to limits, since it is simply not possible to provide everyone with unlimited court time. The rules of civil procedure are filled with restrictions on access to courts, with cost rules, in particular, seeking to incentivize less use. We argued that the “indigency rule”, as it had actually been applied, allowed people who could not afford the court fees to get into court, while a shift of hearing fees to filing fees would actually have the opposite effect. We also gave the Supreme Court of Canada a clear alternative path to end up with something like the Court of Appeal’s result. We said that if the word “impoverished” could not be extended to people like Monserrat Vilardell who could not afford hearing fees, then it was contrary to the common-law right of access to civil justice, which could only be extinguished by clear intention in primary legislation. Since the *Supreme Court Civil Rules* are secondary legislation (i.e., a regulation), then — on this assumption that “impoverished” could not be read widely enough — they would be *ultra vires* their enabling statute to the extent of the inconsistency. Either way, the Supreme Court of Canada should not constitutionalize access to a civil court, in light of the clear choice of the framers of the *Charter* not to do so.

We persuaded two justices (out of seven). Justice Cromwell essentially endorsed our alternative route to invalidity of the “impoverishment” rule. He did not agree with us that it could be read widely enough to include persons like Ms. Vilardell. But from there, he went on to invalidate it under the statute without commenting on the constitutional issues.¹³ Justice Rothstein began his dissent by saying “Courts do not have free range to micromanage the policy choices of governments acting within the sphere of their constitutional powers.”¹⁴ Unsurprisingly given that opening, he disputed that there was any constitutional basis for a right of access to civil courts, or that the Supreme Court of Canada was qualified to determine whether a means-tested hearing fee would promote or deny that access.

The Chief Justice, for the majority, on the other hand, held that section 96 of the *Constitution Act, 1867* included an individual right of

access to superior courts to resolve public- or private-law disputes that historically could be heard in those courts.¹⁵ She acknowledged that the past case law under section 96 concerned legislative transfers of jurisdiction that historically belonged to the superior, district or county courts to bodies other than section 96 courts. But the underlying principle was not just a structural limitation on the ability of the legislature or Parliament to enact provisions transferring jurisdiction, but an individual right to have disputes heard in court. The Chief Justice agreed that this right is not absolute, and that it does not foreclose charging hearing fees for those who can afford them.¹⁶

The problem with the language of “impoverished”, in the Chief Justice’s view, as in Justice Cromwell’s, is that it cannot be properly extended to a person who is not poor in an absolute sense, but is unable to pay the fee. The Chief Justice was also concerned that the requirement that a litigant “explain why they are indigent and beg the court to publicly acknowledge this status” could constitute an additional burden.¹⁷ Finally, the Chief Justice expressed skepticism that the existence of a fee could promote efficiency, since it is triggered based on length.¹⁸

As I read the Chief Justice’s decision, she did not rely on unwritten principles to overturn legislation, and her decision was therefore consistent with the Supreme Court’s reluctance to do this since *Imperial Tobacco*. At the same time, she spoke of how section 96 is “supported by considerations relating to the rule of law.”¹⁹ Access to justice issues are constitutionalized, at least with respect to superior courts, under the written constitution.

Impact of the Case

The immediate effects of the decision may not be that significant. Before the ruling in *Trial Lawyers Association*, a court could exempt a litigant from court fees payable to the government if the person was in receipt of income assistance or was “otherwise impoverished.” As a result of the decision, B.C.’s civil rules were amended so that an exemption could be granted if the person is

in receipt of income assistance or “cannot, without undue hardship, afford to pay the fees.”²⁰ It remains to be seen whether courts react to the new standard by exempting more litigants from court fees, or if a further challenge is brought.

Perhaps this holding will make very little difference outside the context of hearing fees. But it is possible to imagine it leading to a broad constitutionalization of civil procedure. Section 96 of the *Constitution Act, 1867* has been turned into an individual right of access to courts. This is important because it is possible to cast any issue in civil procedure in terms of access to court. Any measure restricting what claimants can allege, the evidence they can obtain or the arguments they can make, restricts access. On the other hand, as the Supreme Court of Canada has recognized, measures to make litigation more efficient in time and resources can also be viewed as necessary to promote access to justice.²¹ It is in the nature of a finite resource that access for one is denial of access to another. It is in the nature of the strategic and zero-sum nature of litigation that justice requires balancing between the interests of the parties.

As Justice Rothstein pointed out, section 96 is not subject to the general limitation clause of section 1 of the *Charter of Rights and Freedoms* or the override under section 33. It is not clear what the standards are for finding a violation of this right: the traditional tests under section 96 do not seem to apply very well.²² The Court did not engage in the historical analysis normally considered under section 96: if it had, the result might have been different, given the ubiquity of hearing fees and “indigency” as the standard for an exception at the time of Confederation. At the same time, the right to access civil courts is clearly not an absolute right, so governments will be given the opportunity to explain why some restrictions are reasonable.

The danger, therefore, is not that courts will strike down every restriction on any individual’s right to a “day in court.” The danger, from a government lawyer’s perspective, is that the constitutionalization of civil procedure will make useful experimentation and reform more difficult by raising the legal risks, and diverting resources

into litigation. The framers of the *Charter* considered this a price worth paying in the criminal context to provide a line of defence for an unusually stigmatized and unpopular minority: the criminally accused. They thought that civil procedure could be left to the common law and the political process. The Supreme Court has decided otherwise, and we can all hope that the result will be better access to just resolution of disputes for all.

Endnotes

- * J. Gareth Morley, B.A., LL.B. was co-counsel for the Attorney General of British Columbia at the Supreme Court of Canada in the decision commented on. All views expressed in this comment are solely those of the author and do not represent the views of the Attorney General of British Columbia.
- 1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*(UK), 1982, c 11. Transformational cases include *Hunter v Southam*, [1984] 2 SCR 145 (warrantless searches *prima facie* unreasonable under section 8); *R v Askov*, [1990] 2 SCR 119 (effect of unreasonable delay under section 11(d)); *R v Stinchcombe*, [1991] 3 SCR 326 (requirement of disclosure under section 7).
- 2 *British Columbia v Imperial Tobacco Ltd*, 2005 SCC 49, [2005] 2 SCR 473 [*Imperial Tobacco*] (no constitutional right to fair civil trial and no constitutional prohibition on shifting onus of proof or restricting evidence); *British Columbia (Attorney General) v Christie*, 2007 SCC 21, [2007] 1 SCR 873 [*Christie*] (no general right to counsel before civil courts and tribunals or to legal services).
- 3 *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31 [*Trial Lawyers Association*].
- 4 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
- 5 *Ibid.*
- 6 Richard A Posner, *Economic Analysis of Law*, 7th ed (Austin: Aspen Publishers, 2007) at 624-28 (arguing delay in US federal courts was result of reduction in court fees in inflation-adjusted terms).
- 7 The BC case law, before this case, assumed that a person who could not afford hearing fees without

- undue hardship fit the test of indigency, even if the person was not “poor” in an absolute sense. See *Trautmann v Baker*, [1997] BCJ No 452 (CA); *Ancheta v Ready*, 2003 BCCA 374 at para 7, 184 BCAC 235.
- 8 *Vilardell v Dunham*, 2009 BCSC 434, [2009] BCJ No 633.
 - 9 The four underlying unwritten constitutional principles of federalism, democracy, rule of law/constitutionalism and protection of minorities are recognized in *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 32.
 - 10 *Imperial Tobacco*, *supra* note 2 at para 66 (“[I]n a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box.”). A similar, but subtly different statement was made by the Chief Justice in *Babcock v Canada (Attorney General)*, 2002 SCC 57 at para 55, [2002] 3 SCR 3 (“The unwritten principles must be balanced against the principle of Parliamentary sovereignty.”)
 - 11 *Vilardell v Dunham*, 2012 BCSC 748, 260 CRR (2d) 1.
 - 12 *Vilardell v Dunham*, 2013 BCCA 65, 359 DLR (4th) 524.
 - 13 *Trial Lawyers Association*, *supra* note 3 at paras 70-79, Cromwell J. (concurring).
 - 14 *Ibid* at para 80, Rothstein J. (dissenting).
 - 15 *Ibid* at para 35.
 - 16 *Ibid* at para 22.
 - 17 *Ibid* at paras 60, 114. Rothstein J. suggests that this passage is inconsistent with the majority’s recognition that means-tested hearing fees are generally permissible.
 - 18 *Ibid* at paras 62-63, 116. Again, Rothstein J. critiques this argument as a misunderstanding of how prices promote allocative efficiency.
 - 19 *Ibid* at paras 38-41.
 - 20 BC Reg 103/2015, s 2.
 - 21 *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87.
 - 22 *Re Residential Tenancies Act*, 1979, [1981] 1 SCR 714.