TLABC and CBABC v. AGBC – Case Comment

(Finally) A Constitutional Home for Access to Justice

An unrepresented mother requests to be relieved of the payment of hearing fees so she can pursue the custody of her child. A trial judge, Mr. Justice Mark McEwan, concerned about the constitutionality of these fees issues a request for assistance. Legal organizations, lawyers and experts serving *pro bono,* step up to the challenge, to ensure the issues are fully canvassed. These somewhat unordinary series of events lead to an extraordinary conclusion: the Supreme Court of Canada declares the fees unconstitutional and carves out a new home for access to justice in the Canadian Constitution: *Trial Lawyers Association of British Columbia and Canadian Bar Association –British Columbia Branch v. Attorney General British Columbia* 2014 SCC 59.

The fortuity or serendipity of this constitutional moment belies the decade long struggle to gain renewed recognition of access to justice as a functional operational principle of our justice system, see for example, *Christie v. BC[[1]](#endnote-1)* and *Canadian Bar Association v. BC[[2]](#endnote-2)* among others.[[3]](#endnote-3) Finally, a victory attained and, more importantly, a strong constitutional foundation for access to justice in Canada.

*Facts and History*

This case began as a family action.[[4]](#endnote-4) A mother and a father went to court to resolve issues concerning child custody and division of assets. In order to get a trial date, the mother had to undertake in advance to pay hearing fees. At the outset of the trial, she asked the judge to relieve her from paying the fees. The judge deferred the consideration of this request until the end of the trial, when he would have the benefit of the evidence of the parties’ means, circumstances, entitlement to property and the outcome of the trial.

Hearing fees are required by the regulations enacted as the *Supreme Court Rules,* subordinate legislation under the *Court Rules Act*.[[5]](#endnote-5) The fees escalate over the course of a trial. At the time of the hearing before the Supreme Court of Canada, the fees escalated from no fee for the first three days of trial, to five hundred dollars for days four to ten, to eight hundred dollars for each day over ten. As noted by the SCC, BC hearing days command “the highest price tag in the country.”[[6]](#endnote-6) The party that sets a case down for trial (usually the plaintiff) is required to undertake to pay the hearing fee — regardless of whether the trial length is based on that party’s estimate or the estimate of the other party or the court.

Under the former regulation, judges had the discretion to exempt a party from paying hearing fees if they could prove “indigence”. In 2010 (after this case), the language of the exemption provision was amended such that the exemption was available to persons who receive employment insurance, social assistance or is otherwise impoverished.[[7]](#endnote-7)

Neither parent was represented at trial and the hearing took 10 days. At the conclusion of the trial, McEwan J. returned to the mother’s request to be exempted from the hearing fees. The hearing fee amounted to some $3,600.00, which was almost the net monthly income of the family.[[8]](#endnote-8) The mother was not indigent (or impoverished) in the ordinary sense of the words given that she is a qualified veterinarian in Europe and had some assets. Nevertheless, the trial judge found that she could not afford the hearing fees.

Aware of some authority for the proposition that hearing fees are unconstitutional,[[9]](#endnote-9) the trial judge held that the Attorney General should be given an opportunity to intervene. He also invited submissions from the Law Society of British Columbia and the B.C. branch of the Canadian Bar Association. The CBABC and the TLABC intervened and challenged the hearing fee scheme as unconstitutional. CBABC counsel contacted Access to Justice Pro Bono to ensure that the mother had independent counsel.[[10]](#endnote-10) Counsel for the two associations also sought the assistance of Professor Susan Boyd and Robert Carson who volunteered their services as experts providing evidence on the unequal, gendered impact of relationship breakdown and the widespread and unequal ability to pay hearing fees about BC residents.

TLABC and CBABC argued that people who possess some means but are not able to pay the hearing fee have the right to have a court adjudicate their legal disputes, and that the hearing fee regime in British Columbia essentially denies them that right. It was argued that the denial of this right infringed written and unwritten provisions of the Constitution: the foundational principles of the rule of law, judicial independence, and substantive equality, s. 96 of the *Constitution Act, 1867*, and s. 7 of the *Charter*. Hearing fees were also argued to amount to the sale of justice. Emphasis was placed on the unequal impact of the hearing fees as established through the expert evidence.

The trial judge employed a thorough and integrated constitutional analysis focusing on the core function of the superior courts. He ruled that hearing fees are unconstitutional. The Court of Appeal agreed that the scheme could not stand as it is, but held that if the exemption provision were expanded by reading in the words “or in need”, it would pass constitutional muster.[[11]](#endnote-11) The mother was granted the exemption and her private interest in the matter was extinguished. The TLABC sought leave to appeal which was granted. The TLABC and CBABC were granted the rights of party appellants.

*Majority Decision*

The SCC’s analysis upholds McEwan J.’s judgment. Writing for the majority[[12]](#endnote-12), Chief Justice McLachlin concluded that court hearing fees that deny some people access to the courts are constitutional. Pursuant to the *Constitution Act, 1867*, the province can establish hearing fees under its power to administer justice under s.92(14) but this power must be “exercised harmoniously with the core jurisdiction of provincial superior courts” protected by s. 96.[[13]](#endnote-13) The fees impermissibly infringe on s.96 by, in effect, denying some people access to the courts.[[14]](#endnote-14)

Provinces have the power to impose hearing fees but this power is not unlimited: “particular grants of power must be read together with other grants of power so that the Constitution operates as an internally consistent harmonious whole.”[[15]](#endnote-15) Section 92(14) does not operate in isolation, exercise of this power must be consistent with other constitutional provisions, in this case s. 96 and with the requirements that flow by necessary implication from those terms.[[16]](#endnote-16)

The majority reviewed the jurisprudence on core jurisdiction[[17]](#endnote-17) and concluded that hearing fees barred access to the courts in a manner inconsistent with the inherent jurisdiction of s.96:

The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the Constitution Act, 1867. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.**[[18]](#endnote-18)**

The province’s powers under s. 92(14) must be exercised in a manner that is consistent with the right of individuals to bring their cases to the superior courts and have them resolved there. The majority further supported its conclusion by considering the rule of law. The Court reaffirmed that access to the courts is essential to the rule of law referring back to Dickson C.J.’s oft-quoted holding that: “[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice”.[[19]](#endnote-19) The Court found further support for this conclusion in its decision in *Hryniak,*[[20]](#endnote-20) and more surprisingly, in the BC Court of Appeal’s reasoning in *Christie.[[21]](#endnote-21)*

Some had foreseen that the SCC’s decision in *Christie* was a barrier to success in this case – this was clearly a concern of the BC Court of Appeal and in large measure explains its decision to read in a broader exemption rather than find hearing fees unconstitutional. The majority distinguished *Christie*:

This Court’s decision in Christie does not undermine the proposition that access to the courts is fundamental to our constitutional arrangements. The Court in Christie — a case concerning a 7 percent surcharge on legal services — proceeded on the premise of a fundamental right to access the courts, but held that not “every limit on access to the courts is automatically unconstitutional” (para. 17).  In the present case, the hearing fee requirement has the potential to bar litigants with legitimate claims from the courts.  The tax at issue in Christie, on the evidence and arguments adduced, was not shown to have a similar impact.[[22]](#endnote-22)

The Court concludes that hearing fees will run afoul of the Constitution when they deprive the “basic right of citizens to bring their case to court”, that is “when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court.”[[23]](#endnote-23)

*Remedy*

The majority overturned the Court of Appeal’s remedy of reading in a larger exemption. In doing so it reaffirmed the principle that the power to read in should be used sparingly.

The Court was very much attuned to the practical difficulties of devising an effective exemption scheme, in particular the efficacy and workability of the broader exemption of persons “in need”. The majority found that the mother was not impoverished but like a large proportion of BC residents could not afford hearing fees for a 10 day trial. Courts cannot be asked to twist the meaning of indigence or impoverishment out of shape. Further more, the scheme affronted the dignity of litigants who have to come to court to explain how they are indigent and beg to have this status recognized in order to access their right to a court hearing, [[24]](#endnote-24) creating a further barrier to the court. The majority also agreed with the trial judge that there was a “dubious” connection between the hearing fees and the policy goal of weeding out unmeritorious cases and encouraging shorter trials.[[25]](#endnote-25) Judges have the tools necessary to accomplish these important goals.

The reasons provide advice as to what type of hearing fees would be constitutional if the province elects to rehabilitate them. A failure to exempt impoverished people “clearly oversteps the constitutional minimum”, but fees that require litigants who are not impoverished to “sacrifice reasonable expense in order to bring a claim” will also be unconstitutional because they effectively prevent access to the courts.[[26]](#endnote-26) The majority cautions: “Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims.”[[27]](#endnote-27)

It is up to the provincial legislature to devise a constitutionally compliant scheme, if it chooses to do so.[[28]](#endnote-28)

*Implications*

The Supreme Court of Canada affirmed McEwan’s J. constitutional analysis finding that for s.96 to be meaningful, it must interpreted consistently with the rule of law and access to justice.  One of the broader implications of *TLABC and CBABC v. BC* is the clear affirmation that written and unwritten constitutional provisions must be made to work harmoniously including respecting the assumptions that underlie the text. This integrated analysis gives access to justice a principled constitutional home.  For this reason, the case is very important for future access to justice issues beyond hearing fees.  Our work is cut out for us.

1. *Christie v. British Columbia (Attorney General),* [2005] B.C.J. No. 217, 250 D.L.R. (4th) 728 (B.C.S.C.), per Koeningsberg J.; affirmed *Christie v. British Columbia (Attorney General),* [2005] B.C.J. No. 2745, 262 D.L.R. (4th) 151 (B.C.C.A); reversed *British Columbia (Attorney General) v. Christie,* [2007] 1 S.C.R. 873 (S.C.C.). [↑](#endnote-ref-1)
2. *Canadian Bar Assn. v. British Columbia*, [2006] B.C.J. No. 2015, [2007] 1 W.W.R. 331, 2006 BCSC 1342 (B.C.S.C.); affirmed in part *Canadian Bar Assn. v. British Columbia,* [2008] B.C.J. No. 350, 290 D.L.R. (4th) 617, 2008 BCCA 92 (B.C.C.A.); leave to S.C.C. denied [2008] S.C.C.A. No. 185. [↑](#endnote-ref-2)
3. Other organizations have also been engaged in this work notably BCPIAC and Westcoast LEAF. See discussion in Melina Buckley, “Searching for the Constitutional Core of Access to Justice” (2008), 42 S.C.L.R. (2d.) 567. [↑](#endnote-ref-3)
4. *Vilardell v. Dunham,* 2009 BCSC 434. [↑](#endnote-ref-4)
5. At the time this case began these were set out in B.C. Reg. 221/90, as amended by B.C. Reg. 10/96 and B.C. Reg. 75/98. In 2010, the *Supreme Court Rules* were replaced by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. [↑](#endnote-ref-5)
6. At para. 63. [↑](#endnote-ref-6)
7. Rule 20-5(1) of the *Supreme Court Civil Rules.* [↑](#endnote-ref-7)
8. *Vilardell v. Dunham,* 2012 BCSC 748, at para. 396. [↑](#endnote-ref-8)
9. *Pleau v. Nova Scotia (Prothonotary* (1998), 186 N.S.R. (2d) 1 (S.C.). [↑](#endnote-ref-9)
10. Jamie MacLaren represented Ms. Vilardell before Mr. Justice McEwan . Robert Parsons served as co-counsel before the Court of Appeal. [↑](#endnote-ref-10)
11. *Vilardell v. Dunham,* 2013 BCCA 65. [↑](#endnote-ref-11)
12. McLachlin C.J. (LeBel, Abella, Moldaver and Karakatsanis JJ. concurring);

Cromwell J. concurred in the result but based his decision on administrative law grounds and the common law right of reasonable access to justice. Rothstein J. dissented. [↑](#endnote-ref-12)
13. At para. 17. [↑](#endnote-ref-13)
14. At para. 2. [↑](#endnote-ref-14)
15. At para. 25. [↑](#endnote-ref-15)
16. At paras. 26 and 37. [↑](#endnote-ref-16)
17. At paras. 88-90. [↑](#endnote-ref-17)
18. At para. 32. [↑](#endnote-ref-18)
19. *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 230. [↑](#endnote-ref-19)
20. *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, per Karakatsanis J., “without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined” (para. 26). [↑](#endnote-ref-20)
21. The majority referred to the BCCA majority reasons in *Christie* [2005 BCCA 631 per Newbury JA] with approval at para. 40. [↑](#endnote-ref-21)
22. At para. 41. [↑](#endnote-ref-22)
23. At para. 45. [↑](#endnote-ref-23)
24. At para. 60. [↑](#endnote-ref-24)
25. At paras. 61-63. [↑](#endnote-ref-25)
26. At para. 46. [↑](#endnote-ref-26)
27. At para. 48 [↑](#endnote-ref-27)
28. At para. 48. [↑](#endnote-ref-28)