Supreme Court invalidates B.C. hearing fees: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*

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On October 2nd 2014, the Supreme Court of Canada released its decision in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)* 2014 SCC 59. This case considers the constitutionality of British Columbia's implementation of a hearing fee scheme pursuant to the Provinces' administration of justice power found in s. 92(14) of *Constitution Act, 1867*. The hearing fees as prescribed by the province of British Columbia require plaintiffs at the outset of the action to pay a fee based on the anticipated length of the trial; a lengthier trial incurs a higher fee. However, the hearing fees found in British Columbia's 2010 *Supreme Court Civil Rules* also allow for an exemption for a person who is "impoverished".

The facts giving rise to this action were as follows: Mrs. Vilardell and Mr. Dunham began a relationship in England and moved to British Columbia with their daughter. The relationship terminated and the question of custody arose. Mrs. Vilardell went to court to have this issue resolved. In order to secure a trial date she had to undertake in advance to pay a court hearing fee as per the *Supreme Court Civil Rules*. Mrs. Vilardell asked the trial judge to relieve her from paying the fee. The trial judge reserved his decision on this request until the end of the trial. The parties were un-represented and the hearing took ten days, which led to a hearing fee of $3,600, almost the net monthly income of the family. Mrs. Vilardell was not an "impoverished" person as described in the exemption. However, once legal fees had depleted her savings, she could not afford the hearing fee. The judge decided that the constitutionality of the hearing fee scheme was impugned and gave the Attorney General the opportunity to intervene on Mrs. Vilardell's application. The trial judge ruled that the hearing fee was unconstitutional, the Court of Appeal held that the scheme could not stand as is and suggested reading in the words "or in need" in the exemption provision to avoid the constitutional invalidity of the fees.

The majority of the Supreme Court held that the hearing fees were unconstitutional, because they infringed the very "core" of the jurisdiction of the superior courts as per s. 96 of the *Constitution Act*. In reaching this conclusion, the Court acknowledged that levying hearing fees was a permissible exercise of the Province's jurisdiction as per s. 92(14). It then established that this power is consistent with s. 96 of the *Constitution Act* and the requirements that flow by necessary implication. Thirdly, the Court also contrasted the effect of the hearing fees against the unwritten principle of the rule of law. The principles stemming from this analysis led the Court to establish the unconstitutionality of the hearing fees.

In it's analysis the majority relied on s. 96 of the *Constitution Act*, the provision that guarantees the core jurisdiction of provincial superior courts throughout the country. It broadly interpreted s. 96 of the *Constitution Act* by qualifying the hearings fees as a measure that would prevent litigants from having their issues of law dealt with by the superior courts. Thus, the Court decided that such a measure was at odds with the superior courts' basic judicial function. If litigants were prevented from having their matters heard in court then the function of the superior courts would be severely undermined. Measures that warrant the latter are at odds with other grants of power found in the Constitution, specifically s. 96:

[32] 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.

Moreover, the majority bolstered their analysis by coupling the rule of law to s.96:

[38] While this suffices to resolve the fundamental issue of principle in this appeal, the connection between s. 96 and access to justice is further supported by considerations relating to the rule of law. This Court affirmed that access to the courts is essential to the rule of law in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214. As Dickson C.J. put it, "[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" (p. 230).

The above factors led the Court to find the hearing fees unconstitutional since they cause undue hardship on litigants who seek adjudication of their cases before the superior courts. While an exemption to the truly impoverished exists, the Court stated that this may set the access to justice bar too high. Therefore, the Court declared the hearing fee scheme unconstitutional and left the legislature to resolve the issue.

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In dissent, Rothstein J. did not find this issue to be one of constitutionality nor did he resort to the principle of rule of law. He opined that there is no express constitutional right to access to justice and disagreed with the majority which based its finding on a broad interpretation of s. 96 and the rule of law. For Rothstein J., the courts must respect the role and policy choices of democratically elected legislators. He stated that there is no clear violation of a constitutional principle and therefore the judiciary should defer to the policy choices of the government and legislature.

Moreover, Rothstein J. added that the conditions imposed by the hearing fee scheme did not infringe the core jurisdiction of the courts. In support of this, he referenced a three part test established by the Court in *Re Residential Tenancies Act, 1979*, [1981] which identifies legislation that removes an aspect of the core jurisdiction of superior courts. He asserted that the Court in this case did not use the test and expanded the definition of core jurisdiction beyond what is contemplated in s.96: “The hearing fees are a financing mechanism and do not go to the very existence of the court as a judicial body to limit the type of powers it may exercise” (para 90).

As for the rule of law, Rothstein J. did not believe that this case warranted the use of this unwritten principle:

[93] But the majority uses the rule of law to support reading a general constitutional right to access the superior courts into s. 96. This provision of the *Constitution Act, 1867* requires that the existence and core jurisdiction of superior courts be preserved, but this does not, for the reasons herein, necessarily imply the general right of access to superior courts described by the majority. So long as the courts maintain their character as judicial bodies and exercise the core functions of courts, the demands of the Constitution are satisfied. In using an unwritten principle to support expanding the ambit of s. 96 to such an extent, the majority subverts the structure of the Constitution and jeopardizes the primacy of the written text. he further adds para 98 conclude then facts.

He concluded by stating that the rule of law should not be used to invalidate the hearing fee scheme. Instead, Rothstein J. chose to rely on the unwritten principle of democracy which favours upholding legislation passed by democratically elected representatives which conforms to the express terms of the Constitution. For Rothstein J., this question is one of politics and not one of constitutionality and declared that the hearing fees are not unconstitutional.