

***Trial Lawyers Association of British Columbia* and the Supreme Court's use of the Constitution to Protect Public Access to the Courts**

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I. INTRODUCTION

In finding certain court fees to be unconstitutional, McEwan J., writing for the B.C. Supreme Court at first instance, concluded his reasons by holding that “Some things cannot be for sale”.¹ He held that the courts are “a common good”, and that “[i]t undermines the fundamental values of democracy, federalism and the rule of law informing the Constitution, elaborated in the case law, and evident in our history, to put a ‘price on justice’ ...”.²

In *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, the Supreme Court of Canada ultimately considered the constitutionality of British Columbia’s hearing fees regime.³ Neither the Supreme Court nor the B.C. Court of Appeal⁴ went as far as McEwan J. to hold that hearing fees are *necessarily* unconstitutional, for putting a

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¹ *Vilardell v. Dunham*, [2012] B.C.J. No. 1016, 260 C.R.R. (2d) 1, at para. 431 (B.C.S.C.) [hereinafter “*Vilardell BCSC*”]. Credit is due to Léonid Sirota, whose blog posts on this case and its related appeals highlight this theme: see “One’s Day in Court: Not for Sale”, *CanLII Connects*, September 6, 2014, online: <<http://canliiconnects.org/en/commentaries/29656>>; “For Sale! (Or to Give Away)”, *CanLII Connects*, September 24, 2015, online: <<http://canliiconnects.org/en/commentaries/29882>>; and “For Sale, at the Right Price”, *CanLII Connects*, November 20, 2014, online: <<http://canliiconnects.org/en/summaries/31399>>.

² *Vilardell BCSC*, *id.*, at para. 429.

³ [2014] S.C.J. No. 59, [2014] 3 S.C.R. 31, 2014 SCC 59 [hereinafter “*Trial Lawyers*”].

⁴ *Vilardell v. Dunham*, [2013] B.C.J. No. 243, 43 B.C.L.R. (5th) 217 (B.C.C.A.) [hereinafter “*Vilardell BCCA*”].

price on access to civil justice. Rather, writing for the majority, McLachlin C.J.C. summarized the court's holding as follows:

Although the province can establish hearing fees under its power to administer justice under s. 92(14) of the *Constitution Act, 1867*, the exercise of that power must also comply with s. 96 of the *Constitution Act, 1867*, which constitutionally protects the core jurisdiction of the superior courts. For the reasons discussed below, the fees impermissibly infringe on that jurisdiction by, in effect, denying some people access to the courts.⁵

On first reading, the majority's reasons may appear to some to provide a constitutional right to "access to justice". The decision is certainly an example of the Court intervening to protect the public interest in access to justice where legislation does not adequately do so. However, the Chief Justice attempted to frame the issue more narrowly. The majority's reasons speak not to the constitutionality of the "price on justice" of which McEwan J. spoke, but answer the question of whether a price for "access to the courts" is constitutional with respect to those who cannot afford it:

A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts.⁶

The distinction between access to the courts and a general right to access to justice is important. It allows the majority's holding to be grounded in section 96 (on its face, a simple judicial appointments provision,⁷ which has grown to constitutionally protect judicial independence and guard the superior courts against incursion by administrative tribunals), and maintains a hard line between positive and negative rights. *Trial Lawyers* can serve as precedent to prevent governments from imposing barriers to access to the courts, but should not obligate governments to remove existing barriers on access to justice of third parties' creation (most notably, the cost of legal representation).

Seen through this lens, the Court's decision in *Trial Lawyers* is not as radical as it may appear on first blush. Justice may, in fact, have a price.

⁵ *Trial Lawyers*, *supra*, note 3, at para. 2, *per* McLachlin C.J.C.

⁶ *Id.*, at para. 46.

⁷ *The Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 96: "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

Access to the courts may come at a price, too — court fees are permissible, so long as litigants can access the courts without undue hardship.

Although an incremental step, *Trial Lawyers* may still have wide-ranging implications. On the facts, the majority's decision seems fair and appears to arrive at the right result. Its reasons, however, use a novel extension of section 96 to ground an individual right, and consider the rule of law in a manner that creates uncertainty with respect to when and how unwritten constitutional principles will be applied. This analysis may have unintended consequences: we should expect to see arguments based in this reasoning to attack other perceived barriers to access to civil justice, such as rules respecting costs, filing fees, transcript fees, and perhaps even time limits for claims, appeals and judicial review. The limited jurisprudence since the decision has not yet permitted undue expansion, but only time will tell how future courts and litigants will interpret and build upon the majority's reasons.

This essay seeks to examine the Supreme Court's analysis in *Trial Lawyers* and consider the possible implications for Canadian law moving forward.

Part II will begin by setting out the background for the Court's decision, including the facts and judicial history of the case before it. Part III will summarize the three opinions of the Supreme Court: the majority's reasons, authored by McLachlin C.J.C.; concurring reasons by Cromwell J.; and a vigorous dissent by Rothstein J. Part IV offers commentary on the Court's reasons: first, by discussing the various frameworks the Court relied upon to address the issue before it — from section 96 and the unwritten constitutional principle of the "rule of law", to administrative and common law principles, to the dissenting focus on the primacy of the constitutional text — then, by considering the possible implications of *Trial Lawyers*, both for potential arguments about other barriers to access to civil justice, and for the doctrines of division and separation of powers.

II. BACKGROUND

1. Facts

Trial Lawyers originated as a family law dispute. Upon the dissolution of their relationship, former partners Ms. Vilardell and Mr. Dunham sought to resolve their disagreements about child custody and division of property in court. Under British Columbia's *Supreme*

Court Rules,⁸ Ms. Vilardell was required to undertake to pay a hearing fee in order to get a trial date. At the outset of trial, she asked the trial judge to relieve her from this obligation.⁹ The trial judge reserved his decision on this request until the end of trial, so he could first hear evidence on the parties' means and circumstances. At the end of trial, he invited submissions on the constitutionality of the hearing fees provision, including from the Attorney General and other interveners, and stayed the obligation to pay the fee pending further order.¹⁰

2. Statutory Regime

At the time of trial, the statutory scheme called for a fee for the hearing of any trial, unless the hearing was for judgment only. Fees started at \$156 for a half day or less, and fees per day increased as a trial lengthened.¹¹ Ms. Vilardell's trial took 10 days, resulting in a hearing fee of about \$3,600.¹²

The scheme was later modified to require no fee for the first three days of trial, \$500 for each of days four to 10, and \$800 per day thereafter.¹³ The appellants challenged the constitutionality of both the scheme in place at the time of trial and its subsequent amended iteration.¹⁴

The Rules required the party who set a case down for trial (usually the plaintiff) 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.¹⁵

Although the Rules allowed for an exemption from hearing fees if the plaintiff is "indigent" or "otherwise impoverished", Ms. Vilardell was found to be neither. Notably, however, the fee amounted to nearly the net monthly income of the family, and she had already depleted her savings by paying \$23,000 in legal fees (before ultimately representing herself at trial).¹⁶

⁸ *Supreme Court Rules*, B.C. Reg. 221/90, as amended by B.C. Reg. 10/96 and B.C. Reg. 75/98, enacted pursuant to the *Court Rules Act*, R.S.B.C. 1996, c. 80. These Rules were in place at the time the case began, but were replaced in 2010 by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. As the constitutionality of both regimes was challenged and the Court considered them together, for ease of reference this essay will refer to both interchangeably as the "Rules".

⁹ *Trial Lawyers*, *supra*, note 3, at paras. 3-4.

¹⁰ *Id.*, at paras. 4 and 6.

¹¹ *Vilardell BCCA*, *supra*, note 4, at para. 8 and Appendix A.

¹² *Trial Lawyers*, *supra*, note 3, at para. 5.

¹³ *Id.*, at para. 10.

¹⁴ *Id.*, at paras. 9-10.

¹⁵ *Id.*, at para. 12.

¹⁶ *Id.*, at paras. 5, 55 and 57.

3. Decisions Below

(a) *British Columbia Supreme Court*

In a lengthy decision, the trial judge concluded the hearing fee provision was unconstitutional. Before McEwan J., the Trial Lawyers Association of British Columbia and the B.C. branch of the Canadian Bar Association submitted that hearing fees violated section 96 of the *Constitution Act, 1867*; section 7 of the *Canadian Charter of Rights and Freedoms*;¹⁷ and the unwritten constitutional principle of the rule of law. The Attorney General of B.C. responded that hearing fees were not inconsistent with any constitutionally guaranteed right of access, with section 96 of the *Constitution Act, 1867*, or with section 7 of the Charter.

Justice McEwan's decision was premised on section 96 principles, namely judicial independence and access to superior courts. He held:

Hearing fees are a barrier to access imposed by one branch of government over another. ... [which] creates a constitutionally untenable appearance of hierarchy. The court cannot fulfill its democratic function as an independent and impartial arbiter ... if the government limits those who may come before the court by means of financial or procedural deterrents.¹⁸

....

Access to the s. 96 courts is a fundamental premise of the constitutional arrangement of Canada which cannot be materially hindered by ... Parliament or the legislatures ...¹⁹

Ultimately, McEwan J. concluded that courts are constitutionally a "common good", and cannot be re-imagined as a service with a price.²⁰ Accordingly, he held that the hearing fees provided in the Rules were unconstitutional.²¹

(b) *British Columbia Court of Appeal*

The Court of Appeal agreed with the trial judge that the hearing fee regime could not remain as it was, but did not agree the scheme was

¹⁷ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

¹⁸ *Vilardell BCSC*, *supra*, note 1, at para. 425.

¹⁹ *Id.*, at para. 425.

²⁰ *Id.*, at para. 429.

²¹ *Id.*, at para. 431.

unconstitutional as a whole. It held that it was the fees' *impeding effect* on those who could not afford them — not the fees themselves — that was unconstitutional.²²

Interestingly, the Court of Appeal did not explicitly consider section 96 in achieving this result.²³ Rather, it premised its decision on the right to access to justice as an aspect of the rule of law, as articulated by Dickson C.J.C. in *British Columbia Government Employees' Union v. British Columbia (Attorney General)*,²⁴ then limited by the Court in *British Columbia (Attorney General) v. Christie*.²⁵ The Court of Appeal noted that the Supreme Court had held in *Christie* that the right to access the courts is not absolute — government may impose some conditions and limits on how and when people have a right to access the courts. Thus, the key issue was whether the impugned hearing fees qualify as "constitutionally valid government-imposed conditions and limits".²⁶

To conduct this analysis, the Court of Appeal considered the question in historical context, asking whether the fees achieve the "time-honoured compromise struck in the *Statute of Henry VII*".²⁷ This English statute (which dates back to 1494, and was inherited by British Columbia upon becoming a colony in 1858) has historically provided for a balance between hearing fees and accompanying exemptions for those who cannot pay them.²⁸

The Court of Appeal considered the evidence and held that the indigency exception was insufficient. However, it held that it had the power to interpret the provision more broadly, and read in the words "or in need" so to allow an exception from the fees for those who are "impoverished or in need". The Court of Appeal held that this exception should "cover those who could not meet their everyday expenses if they were required to pay the fees".²⁹

²² *Vilardell BCCA*, *supra*, note 4, at para. 26.

²³ Although the Court referred to the potential for hearing fees to interfere with the "core jurisdiction" of the judiciary in support of its decision (see *Vilardell BCCA*, *supra*, note 4, at paras. 35-36), it did not consider s. 96 in its analysis and did not rely on this reasoning to determine the hearing fee provisions were unconstitutional in their existing form.

²⁴ [1988] S.C.J. No. 76, [1988] 2 S.C.R. 214 (S.C.C.) [hereinafter "*B.C.G.E.U.*"].

²⁵ [2007] S.C.J. No. 21, [2007] 1 S.C.R. 873, 2007 SCC 21 (S.C.C.) [hereinafter "*Christie*"].

²⁶ *Vilardell BCCA*, *supra*, note 4, at paras. 15-17.

²⁷ *Id.*, at para. 21.

²⁸ *Id.*, at para. 9.

²⁹ *Id.*, at paras. 4, 31 and 41.

In the result, the Court of Appeal set aside the trial judge's order striking the hearing fees rule as unconstitutional, but applied the broader exemption to relieve Ms. Vilardell from paying the hearing fees.³⁰

III. JUDGMENT

1. Majority Opinion (McLachlin C.J.C.)

The majority considered the constitutionality of the hearing fees through the lens of section 96 of the *Constitution Act, 1867*.

Chief Justice McLachlin first noted that provinces have the authority to legislate with respect to the administration of justice under section 92(14).³¹ She cited the statement in *Christie* (also relied upon by the Court of Appeal) that this grants provinces the authority "to impose at least some conditions on how and when people have a right to access the courts".³²

The majority acknowledged that the imposition of hearing fees fell squarely within that head of power, noting that such fees "may be used to defray some of the cost of administering the justice system, to encourage the efficient use of court resources, and to discourage frivolous or inappropriate use of the courts".³³

However, this was only the beginning of the analysis. The majority proceeded to hold that the provinces' authority to impose hearing fees is limited insofar as it must be consistent with section 96 and the requirements that flow from it by necessary implication.³⁴ This conclusion flows from two principles of constitutional interpretation:

- Constitutional grants of power must be read together with other grants of power so that the Constitution operates as an internally consistent harmonious whole,³⁵ and

³⁰ *Id.*, at para. 43.

³¹ *Trial Lawyers*, *supra*, note 3, at paras. 18-19, citing *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 92: "In each Province the Legislature may exclusively make Laws in relation to ... 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of the Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil matters in those Courts."

³² *Trial Lawyers*, *supra*, note 3, at para. 20; *Christie*, *supra*, note 25, at para. 17.

³³ *Id.*, at para. 21.

³⁴ *Id.*, at para. 24.

³⁵ *Id.*, at para. 25.

- Constitutional provisions must be consistent not only with other *express* terms of the Constitution, but also with requirements that “flow by necessary implication of those terms”.³⁶

These principles led the majority to consider section 96. Although section 96 on its face simply gives the federal government the power to appoint judges to the superior, district, and county courts in each province, it has been interpreted to guarantee the core jurisdiction of superior courts, protecting it from incursion by administrative tribunals or inferior courts.³⁷ Section 96 has thus been held to restrict the legislative competence both of provincial legislatures and Parliament — neither can enact legislation that removes part of the superior courts’ core or inherent jurisdiction.³⁸

The heart of the majority’s section 96 analysis is as follows:

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. ... As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.³⁹

The majority acknowledged that the cases decided under section 96 to date had been concerned with different species of incursion into the core jurisdiction of superior courts — specifically, legislation that sought to transfer an aspect of superior courts’ jurisdiction to another decision-making body, and privative clauses that purported to bar judicial review. Nonetheless, the majority held that its conclusion was supported by the section 96 jurisprudence, as “[t]he thread throughout these cases is that

³⁶ *Id.*, at para. 26, citing *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] S.C.J. No. 50, 2005 SCC 49, at para. 66 (S.C.C.).

³⁷ *Id.*, at paras. 28 and 29, citing *MacMillan Bloedel Ltd. v. Simpson*, [1995] S.C.J. No. 101, [1995] 4 S.C.R. 725, at paras. 11, 15 and 52 (S.C.C.) [hereinafter “*MacMillan Bloedel*”]. See also *Reference re: Residential Tenancies Act 1979 (Ontario)*, [1981] S.C.J. No. 57, [1981] 1 S.C.R. 714, at 728 (S.C.C.) [hereinafter “*Residential Tenancies*”], in which Dickson J. (as he then was) held:

Section 92(14) and ss. 96 to 100 represent one of the important compromises of the Fathers of Confederation. It is plain that what was sought to be achieved through this compromise, and the intended effect of s. 96, would be destroyed if a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts. What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined.

³⁸ *Trial Lawyers*, *supra*, note 3, at para. 30, citing *MacMillan Bloedel*, *supra*, note 37, at para. 37 and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3, at para. 88 (S.C.C.) [hereinafter “*Judges of P.E.I.*”].

³⁹ *Trial Lawyers*, *supra*, note 3, at para. 32.

laws may impinge on the core jurisdiction of the superior courts by denying access to the powers traditionally exercised by those courts”.⁴⁰ In effect, the majority held, hearing fees deny a segment of society the ability to bring their matter before the superior court.⁴¹

The majority concluded its section 96 analysis by stating that it follows that a province’s authority under section 92(14) must be exercised in a manner consistent with individuals’ rights to bring their cases to the superior courts and have them resolved there — a requirement that flows from section 96 by necessary implication.⁴²

Although noting that section 96 was sufficient to resolve the issue, the majority continued to bolster its analysis by considering the rule of law. Citing principles stated in *B.C.G.E.U.* and the Court’s more recent decision in *Hryniak v. Mauldin*,⁴³ the majority held: “As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice”.⁴⁴

Chief Justice McLachlin observed the potential for real concern about the maintenance of the rule of law arising from legislation that effectively denies some individuals the right to take their cases to the courts:

If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect.⁴⁵

Although the Court of Appeal (and Rothstein J., in dissent) expressed concern with the extent of the right to access to justice articulated in *B.C.G.E.U.* in light of the Court’s more recent decision in *Christie*, the majority distinguished *Christie* in short order. Chief Justice McLachlin stated that *Christie* simply held that not every limit on access to the courts is necessarily unconstitutional, and that, on the evidence and arguments adduced, the hearing fee requirement has the potential to bar

⁴⁰ *Id.*, at paras. 33-34.

⁴¹ *Id.*, at para. 35.

⁴² *Id.*, at paras. 36-37.

⁴³ [2014] S.C.J. No. 7, [2014] 1 S.C.R. 87, 2014 SCC 7, at para. 26 (S.C.C.): “without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined”.

⁴⁴ *Trial Lawyers*, *supra*, note 3, at para. 39.

⁴⁵ *Id.*, at para. 40.

litigants with legitimate claims from the courts, while the tax at issue in *Christie* was not demonstrated to have such an impact.⁴⁶

The majority ultimately held that hearing fees deny access to the superior courts (and, accordingly, do not pass constitutional muster) where they “cause undue hardship to the litigant who seeks the adjudication of the superior court”.⁴⁷ As a practical matter, this occurs when the fee “is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim ... because it subjects litigants to undue hardship, thereby effectively preventing access to the courts”.⁴⁸

The majority disagreed with the Court of Appeal and agreed with the trial judge that the exception for those who are “indigent” or “impoverished” must be interpreted in accordance with the ordinary meaning of the words, and as such it is not sufficient to cover a middle class person’s inability to pay a fee amounting to one month’s net income.⁴⁹ Accordingly, the scheme in question prevented access to the court in a manner inconsistent with section 96 and the rule of law.⁵⁰

The majority concluded that the Court of Appeal’s preferred remedy of reading in was inappropriate; a number of different options were available to cure the constitutional defect, and as such it was not clear the legislature would make the change proposed (as required by *Schachter v. Canada*).⁵¹ In the result, the majority simply declared the hearing fee scheme unconstitutional and left it to the legislature to enact new, constitutionally compliant, provisions.⁵²

2. Concurring Opinion (Cromwell J.)

In succinct concurring reasons, Cromwell J. arrived at the same result as the majority by a different route. Justice Cromwell found it unnecessary to address the constitutional questions raised, preferring instead to resolve the matter on administrative law grounds, finding the hearing fee provision to be *ultra vires* its enabling statute.⁵³ Justice

⁴⁶ *Id.*, at para. 41.

⁴⁷ *Id.*, at para. 45.

⁴⁸ *Id.*, at para. 46.

⁴⁹ *Id.*, at para. 59.

⁵⁰ *Id.*, at para. 64.

⁵¹ [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.).

⁵² *Trial Lawyers*, *supra*, note 3, at paras. 65-68.

⁵³ *Id.*, at para. 70, *per* Cromwell J.

Cromwell's conclusion was enabled by numerous submissions and concessions made by the Attorney General of British Columbia:

- There is a common law right of reasonable access to civil justice.⁵⁴
- This right allows court fees, but only if there is an exemption to ensure that no one is prevented from making an arguable claim or defence because he or she lacks the resources to carry on the proceeding.⁵⁵
- This right of reasonable access may only be abrogated by clear statutory language.⁵⁶
- As the hearing fees in dispute are found in subordinate legislation (made under the authority of the *Court Rules Act*), they should be reviewed for consistency with the Act.⁵⁷
- The *Court Rules Act* preserves, rather than abrogates, the right of reasonable access.⁵⁸
- Subordinate legislation purportedly adopted pursuant to the *Court Rules Act* but inconsistent with the common law right of access to civil justice is *ultra vires*.⁵⁹
- If the hearing fee exemptions cannot be interpreted to ensure that the common law right of access is not defeated, then the fees are *ultra vires*.⁶⁰

Justice Cromwell agreed with the majority in accepting the trial judge's conclusion that the exemption in place, referring to persons who are "impoverished" and "indigent", could not be interpreted to cover people of modest means who are prevented from having a trial because

⁵⁴ *Id.*, at para. 71. Notably, Cromwell J. also cited three cases from Canada that have recognized the existence of such a right (*Polewsky v. Home Hardware Stores Ltd.*, [2003] O.J. No. 2908, 66 O.R. (3d) 600, at para. 60 (Ont. Div. Ct.); *Fabrikant v. Canada*, [2014] F.C.J. No. 344, 459 N.R. 163, at para. 7 (F.C.A.); *Toronto Dominion Bank v. Beaton*, [2012] A.J. No. 206, 534 A.R. 132, at paras. 17-20 (Alta. Q.B.) [hereinafter "*Toronto Dominion Bank*"]), as well as two from the United Kingdom (*R. v. Lord Chancellor, Ex parte Witham*, [1997] 2 All E.R. 779, [1998] Q.B. 575, at 585 (Eng. Q.B.) [hereinafter "*Lord Chancellor*"]; *R. v. Secretary of State for the Home Department, ex p. Saleem*, [2001] 1 W.L.R. 443, [2000] 4 All E.R. 814, at 820 (Eng. C.A.) [hereinafter "*Secretary of State*"])).

⁵⁵ *Id.*, at para. 74.

⁵⁶ *Id.*, at para. 72.

⁵⁷ *Id.*, at para. 73.

⁵⁸ *Id.*, at para. 73.

⁵⁹ *Id.*, at para. 73.

⁶⁰ *Id.*, at para. 75.

of the hearing fees. As a result, he held the hearing fee regime was *ultra vires* its enabling legislation, and that Ms. Vilardell accordingly need not pay the fee.⁶¹

3. Dissenting Opinion (Rothstein J.)

Justice Rothstein's pointed dissent began by stating "Courts do not have free range to micromanage the policy choices of governments acting within the sphere of their constitutional powers"⁶² — and thereby implying that the majority's decision does precisely that. He expressed concern with the majority's reliance on an "overly broad reading of s. 96",⁶³ supported by the unwritten constitutional principle of the rule of law, stating his contrasting view that absent a violation of an express constitutional provision, the judiciary should defer to the policy choices of the government and legislature.⁶⁴

Justice Rothstein anchored his dissenting reasons in the provincial legislatures' power under section 92(14) to enact laws respecting the administration of justice, and the Court's interpretation of that provision in *Christie*, which held that provinces have the power "to impose at least some conditions on how and when people have a right to access the courts".⁶⁵

Noting that the legislature is accountable to voters, he stated the principle underpinning his dissenting opinion: "In a constitutional democracy such as ours, courts must be wary of subverting democracy and its accountability mechanisms beneath an overly expansive vision of constitutionalism".⁶⁶

It appears that Rothstein J.'s primary concern with the majority's reasons was the use of section 96 to limit the provinces' powers under section 92(14). Although he agreed that section 96 protects the core jurisdiction of superior courts, he disagreed with the majority's conclusion that legislation placing conditions on access to superior courts infringes upon an aspect of their core jurisdiction.⁶⁷ His conception of the

⁶¹ *Id.*, at paras. 77-79.

⁶² *Id.*, at para. 80.

⁶³ *Id.*, at para. 81.

⁶⁴ *Id.*, at para. 82.

⁶⁵ *Id.*, at paras. 83 and 86, citing *Christie*, *supra*, note 25, at para. 17.

⁶⁶ *Id.*, at para. 83.

⁶⁷ *Id.*, at paras. 88-89.

requirements flowing from section 96 is much more limited than that of the majority: in Rothstein J.'s view, "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".⁶⁸

Applying section 96 to the case at hand, he noted that no aspect of core jurisdiction is removed, as the legislation at issue "merely places limits on access to superior courts". As the hearing fees do not go to the very existence of the court as a judicial body or limit the types of powers it may exercise, Rothstein J. stated that the concept of core jurisdiction from section 96 could not apply.⁶⁹

Justice Rothstein similarly disagreed with the majority's use of the rule of law to support its conclusion. Acknowledging that the Court may rely on unwritten principles to fill in gaps in the constitutional text, he stated that section 92(14) has no such gaps, and that "gaps do not exist simply because the courts believe that the text should say something that it does not".⁷⁰ He cited the Court's previous opinions on this point stating unwritten principles "could not be taken as an invitation to dispense with the written text of the Constitution".⁷¹

Relying on the Court's analysis respecting the rule of law in *British Columbia v. Imperial Tobacco Canada Ltd.*,⁷² Rothstein J. noted that the Court has "clearly and persuasively cautioned against relying on the rule of law to strike down legislation",⁷³ and declared that the majority has ignored the Court's holding in that case that:

The rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that

⁶⁸ *Id.*, at para. 93.

⁶⁹ *Id.*, at para. 90.

⁷⁰ *Id.*, at para. 91.

⁷¹ *Id.*, at para. 91, citing *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 53 (S.C.C.), affg *Judges of P.E.I.*, *supra*, note 38, at paras. 93 and 104 (S.C.C.).

⁷² [2005] S.C.J. No. 50, [2005] 2 S.C.R. 473, 2005 SCC 49 (S.C.C.) [hereinafter "*Imperial Tobacco*"].

⁷³ *Trial Lawyers*, *supra*, note 3, at paras. 96-97, citing *Imperial Tobacco*, *id.*, at paras. 59-60: [I]t is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation ... government action constrained by the rule of law as understood in *Reference re Manitoba Language Rights* and *Reference re Secession of Quebec* is, by definition, usually that of the executive and judicial branches. Actions of the legislative branch are constrained too, but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed).

courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text.⁷⁴

Importantly, Rothstein J. also noted that while the Constitution does not include an express right of general access to the superior courts, it specifies certain situations in which access to courts is guaranteed: section 24(1) of the Charter provides that a person whose rights have been infringed may apply to the court for a remedy, and section 11(d) of the Charter guarantees persons charged with an offence the right "to be presumed innocent until proven guilty according to law *in a fair and public hearing by an independent and impartial tribunal*".⁷⁵ Echoing the Court's reasons in *Imperial Tobacco*, he opined that these rights would be redundant if the Constitution already contained a general right to access the courts.⁷⁶

Justice Rothstein further observed that rights read into section 96, unlike those articulated in the Charter, will be absolute; the provision is not subject to limits under section 1 or to the notwithstanding clause at section 33. He questioned why an unwritten right to access to superior courts would warrant stronger protection than the express rights enumerated in the Charter.⁷⁷

In the end, Rothstein J. noted that he would not find the hearing fee scheme to be unconstitutional even if he had found a constitutional basis upon which to challenge it. His reasons on this point are similar to those of the Court of Appeal: he stated that the discretion offered by the "indigency" exception allows courts to apply it where the fees themselves will be a source of impoverishment to the party. He further highlighted judges' abilities to reapportion hearing fees as part of costs orders and to case manage trials to ensure they are not unduly lengthy. Justice Rothstein concluded that, when these measures are taken together, there is no indication that the hearing fees would prevent litigants from bringing meritorious legal claims.⁷⁸

⁷⁴ *Trial Lawyers*, *supra*, note 3, at para. 99, citing *Imperial Tobacco*, *supra*, note 72, at para. 67 (emphasis added by Rothstein J.).

⁷⁵ *Id.*, at para. 92 (emphasis added).

⁷⁶ *Id.*, at para. 101.

⁷⁷ *Id.*, at para. 94.

⁷⁸ *Id.*, at paras. 103-112.

IV. DISCUSSION

1. Use of Section 96 to Provide Right of Access to the Courts

The majority anchored the right to access the superior courts in section 96. Interestingly, the majority relied on Major J.'s reasons in *Imperial Tobacco* for the principle that any interpretation of the powers granted to the provinces under section 92(14) must be consistent not only with the express terms of section 96, but also the requirements that "flow by necessary implication from those terms".⁷⁹

The key dispute between the majority and dissent appears to be precisely what requirements "flow by necessary implication" from the words of section 96. Justice Rothstein does not appear to take issue with the premise of the majority's analysis:

Although the bare words of s. 96 refer to the appointment of judges, its broader import is to guarantee the core jurisdiction of provincial superior courts: Parliament and legislatures can create inferior courts and administrative tribunals, but "[t]he jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution". In this way, the Canadian Constitution "confers a special and inalienable status on what have come to be called the 'section 96 courts'".

Section 96 therefore restricts the legislative competence of provincial legislatures and Parliament — neither level of government can enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction.⁸⁰

Where the majority and dissent part company, however, is the question of whether hearing fees that prevent some people from accessing the courts infringe upon the core jurisdiction of the superior courts. In concluding that they do, the majority arguably expands the scope of section 96. Although previous section 96 cases — and the principle the majority itself states — provide that legislation cannot *remove* part of superior courts' core jurisdiction, the majority asks whether the impugned provisions *infringe upon* superior courts' core jurisdiction. This careful choice of wording has the effect of significantly reframing the issue.

⁷⁹ *Id.*, at paras. 25-26.

⁸⁰ *Id.*, at paras. 29-30 (citations omitted), citing *MacMillan Bloedel*, *supra*, note 37, at paras. 11, 15, 37 and 52 and *Judges of P.E.I.*, *supra*, note 38, at para. 88 (S.C.C.).

As noted by the majority, the cases previously decided under section 96⁸¹ were concerned with legislation seeking to transfer an aspect of superior courts' jurisdiction to another decision-making body and privative clauses purporting to bar judicial review. The majority states that the common thread of these cases is that "laws may impinge on the core jurisdiction of the superior courts by denying access to the powers traditionally exercised by those courts".⁸²

Finding this thread requires something of a leap. Although the majority describes each case as one denying access to superior courts for a particular class of cases or segment of society,⁸³ *Residential Tenancies*, *MacMillan Bloedel*, and *Crevier* were not so much about denying *litigants* access to the superior courts as denying *courts* the ability to exercise certain powers. Of course, the removal of such powers had the effect of preventing individual litigants from having related issues resolved before a superior court, but that was a secondary consequence of the infringement. It is not clear from those cases that denying individuals access to the superior courts was, in itself, an infringement of section 96 — it was the removal of the power from the court that was cause for concern. The principle from *Crevier* and *MacMillan Bloedel* relied upon for the majority's conclusion makes this clear: in those cases, the Court held that "powers which are 'hallmarks of superior courts' cannot be removed from those courts".⁸⁴

However, the majority proceeds to make the jump from the removal of powers from courts to the denial of access to courts, holding: "Here, the legislation at issue bars access to the superior courts in yet another way — by imposing hearing fees that prevent some individuals from having their private and public law disputes resolved by the courts of superior jurisdiction — the hallmark of what superior courts exist to do".⁸⁵

The majority concludes that "[i]t follows that the province's power to impose hearing fees cannot deny people the right to have their disputes resolved in the superior courts".⁸⁶ With respect, although such a conclusion may be consistent with the section 96 jurisprudence, it does not *follow* from it. Those cases did not provide for an individual right to

⁸¹ In particular, the majority cites *Residential Tenancies*, *supra*, note 37; *MacMillan Bloedel*, *supra*, note 37; and *Crevier v. Attorney General of Quebec*, [1981] S.C.J. No. 80, [1981] 2 S.C.R. 220 (S.C.C.) [hereinafter "*Crevier*"].

⁸² *Trial Lawyers*, *supra*, note 3, at para. 33.

⁸³ *Id.*, at para. 34.

⁸⁴ *Id.*, at para. 34, citing *MacMillan Bloedel*, at para. 35 (emphasis added).

⁸⁵ *Id.*, at para. 35.

⁸⁶ *Id.*, at para. 36.

have one's disputes resolved in the superior courts. The majority's conclusion requires an expanded interpretation of the "necessary implications" of section 96.

This is one of Rothstein J.'s key criticisms of the majority's reasons. He notes that no aspect of superior courts' core jurisdiction is *removed*, as the legislation at issue "merely places limits on access to superior courts".⁸⁷ As the hearing fees do not go to the very existence of the court as a judicial body or limit the types of powers the court itself may exercise, Rothstein J. states that the concept of core jurisdiction from section 96 cannot apply.⁸⁸

Viewed in this manner, the applicability of section 96 to the imposition of hearing fees depends on one's conception of that which flows from the text of section 96. Specifically, section 96 can apply if one agrees that a secondary consequence of removing an aspect of superior courts' jurisdiction — effectively denying access to the court — is a "necessary implication" of the protection of superior courts' jurisdiction. This may be somewhat of a stretch.

Alternatively, however, the applicability of section 96 may simply require a shift in perspective. While the majority acknowledged that hearing fees preventing some people from accessing the courts would not abolish or destroy the existence of the courts, perhaps the hearing fees should be considered through that lens. Although there is no doubt the superior courts would continue to exist in spite of the hearing fees, it could be argued that their inability to resolve the disputes of certain litigants — namely, those who cannot afford the fees — renders them effectively non-existent *to those litigants*.

Justice Rothstein stated that the hearing fees did not make the B.C. courts "something other than a superior court".⁸⁹ Although the courts would of course remain capable of exercising all their core powers in the abstract, the practical effect of hearing fees could be to render the court unable to exercise those powers in respect of a certain segment of Canadians. If this were the case, arguably the court would effectively be "something other than a superior court", contrary to section 96.

Regardless of how the analysis is framed, the import of the majority's reasons respecting section 96 is significant. Following *Trial Lawyers*, section 96 does not simply limit Parliament and provincial

⁸⁷ *Id.*, at para. 90, *per* Rothstein J.

⁸⁸ *Id.*, at para. 90.

⁸⁹ *Id.*, at para. 90, citing *MacMillan Bloedel*, *supra*, note 37, at para. 30.

legislatures from *removing* an aspect of superior courts' core jurisdiction — it protects Canadians' *access* to those courts as well.

There are two further noteworthy consequences of the majority's decision to ground the right to access the courts in section 96. First, as Rothstein J. observed in dissent, rights read into section 96 are not limited by section 1 or section 33.⁹⁰ His concern that this places this unwritten right on a higher plane than the express rights provided in the Charter is legitimate, but perhaps abstract. The majority did not endorse an absolute right to access to justice or unhindered access to the court; on the contrary, it affirmed the Court's decision in *Christie* that the provinces may impose some limits and conditions on access to the courts.⁹¹ Although such limits may not be as predictable as those imposed by section 1 (under the well-established framework from *Oakes*),⁹² Rothstein J.'s unease that any right read into section 96 is absolute should not be a great concern.

Second, and perhaps more interestingly, by grounding the right to access the courts in section 96, the majority limited its disposition to superior courts. Presumably, hearing fees for access to the Federal Court, provincial court and administrative tribunals, even if unaffordable to many, cannot be deemed unconstitutional on the basis of this decision, as such decision-making bodies do not fall within the ambit of section 96. This is worthy of note in particular because a number of the earlier Canadian decisions recognizing a right of access pertained to courts that were not section 96 courts: *Polewsky v. Home Hardware Stores Ltd.*⁹³ pertained to fees in the Ontario Small Claims Court, and *Fabrikant v. Canada*⁹⁴ considered filing fees for a Notice of Appeal in the Federal Court of Appeal. Notably, both these cases were relied upon by Cromwell J. in his concurring opinion as the basis for a common law right of reasonable access to civil justice.

As a result, we appear to have two concurrent bases for a right to access the courts in Canada: a right to access superior courts grounded in section 96 (as affirmed by the *Trial Lawyers* majority), and a common law right of access to the courts arising from the pre-existing jurisprudence pertaining to non-section 96 courts (and as recognized in Cromwell J.'s concurring reasons). The majority's reasons are silent on

⁹⁰ *Id.*, at para. 94.

⁹¹ *Id.*, at paras. 20-22 and 41.

⁹² *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

⁹³ [2003] O.J. No. 2908, 66 O.R. (3d) 600 (Ont. Div. Ct.) [hereinafter "*Polewsky*"].

⁹⁴ [2014] F.C.J. No. 344, 459 N.R. 163 (F.C.A.) [hereinafter "*Fabrikant*"].

whether there is any right to access courts that are not section 96 courts, and do not touch upon this earlier jurisprudence. However, its conclusions respecting the rule of law may support such a right.

2. Use of the Rule of Law to Support Right of Access to the Courts

Although it relied on section 96 to ground the right in question, the majority held that the unwritten principle of the rule of law supported its conclusion, citing *B.C.G.E.U.*⁹⁵ It was the rule of law that grounded a right to access the courts in that case.⁹⁶

Justice Rothstein, in dissent, vehemently disagreed with the majority's consideration of the unwritten principle of the rule of law in creating a right to access the courts. First, he observed that the Court in *B.C.G.E.U.* decided there was a right to access the courts "for the purpose of vindicating Charter rights".⁹⁷ This position is defensible, but overly limited. Although the Court in *B.C.G.E.U.* declared the right to access the courts in a Charter context, and based on reasoning premised in Charter rights and principles,⁹⁸ it did not state that a right to access the courts was limited to such purpose, and the case has since been relied upon numerous times for a more general right of access.⁹⁹

Justice Rothstein's objections are most compelling when he takes issue with the use of the rule of law to supplant the express text of the Constitution. Section 92(14) grants to the provinces the authority to legislate respecting the administration of justice. It is thus difficult to reconcile the majority's use of the rule of law to support striking down otherwise validly-enacted legislation with the Court's statements in *Imperial Tobacco*:

The rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text.¹⁰⁰

⁹⁵ *Trial Lawyers*, *supra*, note 3, at para. 38.

⁹⁶ *B.C.G.E.U.*, *supra*, note 24, at paras. 24-26.

⁹⁷ *Trial Lawyers*, *supra*, note 3, at para. 92.

⁹⁸ *B.C.G.E.U.*, *supra*, note 24, at paras. 24-25.

⁹⁹ See, e.g., *Newfoundland Assn. of Public Employees v. Newfoundland (Attorney General)*, [1988] S.C.J. No. 73, [1988] 2 S.C.R. 204 (S.C.C.); *Fabrikant*, *supra*, note 94; *Polewsky*, *supra*, note 93.

¹⁰⁰ *Trial Lawyers*, *supra*, note 3, at para. 99, citing *Imperial Tobacco*, *supra*, note 72, at para. 67 (emphasis added by Rothstein J.).

This caution in *Imperial Tobacco* followed a discussion of the possibility of conflicting constitutional principles. Even if the rule of law favoured striking down a particular piece of legislation, the Court held:

... several constitutional principles other than the rule of law that have been recognized by this Court — most notably democracy and constitutionalism — [that] very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution ... in 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.¹⁰¹

Justice Rothstein similarly echoed this sentiment, stating: “In a constitutional democracy such as ours, courts must be wary of subverting democracy and its accountability mechanisms beneath an overly expansive vision of constitutionalism”.¹⁰² Although the point about unwritten principles working at cross purposes is a valid one, this is perhaps an overly rosy view of the power of democracy and legislative accountability — especially when applied to this particular case, in which the impugned law is a fee provision in subordinate legislation. As a practical matter, it is difficult to envision voters *en masse* ousting their elected representatives on the basis of the wording of an exception to a fee established by regulations governing the rules of civil court — especially where numerous learned judges disagreed on the interpretation of the provision in question.

In any case, there is a further aspect of *Imperial Tobacco* that is difficult to square with the majority’s decision. The appellants in that case sought the recognition of a right to a fair civil trial. The Court rejected this argument in part on the basis that the Charter specifically provided a right to a “fair and public hearing” to those charged with an offence under section 11(d), and to accept the appellants’ argument would render such express right irrelevant. The Court held:

... the appellants’ conception of the unwritten constitutional principle of the rule of law would render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers.¹⁰³

¹⁰¹ *Imperial Tobacco*, *supra*, note 72, at para. 66.

¹⁰² *Trial Lawyers*, *supra*, note 3, at para. 83.

¹⁰³ *Imperial Tobacco*, *supra*, note 72, at para. 65.

The landscape with respect to rights to access to the courts is quite similar. As noted by Rothstein J., the Constitution specifies certain situations in which access to courts is guaranteed: section 24(1) of the Charter provides that a person whose rights have been infringed may apply to the court for a remedy, and section 11(d) of the Charter guarantees persons charged with an offence the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”.¹⁰⁴ The majority does not address why it considered it appropriate to use an unwritten principle to read in a broader right to access the courts than the ones already provided expressly in the Charter, given the warning in *Imperial Tobacco*. If the Constitution already provided for a right to access the superior courts, why would section 24(1) be necessary?

If one were to put aside jurisprudential inconsistencies and concerns with the application of unwritten principles to constitutional interpretation, the majority’s use of the rule of law to support a right to access the court is persuasive from a common-sense perspective. The majority’s statement of the possible practical consequences of legislation that denies Canadians the ability to bring their cases to court is compelling:

If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect.¹⁰⁵

However, the majority’s departure from *Imperial Tobacco* cannot be ignored. We are left with considerable uncertainty with respect to when the Court can and will use unwritten constitutional principles to create or support new rights or to fill gaps in the constitutional text.¹⁰⁶

3. A Concurring View of a Common Law Right to Access to Civil Justice

In his concurring reasons, Cromwell J. elected to resolve the issues in *Trial Lawyers* on administrative law grounds, thus dodging the

¹⁰⁴ *Trial Lawyers*, *supra*, note 3, at para. 92.

¹⁰⁵ *Id.*, at para. 40.

¹⁰⁶ Professor Bruce Ryder expressed a similar sentiment in his blog post “Access to Justice and the Rule of Law Principle: *Trial Lawyers Association v. British Columbia*”, *The Court*, October 2, 2014, online: <<http://www.thecourt.ca/2014/10/02/access-to-justice-and-the-rule-of-law-principle-trial-lawyers-association-v-british-columbia/>>.

complex constitutional questions raised altogether. He held there is a common law right to reasonable access to civil justice, preserved in the *Court Rules Act*, and the hearing fees imposed by a regulation enacted thereunder were inconsistent with such right and thus *ultra vires*.¹⁰⁷

Although uncontroversial in this particular case given the Attorney General's concessions, the endorsement of a common law right of reasonable access to civil justice is nonetheless significant, and opens the door to possible future controversy.

Relatively few Canadian cases had previously considered such a right.¹⁰⁸ Notably, all three Canadian cases Cromwell J. cited in support of the existence of such a right relied at least in part on the Supreme Court having found a right to access the courts as part of the rule of law in *B.C.G.E.U.*¹⁰⁹ This suggests that the common law right to reasonable access to civil justice in fact originates in the same unwritten constitutional principle relied upon by the majority (and thus may be susceptible to many of the same criticisms).

More importantly, however, the recognition of a common law right of reasonable access to civil justice raises serious questions about the scope of such a right. As noted by Professor Paul Daly, the delineation of common law rights requires judges to make numerous value judgments, without a textual basis upon which to ground such rights.¹¹⁰ One can certainly envision different judges arriving at very different conceptions of what falls within and what falls outside the limits of a right to "reasonable" access to civil justice.

Justice Cromwell's concurring opinion, although arriving at a convenient resolution to the issues before the Court in light of the concessions made by the Attorney General, raises further uncertainties. As value judgments will be required to interpret the common law right of reasonable access to civil justice, there is a danger that such right may become unpredictable or unwieldy. It will be left to future jurisprudence to restrain its scope.

¹⁰⁷ *Trial Lawyers*, *supra*, note 3, at paras. 71-78, *per* Cromwell J.

¹⁰⁸ Justice Cromwell cited only three cases from Canada recognizing the existence of such a right (*Polewsky*, *supra*, note 93, at para. 60; *Fabrikant*, *supra*, note 94, at para. 7; *Toronto Dominion Bank*, *supra*, note 54, at paras. 17-20), alongside two from the United Kingdom (*Lord Chancellor*, *supra*, note 54, at 585; *Secretary of State*, *supra*, note 54, at 820).

¹⁰⁹ See *Polewsky*, *supra*, note 93, at paras. 69-76; *Fabrikant*, *supra*, note 94, at para. 7; and *Toronto Dominion Bank*, *supra*, note 54, at paras. 17-18 and Appendix B.

¹¹⁰ See Professor Paul Daly, "Court Fees, Constitutional Rights and the Common Law", *Administrative Law Matters*, October 3, 2014, online: <<http://www.administrativelawmatters.com/blog/2014/10/03/court-fees-constitutional-rights-and-the-common-law>>.

4. Interjurisdictional Immunity for the Judicial Branch?

In addition to possible effects of the majority's expanded interpretation of section 96 and application of unwritten constitutional principles, *Trial Lawyers* may play a further role in the development of Canadian constitutional jurisprudence. In holding that the province's exercise of its jurisdiction under section 92(14) must be consistent with section 96 of the *Constitution Act* and the requirements that flow therefrom, the majority has arguably created a new species of the interjurisdictional immunity doctrine.

The doctrine of interjurisdictional immunity historically provided that the heads of power allocated to the federal and provincial governments by sections 91 and 92 of the *Constitution Act, 1867* must be assured a "basic, minimum and unassailable content" immune from the application of legislation enacted by the other level of government.¹¹¹

The Supreme Court has reined in the application of the interjurisdictional immunity doctrine in recent years. In *Canadian Western Bank v. Alberta*, the Court held it is a "doctrine of limited application" whose broad use would be inconsistent with the preferred contemporary approach of flexible federalism; as such, the doctrine should be "applied with restraint" and "reserved for situations already covered by precedent".¹¹² Numerous other recent decisions of the Court have further stressed its limits and reinforced this caution against the application of the doctrine.¹¹³

Despite the Court's shift away from the interjurisdictional immunity doctrine in its traditional sense, the majority's use of section 96 to limit provincial powers under section 92(14) harkens back to the doctrine, and suggests a different version of it may be emerging. Although traditionally tied to the division of powers analysis between provincial and federal jurisdiction, in *Trial Lawyers* the majority's reasoning implies interjurisdictional immunity in a new context: between the legislative and judicial branches.

¹¹¹ *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, 2007 SCC 22, at para. 33 (S.C.C.) [hereinafter "*Western Bank*"], citing *Bell Canada v. Quebec (Commission de santé et de la sécurité du travail du Québec)*, [1988] S.C.J. No. 41, [1988] 1 S.C.R. 749, at 839 (S.C.C.).

¹¹² *Id.*, at paras. 33, 42, 66 and 77.

¹¹³ See *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] S.C.J. No. 39, [2010] 2 S.C.R. 536, 2010 SCC 39 (S.C.C.); *Marine Services International Ltd. v. Ryan Estate*, [2013] S.C.J. No. 44, [2013] 3 S.C.R. 53, 2013 SCC 44 (S.C.C.); *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257, 2014 SCC 44 (S.C.C.); and *Bank of Montreal v. Marcotte*, [2014] S.C.J. No. 55, [2014] 2 S.C.R. 725, 2014 SCC 55 (S.C.C.).

Section 96 has been held to restrict the legislative competence of both provincial legislatures and Parliament, as neither can enact legislation that removes part of the superior courts' inherent jurisdiction. As discussed above, the majority arguably extended this restriction beyond a prohibition on *removing* aspects of section 96 courts' core jurisdiction, so legislation purporting to limit access to the courts is constitutionally uncertain. Indeed, McLachlin C.J.C. held that "the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts".¹¹⁴

In effect, the Court declared that section 96 creates an "unassailable" core over which the province cannot legislate. Despite the provinces' authority to create laws pertaining to the administration of justice pursuant to section 92(14), it appears the judicial branch is immune from a sizable swath of the subject matter of that head of power.

5: Implications of a Constitutional Right to Access the Courts

The Supreme Court's decision in *Trial Lawyers* is undoubtedly an important advance for the cause of access to justice. The decision prevents governments from imposing barriers to accessing the superior courts that pose "undue hardship" for litigants. This is a fair and reasonable result that should have a positive practical impact on Canadians entangled in the court system.

One wonders, however, if the decision will have unintended consequences. Specifically, a right to access the courts grounded in section 96 may bear the potential to render other provisions requiring the payment of money unconstitutional. In *Lord Chancellor*,¹¹⁵ a decision of the British High Court of Justice, Queen's Bench Division (Divisional Court) cited by Cromwell J. in his concurring reasons, the court considered the validity of various fees that pose possible barriers to accessing the courts. After discussing the fees for issuing a writ, for setting aside a default judgment, and for being joined as an interested party, the court held:

... it is clear on the evidence before us that there is a wide-ranging variety of situations in which persons on very low incomes are in practice denied access to the courts to prosecute claims or, in some circumstances, to take steps to resist the effects of claims brought against them.¹¹⁶

¹¹⁴ *Trial Lawyers*, *supra*, note 3, at para. 37, *per* McLachlin C.J.C.

¹¹⁵ *Supra*, note 54.

¹¹⁶ *Id.*, at para. 7.

One can only imagine the potential for creative lawyers to bring challenges to the rules respecting costs, filing fees and perhaps even time limits for claims, appeals and judicial review on the basis of an individual right to access the courts. Moreover, there is a risk that any future legislative initiatives to increase the efficiency of our overburdened courts may be challenged, with the majority's decision in *Trial Lawyers* as a basis. Justice Cromwell's concurring reasons endorsing a common law right of reasonable access to civil justice may provide further ammunition.

That being said, the majority's measured language requiring "undue hardship" before limits to access to the courts will be struck down, coupled with its endorsement of the Court's earlier statements in *Christie* that provinces have the power to impose at least some conditions on how and when people have a right to access the courts, should temper unreasonable challenges and ensure any developments flowing from this new right are incremental and appropriate.

Decisions of the lower courts interpreting *Trial Lawyers* in the time since the Court's decision have shown no reason for alarm. For instance, in *Taylor v. St. Denis*,¹¹⁷ a self-represented litigant who sought to appeal an unfavourable decision requested an exemption from a fee for trial transcripts required for his appeal record, on the basis of *Trial Lawyers* (among other proposed grounds). The Saskatchewan Court of Appeal denied to extend the majority's reasons to permit such an exemption. Citing *Christie*, Ryan-Froslic J. held that the right articulated in *Trial Lawyers* is not an unfettered one, stating "[n]ot everything that limits a litigant's ability to access the courts is unconstitutional".¹¹⁸

Importantly, the decision in *Trial Lawyers* does not raise the prospect of imposing *positive* obligations on governments to facilitate access to justice. The majority's conception of a right to access the courts fits squarely within a negative rights framework. Although the decision can serve to prevent governments from creating or maintaining barriers to accessing the courts, it cannot be used to require the state to take active steps to alleviate the access to justice crisis (such as by increasing funding to Legal Aid). It is interesting to consider that while the Court's decision removed the \$3,600 burden on Ms. Vilardell posed by hearing

¹¹⁷ [2015] S.J. No. 1, 451 Sask. R. 187 (Sask. C.A.) [hereinafter "*Taylor*"].

¹¹⁸ *Id.*, at para. 59. See also *Jull v. Victoria (City)*, [2015] B.C.J. No. 753, 37 M.P.L.R. (5th) 270 (B.C.S.C.), in which the court similarly denied an appellant's request on the basis of *Trial Lawyers* to avoid the cost of transcripts.

fees, it did nothing to alleviate the much greater burden of exorbitant lawyers' fees (which, in Ms. Vilardell's case, amounted to the much greater sum of \$23,000, before she ultimately represented herself at trial).

As the impact of the new right established in *Trial Lawyers* may be limited and any resulting practical change incremental, the majority's analysis may be the most striking implication of the decision. Its expanded use of section 96 to ground a new constitutional right, with support from the unwritten principle of the rule of law (applied in a manner inconsistent with *Imperial Tobacco*), breaks new ground in constitutional interpretation, and creates a precedent future litigants are likely to try to build upon.