Ian Mulgrew: Supreme Court strikes down B.C. court fees for barring access to justice system

BY IAN MULGREW, VANCOUVER SUN OCTOBER 2, 2014 true

The Supreme Court of Canada building in Ottawa.

OTTAWA - Middle-class litigants were thrown a lifeline Thursday by the Supreme Court of Canada which stuck down court-hearing fees that block their access to justice.

The country's highest bench said B.C.'s hearing-fee scheme is unconstitutional because it imposed undue hardship on ordinary people and impeded their right to bring legitimate cases to court.

Writing for the five-judge majority, Chief Justice Beverley McLachlin said the exemptions for the indigent or needy do not provide sufficient discretion to trial judges to exempt litigants in appropriate circumstances.

She said such levies are permissible only so long as they do not impinge on the constitutional jurisdiction of the courts by denying some people access.

Though the constitution "on its face" does not limit the powers of the provinces to impose hearing fees, the Chief Justice said the court "must consider not only the written words," but "how a particular interpretation fits with other constitutional powers and the assumptions that underlie the text."

Justice Marshall Rothstein dissented saying there was no right to access to the courts without hearing fees and accused his colleagues of significantly expanding their jurisdiction.

By using an unwritten principle to support expanding the ambit of the courts, he said, the majority is subverting the constitution.

“Courts must respect the role and policy choices of democratically elected legislators,” Rothstein said.

“In the absence of a violation of a clear constitutional provision, the judiciary should defer to the policy choices of the government and legislature. How will the government deal with reduced revenues from hearing fees? Should it reduce the provision of court services? Should it reduce the provision of other government services? Should it raise taxes? Should it incur debt? These are all questions that are relevant but that the Court is not equipped to answer.”

In a concurring judgment, Justice Thomas Cromwell said the court didn’t have to decide the constitutionality because the fees violated the Court Rules Act.

Regardless, the majority ruling vindicated B.C. Supreme Court Justice Mark McEwan, whose two-year-old, 178-page judgment was reinstated.

McEwan ignited this debate nearly five years ago by identifying a middle-class 43-year-old woman’s predicament in a divorce case as a systemic issue — inviting the attorney general, the Law Society, the Canadian Bar Association and the Trial Lawyers’ Association to appear before him.

In what followed, the Crown and the Bar occupied centre stage, not the two litigants — a UBC professor and the unemployed veterinarian who had asked McEwan to waive $3,600 in hearing fees for the 10-day divorce trial because she had other bills.

Ironically, the three-day constitutional debate would have added $1,872 in fees.

Two year later — in May 2012, McEwan produced a landmark ruling that was a veritable a cri de Coeur for the middle class concluding the hearing fees were unconstitutional.

Weaving together precedent with economic and cultural analysis, he surveyed Canada’s legal history from its roots in old English documents such as the Magna Carta of 1225 and the 1494 Statute of Henry VII, to the present-day Charter of Rights and Freedoms.

You cannot put a price tag on justice, the veteran provincial jurist scolded government - “some things are not for sale.”

Supported by two of his colleagues, however, B.C. Court of Appeal Justice Ian Donald gave the matter short shrift — less than a month’s thought before overturning McEwan on Feb. 15, 2013.

Nevertheless, Chief Justice McLachlin said McEwan was right — the hearing fees denied people access to the courts and “infringe the core jurisdiction of the superior courts.”

“In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical,” she added.

“If people cannot challenge government actions in court, individuals cannot hold the state to account — the government be, or be seen to be, above the law.”

She said fees that require litigants “who are not impoverished to sacrifice reasonable expenses” are not allowed.

Although the case involved a hearing fee scheme that is no longer in effect, McLachlin said her opinion was equally relevant to the current regime that charges about the same for a 10-day trial, $3,500.

Having exemptions for the “otherwise impoverished” or the “indigent” wasn’t a solution, she added.

“I agree with the view of the trial judge that the plain meaning of the words ‘impoverished’ and ‘indigent’ does not cover people of modest means who are nonetheless prevented from having a trial because of the hearing fees,” McLachlin said.

She didn’t have a remedy and said it was up to legislatures to figure out a solution and “enact new provisions, should they choose to do so.”

The woman involved in the litigation, who would normally launch any appeal to the Supreme Court of Canada, had no interest in it because the B.C. Court of Appeal waived her fees.

Vancouver litigator Darrell Roberts, on behalf of the 1,400-member Trial Lawyers Association of B.C., along with co-counsel Sharon Matthews and Melina Buckley, representing the 6,800 members of the Canadian Bar Association BC Branch, led the fight.

“For us it’s an outstanding success on the access to justice front — the courts should be not only for the rich,” said Richard Parsons, president of the TLABC.

“People need to be able to access the courts. It’s terrific.”

The bar association hailed the decision as well.

“Today’s verdict is welcome news as this is a huge win for the public in the fight for Access to Justice” says CBABC President Alex Shorten. “Removing barriers to access to the courts is what this case was all about.”

Others celebrated, too.

“This decision is important because it means that those who genuinely cannot afford hearing fees will not have to pay them,” said Kasari Govender, executive director for intervener West Coast LEAF.

“This will mean improved access to justice for women in family law. It also means that the highest court in Canada has confirmed that access to justice is constitutionally protected, and that the justice system is not just for those who can afford it.”

(The decision is available here.)

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