IS THE NEW LAW RELATING TO EXPERT WITNESSES UNCONSTITUTIONAL? A FURTHER CONSTITUTIONAL CHALLENGE TO *THE EVIDENCE AMENDMENT ACT, 2020*

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This is the second part of an analysis canvassing ways to mount a constitutional challenge to the *Evidence Amendment Act, 2020* (the "Act").[1] In the first part,[2] we explored the argument that the Act is invalid because it violates the core jurisdiction of a s. 96 court. In this part, we argue that it violates the rule of law, an unwritten constitutional principle, because it denies access to justice.

THE MEANING OF THE RULE OF LAW

The rule of law is an amorphous concept, but its importance is well described by the Alberta Court of Queen's Bench in *Larouche v. Court of Queen's Bench of Alberta*, as follows:

> The Rule of Law is an organization of principles which are not only foundational to our Constitutional order but crucial to our democracy, to our security, to our rights and freedoms, and to our equal status as members of humanity. The Rule of Law is also an expression of our collective and inherited wisdom and socialization. It is our cloak and our shelter from oppression on the one hand and from disorder on the other. As the Governor General of Canada wisely observed on Remembrance Day, November 11, 2014, freedom without peace is agony, and peace without freedom is slavery. Without the Rule of Law, we can have neither freedom nor peace.
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> A crucial element of the Rule of Law is that no exercise of power emanating from the structure of our social order of governance can be considered above or beyond the reach of law. The integrity and validity of the exercise of legal authority are necessarily linked to its own legality. Power and its exercise must be legitimate. ...[3]

Access to justice is closely tied to the rule of law. The Supreme Court of Canada's decision in *B.C.G.E.U. v. British Columbia (Attorney General)*[4] was arguably the first to acknowledge that access to justice is, in the words of two commentators, "a necessary precondition to the rule of law".[5] In that

case, the B.C.G.E.U. had picketed all law courts in British Columbia in the course of a legal strike but allowed persons to cross the line if they obtained "picket passes". On his own motion, McEachern C.J.S.C. issued an injunction restraining the picketing. The union moved to set aside the injunction. McEachern C.J.S.C. dismissed the motion, the B.C. Court of Appeal upheld his decision, and the Supreme Court of Canada did as well. Chief Justice Dickson, writing for the majority, first noted that the preamble to the *Charter* states: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law".[6] The majority then reasoned:

> Of what value are the rights and freedoms guaranteed by the *Charter* if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the *Charter* if court access is hindered, impeded or denied? The *Charter* protections would become merely illusory, the entire *Charter* undermined.
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> There 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. ...
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> I would adopt the following passage from the judgment of the British Columbia Court of Appeal (at p. 406):
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> > We have no doubt that the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. It is the preservation of that right with which we are concerned in this case. Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, interference from whatever source falls into the same category.[7]

Arguably, the Supreme Court of Canada's seminal decision in *Hryniak v. Mauldin*[8] also ties the principle of access to justice to the rule of law, although to other foundations as well—namely, "the inherent jurisdiction of the courts, pursuant to section 96 of the *Constitution Act, 1867*".[9]

HOW THE ACT VIOLATES THE RULE OF LAW

In our view, there is a good argument that the Act violates the rule of law by denying access to justice—which, as described above, can be seen as a necessary precondition to the rule of law. A number of cases have considered whether a particular statute violates the rule of law by denying access to justice, with mixed results. However, in our view, there is good reason to consider the case of the Act to align more closely with the cases in which the constitutional challenge succeeded.

Issues with the Act that in our view arguably limit access to justice, and thereby arguably violate the rule of law, include those identified by MLA

Michael Lee, of the Official Opposition, in debate on Bill 9, the bill that led to the Act. Concerns he raised included the following:

- The amendments will undermine the ability of a British Columbian to seek recovery for damages for their injuries in court.
- The amendments will limit the ability of a British Columbian to advocate for themselves as they will face limits on the evidence they can adduce to prove their damages claim.
- As only the plaintiff and not the Insurance Corporation of British Columbia ("ICBC") will be subject to the Act's restrictions, the proceedings in court will be an "unfair fight".
- The rules regarding expert reports are being changed retroactively. The 95,000 files with ICBC and approximately 48,000 lawsuits with ICBC currently in the system will potentially be affected,[10] and claimants will not be able to bring a claim for full recovery.[11]
- The plaintiff's litigation privilege will be undercut because, to get leave to adduce more than three expert reports, the party must in their application reveal the names of the proposed additional experts, reveal the scope of their expertise and provide records that support the need for additional expert evidence, forcing the plaintiff to open up privileged and confidential aspects of their case.

CASE LAW

Below, we canvass both the cases that support the argument that the Act is constitutionally invalid because it violates the rule of law, and the cases that suggest otherwise. It is not always clear why the rule-of-law argument succeeded in some of these cases and not in others. However, we posit that where judges may have seen the impugned legislation as having a more important policy objective, with a more significant and positive societal impact, they may have been less inclined to set legislation aside based on the rule of law. Conversely, they may have been more open to setting the legislation aside based on the rule of law if they saw the objective of the legislation as being less important. Of course, the ranking of objectives is somewhat subjective, and our analysis does not rest on a particular discussion of these degrees of importance (or how they might figure into the result) in the cases themselves. With this qualification, to the extent that the policy objectives of the Act could be seen as relatively modest, there may be a greater chance of the Act being set aside based on the rule of law than other legislation with more compelling policy objectives.

The Supreme Court of Canada's decision in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*[12] is seminal in finding

legislation to be unconstitutional because it denied access to justice in a manner inconsistent with s. 96 of the *Constitution Act, 1867* and the unwritten constitutional principle of the rule of law.[13] The B.C. court rules at the time required that a party pay hearing fees for trials lasting longer than three days in order to obtain a trial date. The applicant, a self-represented litigant in a family law proceeding, was involved in a lengthy trial and at the outset asked the judge to relieve her from paying the hearing fees, as she could not afford to pay them. The rules exempted persons from paying the hearing fees if they were impoverished, but the litigant was not, though had limited means. The judge reserved judgment and invited the Trial Lawyers Association of British Columbia, the Attorney General of British Columbia and the Canadian Bar Association (B.C. Branch) to make submissions as interveners. The trial took over ten days, and the hearing fees of $3,600 were almost equal to the applicant's net family monthly income. The trial judge held that the hearing fee provision was unconstitutional and struck it down. The Court of Appeal agreed that the provision was unconstitutional, but rather than striking it down, declared the existing exemption to be available to persons "in need". On further appeal, the Supreme Court of Canada held that the hearing fee scheme was unconstitutional because it prevented access to the courts. As two commentators explain:

> In concluding that the hearing fee scheme is unconstitutional, the majority of the Supreme Court of Canada appears to do two key things. First, it has extended the constitutional right to access superior courts. Previous case law on section 96 had largely focused on the extent to which the government could pare away at the court's inherent jurisdiction to create administrative law tribunals and statutory courts. Now the concept has been extended to incorporate a right to the removal of barriers to accessing the court's jurisdiction. In doing so, the majority incorporates access to justice into the broader constitutional principles that flow from section 96 and seems to give access to justice the status of an unwritten constitutional principle. In this way, access to justice (like judicial independence) may become a basis to invalidate legislation in its own right. ...[14]

More recently, in *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, the B.C. Court of Appeal described access to justice as "a core constitutional principle rooted in the rule of law and critical to its maintenance".[15] The plaintiff association challenged the constitutionality of B.C. legislation related to the provision of non-consensual psychiatric health care treatment based on ss. 7 and 15 of the *Charter*. The chambers judge summarily dismissed the action on the basis that the plaintiff lacked public interest standing. In the course of reinstating the action and remitting the standing question for reconsideration, the Court of Appeal stated that public interest standing "enables the courts to fulfill their constitutional

role of scrutinizing the legality of government action, striking it down when it is unlawful and thus establishing and enforcing the rule of law".[16] Quoting *Trial Lawyers*, the Court of Appeal stated:

> [74] ... 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. 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 ...

After the Supreme Court of Canada in *Trial Lawyers* held that the hearing fees were unconstitutional because the exemptions in place did not give sufficient discretion to trial judges to exempt litigants from having to pay in appropriate circumstances, the rules of court were amended. The amended hearing fee regime was challenged in *Cambie Surgeries Corporation v. British Columbia (Attorney General)*.[17] The Court of Appeal declined to declare the hearing fee regime unconstitutional because, among other reasons, the plaintiffs had not established that the fees were a barrier to access to justice. Although the plaintiffs asserted violations of ss. 7 and 15 of the *Charter*, and not breach of the rule of law, the Court of Appeal's reasons are helpful as they review and affirm passages in earlier jurisprudence underscoring the importance of access to justice.

The Alberta Court of Appeal recently applied *Trial Lawyers* in *Jonsson v. Lymer*.[18] The self-represented defendant was an undischarged bankrupt pursued by investors trying to trace their lost funds given to him in an investment scheme. The investors sought sanctions against him for his contempt of a production order and requested that he be declared a vexatious litigant. The case management judge granted the vexatious litigant order and imposed a sentence of 30 days' imprisonment for his contempt. The Alberta Court of Appeal set aside these orders and stated:

> [10] It is important to remember the constitutional context. The rule of law, which is one of the foundational concepts of the constitution, has many facets. One is that no person is above the law; all citizens are to be subject to the same law, regardless of social status, wealth, or high office. Requiring every citizen to obey the law is an empty concept unless there is some way of holding everyone to account. The rule of law thus requires the establishment of a universal "superior" court of general jurisdiction, to which all citizens are subject. Universal access to the courts is therefore an important component of the rule of law, allowing every citizen to hold every other citizen to account.
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> [11] It follows that any restriction or impediment to court access must be carefully monitored. ...

One of the early cases establishing that access to justice is protected by the rule of law is *Pleau v. Nova Scotia (Prothonotary)*,[19] a decision of the Nova Scotia

Supreme Court. Pleau and others applied for a ruling on the constitutional validity of regulations that increased existing court fees and created new fees. The court fees were imposed in part to help pay for new technologies. In our view, the relatively modest objective of these regulations may have made the judge more comfortable in making a finding of unconstitutionality. Although *Charter* and certain other arguments were dismissed, the court held that the hearing fees unduly hindered or denied access to the courts. The effect of the fees was to put a price on accessing the courts, to which there is a constitutionally guaranteed right. The chambers judge stated:

> [65] Access to justice is neither a service nor a commodity. It is a constitutional right of all citizens; any impediments must be strictly scrutinized. Regardless of whether the impediment takes the form of a tax, a fee, an allowance, or some other form, it will, and must fail if its effect is to unduly "impede, impair or delay access to the courts".

Another early case of note is *Polewsky v. Home Hardware Stores Ltd.*,[20] from the Ontario Superior Court of Justice (Divisional Court). The plaintiff sought a declaration that the Small Claims Court tariff fees for setting a matter down for trial violated the *Charter*. This argument failed at first instance but succeeded on appeal. The *Charter* arguments were not successful, but the appeal court held that under the rule of law and at common law there was a conditional right of access to the courts. It stated:

> [76] We agree that the Rule of Law infuses this court's determination of the issues raised in this appeal. We say that the existence of the Rule of Law combined with what we find to be the common law constitutional right of access to justice compels the enactment of statutory provisions that permit persons to proceed in forma pauperis in the Small Claims Court.

Again, in our view, the social objective of the fees was relatively modest, perhaps again providing some reassurance to the court in making its finding.

Of course, as noted earlier, not all cases that have considered rule-of-law arguments led to outcomes favourable to those challenging the enactment at issue. The most significant Supreme Court of Canada case casting doubt on the rule-of-law argument is *British Columbia v. Imperial Tobacco Canada Ltd.*[21] *Imperial Tobacco* dealt with British Columbia's *Tobacco Damages and Health Care Costs Recovery Act*, which allows the provincial government to sue tobacco manufacturers to recover the cost of health care benefits caused or contributed to by a "tobacco-related wrong". This effort by the B.C. government to hold the tobacco companies to account arguably had a significant societal objective, in contrast to some cases in which rule-of-law arguments were accepted. By extension, one might posit that this objective's significance constrained judges' willingness to invalidate the legislation on this basis. Notably, this legislation was a second attempt: prior

legislation had been held to be unconstitutional. The second statute was drafted to avoid concerns about the extraterritorial aspects of the earlier statute and avoid further challenges.

The tobacco companies argued that the second statute was unconstitutional because it violated territorial limits on provincial legislative jurisdiction, the principle of judicial independence and the rule of law. Regarding the rule of law, Major J. undertook the following textual analysis:

> [66] ... the appellants' arguments fail to recognize that 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. ...
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> [67] 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.
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> ...
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> [76] Additionally, the appellants' conception of a "fair" civil trial seems in part to be of one governed by customary rules of civil procedure and evidence. ... [T]here is no constitutional right to have one's civil trial governed by such rules. Moreover, new rules are not necessarily unfair. ...

The Alberta Court of Queen's Bench applied this textual analysis in *Alberta v. Kingsway General Insurance Co*.[22] That case considered legislation that froze auto insurance premiums, arguably with a larger societal objective of addressing potential abuses in the auto insurance industry, which affects most citizens. On our theory, the importance of that objective may have discouraged the court from finding the legislation to be unconstitutional. Kingsway sued the Alberta government, claiming losses for rewriting existing policies and for eliminated rate increases. Later legislation included a provision extinguishing rights of action against the government. Kingsway argued the legislation was unconstitutional and contrary to the rule of law, among other things. The court dismissed these arguments and found it to be constitutional. Kingsway relied on *BCGEU*, *Pleau* and *Polewsky*, as well as European cases, and argued the rule of law prevented interference by statute with the judicial process. In response, the government argued that Canadian jurisprudence did not establish the rule of law as an independent basis for striking down legislation. The court cited the principle that laws are presumed to be constitutionally valid until shown to be otherwise.

The rule-of-law reasoning in *Trial Lawyers* follows very closely the B.C. Court of Appeal's decision in *Christie v. British Columbia*.[23] *Christie* involved a constitutional challenge to B.C. legislation that imposed a seven per cent tax on the purchase of legal services, ostensibly to fund legal aid. Christie

was a litigator providing legal services to low-income clients; with the tax, his clients could no longer afford his services. The trial judge in *Christie* had characterized the issue as whether the state could impose an additional financial burden on those seeking legal services, as opposed to whether the government must provide and pay for legal counsel in any matter requiring legal services, and the Court of Appeal accepted this characterization. It found the legislation to be unconstitutional because the tax breached the fundamental constitutional right to access to justice for low-income persons. As one commentator notes, "the majority would have struck down the tax as an unconstitutional infringement of the rule of law to the extent that it applied to 'legal services related to the determination of rights and obligations by courts of law or independent administrative tribunals'".[24] The Court of Appeal's decision was issued three months after the Supreme Court of Canada issued its textual analysis in *Imperial Tobacco*.

The Supreme Court of Canada subsequently overturned the Court of Appeal's decision.[25] The Supreme Court reframed the issue as whether there was a general right protected by the constitution to have access to legal counsel in any court case. Thus, the Court of Appeal's understanding of access to justice as protected by the rule of law was undermined. The Supreme Court held that the right to access the courts was not absolute and that the B.C. legislature had the power under s. 92(14) of the *Constitution Act, 1867* to impose at least some conditions on how and when people have a right to access to the courts. General access to legal services was not a recognized aspect of or a precondition to the rule of law. The court stated:

> [17] The right affirmed in *B.C.G.E.U.* is not absolute. The legislature has the power to pass laws in relation to the administration of justice in the province under s. 92(14) of the *Constitution Act, 1867*. This implies the power of the province to impose at least some conditions on how and when people have a right to access the courts. Therefore *B.C.G.E.U.* cannot stand for the proposition that every limit on access to the courts is automatically unconstitutional.

The legislation in *Christie* was originally challenged in *John Carten Personal Law Corp. v. British Columbia (Attorney General)*[26] on the basis that it unconstitutionally inhibited access to justice. The case was dismissed because the plaintiff failed to show that any person had in fact been denied access to legal services as a result of the tax. The majority's reasoning, however, suggested that if the plaintiff had led such evidence, the constitutional argument might have prevailed.[27] Chief Justice McEachern, in dissent, considered the tax to impose an additional burden on *Charter* litigants.

It has since been argued that the dissent in *Carten* was adopted by the B.C. Court of Appeal in *Christie*, so should be given weight.[28] This argument

has been given short shrift in cases noting that the B.C. Court of Appeal's decision in *Christie* was overturned by the Supreme Court of Canada.

The Supreme Court of Canada's decision in *Christie* was applied for the principle that "[i]t is clear that legislatures have the right to restrict access to the courts" in *908077 Alberta Ltd. v. 1313608 Alberta Ltd.*[29] The Alberta Court of Queen's Bench held that non-lawyers did not have the right to represent corporate litigants, and considered the implications of that for access to justice. The court commenced by stating that it was clear that legislatures have the right to restrict access to the courts, relying on *Christie*, then quoted from it as follows: "the constitutional text, the jurisprudence and the history of the concept does not support the respondent's contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law".[30]

Imperial Tobacco and *Christie* were applied by the B.C. Court of Appeal in *J. Cote & Son Excavating Ltd. v. Burnaby (City)*[31] to hold that the rule of law does not ground an independent right to access the courts and, further, that *Trial Lawyers* ties the efficacy of the rule of law inextricably to the judicial function of the court under s. 96 of the *Constitution Act, 1867* such that the rule of law did not operate alone. The plaintiff contractor submitted a tender for work with the City of Burnaby. The city had a clause in its tender documents precluding bids from contractors involved in litigation with the city in the prior two years. The plaintiff argued the clause was of no force and effect because it unjustifiably infringed the rule of law. The trial judge held these constitutional protections were subject to permissible limits and dismissed the application. The B.C. Court of Appeal dismissed the appeal, holding the clause did not infringe a constitutionally protected right of access to the civil superior courts. It adopted the textual approach of *Imperial Tobacco* and concluded:

> [22] The jurisprudence establishes the rule of law does not provide an independent, stand-alone protection of access to the civil courts. Instead, the rule of law supports the *Charter* and is inextricably linked to the judicial function in s. 96 of the *Constitution Act, 1867*. ...

Most recently, in *Toronto (City) v. Ontario (Attorney General)*,[32] a majority of the Supreme Court of Canada upheld Ontario legislation that redrew ward boundaries and reduced the number of wards in Toronto, reducing the size of council. In rejecting the City's argument that the legislation violated unwritten constitutional principles, the majority stated that, although unwritten principles such as democracy and the rule of law "form part of the context and backdrop to the Constitution's written terms", they "cannot serve as bases for invalidating legislation".[33] The majority also clarified that,

in *Trial Lawyers*, the rule of law was used as "an interpretive aid", not as "an independent basis for invalidating the impugned court fees".[34]

CONCLUSION

The rule of law may provide a strong secondary argument for challenging the Act. A challenge on a rule-of-law basis is well supported in the case law, notwithstanding contradictory authorities. The relatively modest societal objectives that may be associated with the Act—placing restrictions on adducing expert reports in a tort action for damages arising from a motor vehicle accident—may make this legislation more akin to the enactments that have been successfully challenged based on the rule of law, rather than to those against which rule-of-law challenges have failed.

However, given the existence of those contradictory authorities, violation of the rule of law may be more vulnerable to rebuttal as a ground for challenging the constitutionality of the Act than the first ground (violation of the core jurisdiction of a s. 96 court), which we discussed in the first part of our analysis.[35] It may be for this reason that Hinkson C.J.S.C. hung his hat on that first ground in *Crowder v. British Columbia (Attorney General)*.[36]

ENDNOTES

1. SBC 2020, c 7.
2. "Is the New Law Relating to Expert Witnesses in Motor Vehicle Cases Legal? Constitutional Challenges to the *Evidence Amendment Act, 2020*" (2020) 78 Advocate 841.
3. 2015 ABQB 25 at paras 1–2.
4. [1988] 2 SCR 214 [*BCGEU*].
5. Andrea A Cole & Michelle Flaherty, "Access to Justice Looking for a Constitutional Home: Implications for the Administrative Legal System" (2016) 94 Can Bar Rev 13 at 23.
6. *BCGEU*, *supra* note 4 at 228–29.
7. *Ibid* at 229–30.
8. 2014 SCC 7.
9. Cole & Flaherty, *supra* note 5 at 28.
10. British Columbia, *Official Report of Debates (Hansard)*, 41st Parl, 5th Sess, No 325 (5 March 2020) at 11587 (Hon D Eby), online: <www.leg.bc.ca/content/hansard/41st5th/20200305pm-Hansard-n325.pdf>.
11. British Columbia, *Official Report of Debates (Hansard)*, 41st Parl, 5th Sess, No 323 (4 March 2020) at 11530–37, online: <www.leg.bc.ca/content/hansard/41st5th/20200304pm-Hansard-n323.pdf>.
12. 2014 SCC 59 [*Trial Lawyers*].
13. Christian Morey, "A Matter of Integrity: Rule of Law, the *Remuneration Reference*, and Access to Justice" (2016) 49:1 UBC L Rev 275 at 300–01.
14. Cole & Flaherty, *supra* note 5 at 33.
15. 2020 BCCA 241 at para 74, leave to appeal granted 2021 CanLII 24821 (SCC).
16. *Ibid* at para 2.
17. 2018 BCCA 385 [*Cambie Surgeries*], leave to appeal refused 2019 CanLII 37488 (SCC).
18. 2020 ABCA 167.
19. (1999), 186 NSR (2d) 1 (SC) [*Pleau*].
20. (2003), 66 OR (3d) 600 (SCJ (Div Ct)) [*Polewsky*].
21. 2005 SCC 49 [*Imperial Tobacco*].
22. 2005 ABQB 662.
23. 2005 BCCA 631. See the discussion in Ayn James Johnson, "*Imperial Tobacco* and *Trial Lawyers*: An Unstable and Unsuccessful Retreat" (2019) 57:1 Alta L Rev 29 at 48.
24. Morey, *supra* note 13 at 297.
25. 2007 SCC 21 [*Christie*].
26. (1997), 40 BCLR (3d) 181 (CA) [*Carten*].
27. Morey, *supra* note 13 at 296–97.
28. See *Cambie Surgeries*, *supra* note 17 at para 15.
29. 2015 ABQB 108.
30. *Ibid* at para 52, quoting *Christie*, *supra* note 25 at para 23.
31. 2019 BCCA 168, leave to appeal refused 2019 CanLII 117831 (SCC).
32. 2021 SCC 34.
33. *Ibid* at paras 50, 63
34. *Ibid* at para 75.
35. *Supra* note 2.
36. 2019 BCSC 1824.