Is the New Law Relating to Expert Witnesses Legal? Constitutional Challenges to *The Evidence Amendment Act, 2020*

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Introduction

The NDP government in British Columbia has stated its intention to implement no-fault automobile insurance, and as part of this general legislative initiative has amended the *Evidence Act* of British Columbia in Bill 9, the *Evidence Amendment Act, 2020*, which received Royal Assent on July 8, 2020. The NDP government is of the view that ICBC is incurring huge losses because there has been a significant increase in the number of claims for automobile insurance accidents as against ICBC, and further the damage award value of the claims has been increasing because of the use of too many "adversarial expert witnesses" by the plaintiff's bar. They assert that the "use of duelling adversarial experts" has the effect of "artificially driving up claim amounts" and increasing expenses.[i] With this view, they have enacted legislation to limit the amount of expert witnesses the plaintiff can call in an automobile personal injury accident regarding damages to three, with only one report from each expert,[ii] subject to the number of expert witnesses being increased by leave of the court following a finding that a stipulated test is satisfied.[iii] In the event the litigation is a "fast track vehicle injury proceeding" only one expert may give evidence, with one report, subject to leave of the court on the same test.[iv] They are seeking to compel the use of joint experts and court-appointed experts, which they characterize as "non-adversarial experts". They also propose to prescribe by regulation after the enactment of the *Evidence Amendment Act, 2020* to limit the fee that can be paid to an expert as to damages to $3000,[v] and to limit the overall amount of disbursements that can be paid in an automobile personal injury action to 5% of the total amount recovered.[vi] These regulations have not been enacted to date.[vii] The bill will have retroactive effect for all lawsuits that have trial dates occurring after October 1, 2020. Further, the government has indicated that although the *Evidence Amendment Act, 2020*

will apply only to motor vehicle personal injury litigation, they intend to expand its application more broadly in tort litigation, and thus there is much at stake.

In 2019 the NDP government first attempted to affect these restrictions on civil litigation procedure by enacting changes to the British Columbia Rules of Court by way of Orders in Council. These amending rules did not provide for any discretion in the trial judge to allow greater than three expert witnesses. This bill was struck down by Hinkson CJSC of the British Columbia Supreme Court on October 24, 2019 in ***Crowder v. British Columbia (Attorney General)***, 2019 BCSC 1824, 31 BCLR (6th) 127. Hinkson CJSC found the Orders in Council to be unconstitutional because they violated the core jurisdiction of a section 96 court and were thus a contravention of s. 96 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict. c. 3. Although an argument was also made by the plaintiffs that the Orders in Council were unconstitutional because they violated the unwritten constitutional principle of the rule of law by impeding access to justice, Hinkson CJSC declined to decide this point.

The NDP government then introduced Bill 9, which received Royal Assent on July 8, 2020 as the *Evidence Amendment Act, 2020*, S.B.C. 2020 c. 7. Bill 9 is substantially the same as the previous attempt to effect procedural changes by way of Orders in Council, except that it introduces the amendments through the *Evidence Act*, as opposed to the Rules of Court, and allows a trial judge discretion to allow for greater than three expert witnesses, or one in the case of a fast track proceeding, if a stipulated test is met. The Act allows for the court to allow for additional experts if "the subject matter of the additional evidence to be tendered is not already addressed by expert evidence of the party" and "without the additional expert evidence, the party making the application would suffer prejudice disproportionate to the benefit of not increasing the complexity and cost of the proceeding".[viii]

There appear to be five bases upon which a constitutional challenge can be launched as against *The Evidence Amendment Act, 2020*:

1. The *Evidence Amendment Act, 2020* is constitutionally invalid as it violates the core jurisdiction of a section 96 court.
2. The *Evidence Amendment Act, 2020* is constitutionally invalid as it violates the rule of law, an unwritten constitutional principle, as it denies access to justice.
3. The *Evidence Amendment Act, 2020* is constitutionally invalid as it violates the rule of law as the legislation is so vague and arbitrary as to undermine the legal relationship between the individual and the state.
4. The *Evidence Amendment Act, 2020* is skeletal legislation which, being too broad, results in *ultra vires* regulations.
5. The *Evidence Amendment Act, 2020* violates s. 15 of the *Charter of Rights and Freedoms* as it discriminates against lower income British Columbians who are less able to spend the money required to advance their personal injury lawsuit, in view of the proscriptions of a $3000 cap on the amount payable for an expert report and the 5% cap on overall disbursements.

This article will examine ground 1 in detail and leave development of the further four grounds for a future day in court.

<u>The *Evidence Amendment Act, 2020* is constitutionally invalid as it violates the core jurisdiction of a section 96 court.</u>

If there is a constitutional challenge to the *Evidence Amendment Act, 2020*, it can be anticipated that the government will state that the concerns of Hinkson CJSC have been overcome in that it is the *Evidence Act* that is being amended, as opposed to the Rules of Court, and the trial judge now has discretion to allow a greater number of expert witnesses provided that the stipulated test is met.

In fact, on a close reading of the ***Crowder*** decision, it is clear that Hinkson CJSC found that the core jurisdiction of a section 96 court was violated **because the proposed legislation cast the court in an investigatory role, rather than the traditional role of the Court as impartial adjudicator in an adversarial proceeding, and was contrary to the principle of party presentation**. Instead of leaving it to the litigants to meet their burden of proof by adducing the necessary evidence, the Act places a duty on the court to ensure that it has sufficient expert

evidence before it determines a proceeding on its merits. Further, the use of joint and court appointed experts also diverges from the principle of party presentation.

Hinkson CJSC found that a core function of the section 96 court was violated as the legislation would require judges to depart from their traditional non—adversarial role and consider how a case might be best presented, contrary to the principle of party presentation, as follows:

> **166** I find that the caution expressed by Mr. Justice Iacobucci and Madam Justice Arbour, for the majority, in *Application under s. 83.28 of the Criminal Code (Re)*, *2004 SCC 42*, is also applicable in this case:
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> > ... **once legislation invokes the aid of the judiciary, we must remain vigilant to ensure that the integrity of its role is not compromised or diluted**. Earlier in these reasons we endorsed a broad and purposive approach to the interpretation of s. 83.28. This interpretation is consistent not only with the presumption of constitutional validity, but also with the traditional role of the judiciary. **The function of the judge in a judicial investigative hearing is not to act as "an agent of the state", but rather, to protect the integrity of the investigation and, in particular, the interests of the named person *vis-à-vis* the state.**
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> **167 This principle is applicable to the petition before me because under the impugned Rule, the court would be asked to play an investigatory function by appointing expert witnesses, in contrast to its usual impartial, adjudicative role.**
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> . . .
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> **172** Instead, the impugned Rule places the court in a role that it should not be placed in. **Transferring the responsibility of ensuring that there is relevant evidence upon which to decide the issues in a personal injury case from the parties to the court does, in my view, intrude upon what has, to date, been the core function of the court: to decide a case fairly upon the evidence adduced by the parties**.
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> **173 The Attorney General's submission that more reliance ought to be placed on court-appointed experts misconstrues the role and the ability of the court.**
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> **174 The use of court-appointed expert witnesses is inconsistent with the traditional means of litigating legal disputes in Canada. In *R. v. Mian*, *2014 SCC 54*, with reference**

to a criminal prosecution, Mr. Justice Rothstein wrote at para. 38:

> **Our adversarial system of determining legal disputes is a procedural system "involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker" (*Black's Law Dictionary* (9th ed. 2009), *sub verbo* "adversary system"). An important component of this system is the principle of party presentation, under which courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present" (*Greenlaw v. United States*, 554 U.S. 237 (2008), at p. 243, *per* Ginsburg J.).**
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> **175 Unless and until the evidence that the parties have chosen to lead has been adduced, the court has no way of determining what further evidence might be needed, and no way of obtaining that evidence if it is thought to be required.**
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> **176 If it is thought that the court would engage in a planning exercise with counsel prior to trial in order to determine what evidence is needed, it would require judges to depart from their traditional non-adversarial role, and consider how a case might be best presented, contrary to the principle of party presentation.**
> [Emphasis added.]

Hinkson CJSC referenced the leading 2014 Supreme Court of Canada case of ***Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)***, 2014 SCC 59, [2014] 3 SCR 31. As reviewed by Alyn James Johnson in "Imperial Tobacco and Trial Lawyers: An Unstable and Unsuccessful Retreat" (2019), 57:1 Alta L Rev 29 there has been for some time a struggle in constitutional litigation between a "textual approach", in which constitutional terms must be sourced in express terms of the text of the Constitution before they can form the basis of an argument to overrule legislation, (which found its high watermark in ***British Columbia v. Imperial Tobacco Canada Ltd***., 2005 SCC 49, [2005] 2 SCR 473), and the "architectural model" which has an informing core of organizing principles engaging both written and unwritten constitutional rules such as the rule of law as a basis upon which to overrule legislation, (which found its high watermark in ***Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)***, 2014 SCC 59; [2014] 3 SCR 31). As stated by Johnson: "The textualist project of Imperial Tobacco essentially collapses in Trial Lawyers."[ix]

BC Trial Lawyers is seminal in that it found legislation to be unconstitutional as it denied access to justice in violation of the unwritten constitutional principle of the rule of law. Most notable about this case, however, for the purposes of the argument that the *Evidence Amendment Act, 2020* is unconstitutional as it violates the core jurisdiction of a section 96 court, is that it anchors the finding of a breach of the rule of law because of denial of access to justice within the foundation of the inviolability of the core jurisdiction of the section 96 court. (In ***Crowder***, arguments for the unconstitutionality of the Orders in Council were made on both bases: violation of the rule of law by denial of access to justice, and violation of the core jurisdiction of a section 96 court. Because Hinkson CJSC had accepted the section 96 argument, he found that he did not need to decide the rule of law argument.)

In ***BC Trial Lawyers*** the court rules applicable in British Columbia 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 of the hearing she asked the judge to relieve her from paying the hearing fees as she could not afford to pay them. The rules exempted a person from paying the hearing fees if they were impoverished, but the litigant was not impoverished, although she was of limited economic means. The judge reserved his ruling and invited the following interveners to make submissions: the BC Trial Lawyers of British Columbia, the Attorney General of British Columbia, and the British Columbia chapter of the Canadian Bar Association. The trial took over 10 days and the hearing fees of $3600 amounted to a sum almost equal to the applicant's net family monthly income. In the result the judge held that the provincial legislature did not have the constitutional authority to materially hinder access to justice and that the obligation to pay hearing fees was therefore of no force and effect. The trial judge was upheld by the British Columbia Court of Appeal, although rather than strike down the hearing fee requirement the appellate court declared the existing exemption to be read as available to persons who were impoverished "or in need". On further appeal the Supreme Court of Canada found the existing exemption to the hearing fee to be unconstitutional.[x]

In the words of McLachlin CJ, for the majority at para 39:

> **The s 96 judicial function and the rule of law are inextricably intertwined**. As Lamer CJ stated in *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725, '[i]n the constitutional arrangements passed on to us by the British and recognised by the preamble to the 1867 Act, **the provincial superior courts are the foundation of the rule of law itself**' (at para 37). The very rationale for the provision is said to be 'the maintenance of the rule of law through the protection of the judicial role': *Provincial Judges Reference* [1997] 3 SCR 3 at para 88. **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**. [Emphasis added.]

She concluded at para 64:

> I conclude that the hearing fee scheme prevents access to the courts in a manner inconsistent with s 96 of the constitution and the underlying principle of the rule of law. It therefore falls outside the province's jurisdiction under s 92(14) to administer justice.

The *ratio* of the Supreme Court of Canada decision is explained in Andrea A. Cole and Michelle Flaherty, “Access to Justice Looking For A Constitutional Home: Implications For The Administrative Legal System” (2016), 94 Can Bar Rev 13 at para 31:

> **31** A majority of the Supreme Court of Canada held that the province had the constitutional jurisdiction to impose hearing fees, but that this power must be exercised in a way that is consistent with constitutional principles, including the inherent jurisdiction of the superior courts. The majority concluded that section 96 of the Constitution Act, 1867, supported by the rule of law, provides a general right to access the courts. The majority explained that: "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[.]"The Supreme Court of Canada's jurisprudence has long recognized that the jurisdiction of what are referred to as section 96 courts is constitutionally protected and cannot be removed by either level of government without a constitutional amendment. By extension, because the heart of courts' work is to resolve legal disputes, hearing fees that prevent people from accessing the courts infringe on the core jurisdiction of the courts and are unconstitutional.

And further at para 36:

> **36** 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. Second, the majority fundamentally shifts the Supreme Court of Canada's access to justice rhetoric. Until now, the Court had not addressed access to justice in terms of the inherent jurisdiction of the courts but had focused on the connection between the rule of law and access to justice.

The anchoring of the constitutional right of access to justice to the inviolability of the core jurisdiction of a section 96 court is further noted by Christian Morey in "A Matter of Integrity: Rule of Law, The Remuneration Reference, and Access to Justice" (2016), 49 UBC L Rev 275 at para 44:

> **44** Upon further appeal, a majority of the Supreme Court of Canada (per McLachlin CJC) affirmed that the existing exemption was unconstitutional. In the majority's view, subsection 91(24) of the Constitution Act, 1867 grants to the provinces the power to impose at least some administrative constraints on the manner in which people are able to access the courts; however, this section is to be read and interpreted in conjunction with the terms of section 96 of the Constitution Act, 1867, as well as the unwritten principle of the rule of law. On this view, the legislative power should not be read as including the power to affect the "core jurisdiction" of the courts as established by section 96. The majority reasons note that the power to resolve disputes and decide questions of public and private law constitutes the basic judicial function of the courts. If prospective litigants are unable to access the courts, this function is thwarted; hence, the requirement that such access should not be hindered by legislation "flows by necessary implication" from the terms of section 96. The majority also noted that this conclusion is further supported by considerations relating to the rule of law; in particular, access to the courts is necessary in order to ensure that the positive laws of the state may be given effect. . . .

Rothstein J in dissent in ***BC Trial Lawyers*** deplored reliance on the unwritten constitutional principle of the rule of law and argued for a textual analysis. As there was no express constitutional right to access the civil courts without paying hearing fees, in the absence of a violation of a clear constitutional provision, he held that the judiciary should defer to the policy choices of the government and legislature.

As noted by Hinkson CJSC in ***Crowder***, perhaps the earliest Supreme Court of Canada authority to overrule legislation because it threatened the core jurisdiction of a section 96 superior court is ***MacMillan Bloedel Ltd. v. Simpson***, [1995] 4 SCR 725, wherein Chief Justice Lamer, who wrote the majority decision, in addition to the passages noted by Hinkson CJSC, also stated at paras 37-38:

> Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected. **In Canada, the provincial superior court is the only court of general jurisdiction and as such is the centre of the judicial system. None of our statutory courts has the same core jurisdiction as the superior court and therefore none is as crucial to the rule of law.** To remove the power to punish contempt ex facie by youths would maim the institution which is at the heart of our judicial system. **Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment**.
>
> **The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law**. It is unnecessary in this case to enumerate the precise powers which compose inherent jurisdiction, as the power to punish for contempt ex facie is obviously within that jurisdiction. [Emphasis added.]

There is a further decision of Hinkson CJSC on the section 96 argument that is of interest. In ***Single Mothers' Alliance of BC Society v British Columbia***, 2019 BCSC 1427, 443 CRR (2d) 68 the Single Mothers' Alliance challenged the constitutionality of British Columbia's family law legal aid regime. The primary arguments were that it violated sections 7 and 15 of the *Charter of Rights and Freedoms*, but they also alleged that it violated section 96 of the *Constitution Act, 1867*. The defendants applied to have the pleadings struck as disclosing no reasonable claim and in the result Hinkson CJSC allowed the claim to proceed.

With respect to the section 7 *Charter* argument, the plaintiffs claimed that the impugned legal aid scheme denied the woman litigants of limited or moderate means engaged in family law proceedings access to the legal services they needed to effectively participate in the proceedings and obtain the remedies they needed to protect themselves and their children from family violence or abuse. Hinkson CJSC held on this point at para 112:

> While I agree that s. 7 does not currently impose positive obligations on the state to ensure that each person enjoys life, liberty or security of the person, given the comment of Chief Justice McLachlin in *Gosselin* that "[o]ne day s. 7 may be interpreted to include positive obligations", and the holdings in *Adams, Bedford*, and *PHS*, I am unable to say that the plaintiffs' claim under s. 7 of the *Charter*, erring on the side of permitting a novel but arguable case to proceed to trial as the test requires, has no prospect of success.

The plaintiffs advanced a section 15 *Charter* argument on the basis that the legal aid scheme widened the gap between the claimants and the rest of society because their pre—existing disadvantages were perpetuated by lack of access to lawyers in family law proceedings. Hinkson CJSC also held that it was not clear there was no prospect of success for this claim.

The province argued with respect to the section 96 claim that although section 96 conferred a right of access to the superior courts, this access did not require the government to provide state – funded legal counsel. The plaintiffs argued:

> **147** The plaintiffs contend that it is not plain and obvious that the SMA's claim under s. 96 will fail. The impugned legal scheme, they say, creates unlawful barriers for women litigants of limited or moderate means to access the superior courts in family law proceedings. Access to justice is essential to the rule of law, and because the impugned legal scheme limits access to the superior courts, the plaintiffs contend that it prevents the courts from complying with their basic judicial function of resolving disputes between individuals, and infringes s. 96 of the *Constitution Act, 1867*. The scope of that protection has yet to be determined in the context of ensuring meaningful access to a court process that is mandated by legislation.

Hinkson CJSC held that in view of the guidance that he should err on the side of permitting a novel but arguable claim to proceed to trial, he could not conclude that the plaintiff's claims under section 96 had no reasonable prospect of success.

Thus a challenge to the *Evidence Amendment Act, 2020* can be advanced on the basis that a core function of a section 96 court is still being violated as the section 96 court continues to be cast in an investigatory role, as opposed to the role of impartial adjudicator in an adversarial proceeding, and the principle of party presentation continues to be violated. Notwithstanding that Bill 9 gives the trial judge discretion to allow a greater number of expert witnesses on damages if the

stipulated test is met, it continues to place a duty on the court to ensure that it has sufficient expert evidence before it determines a proceeding on its merits, rather than leaving it to the litigants to meet their burden of proof by adducing the necessary evidence. The continued emphasis on the use of joint and court appointed experts also continues to diverge from the principle of party presentation.

END

[i] Per Hon. D. Eby in second reading of the bill, Hansard, Wednesday March 4, 2020 afternoon sitting at 5:25 pm

[ii] Per section 12.1(2)(a). In addition to medical reports, the following expert reports could, for example, also be limited: cost of future care reports, economists' reports, life planner reports, vocational care reports and physio and occupational therapy reports. (Per Hon. D. Eby in debate as a Committee of the Whole, Hansard, Thursday March 5, 2020 afternoon sitting at 2:05 pm)

[iii] Per section 12.1(5)

[iv] Per section 12.1(2)(b)

[v] The $3000 amount is based on ICBC data that half of the expert reports currently being reimbursed by ICBC cost $3000 or less. Expert reports reimbursed by ICC can range anywhere from $1000 to $10,000 depending on the complexity of the report and the rate charged by the expert.(Per Hon. D. Eby in debate as a Committee of the Whole, Hansard, Thursday March 5, 2020 afternoon session at 4:50 pm)

[vi] The 5% limit is based on the current level of reimbursement of disbursements made by ICBC in about 70% of the cases. (Per Hon. D. Eby in debate as a Committee of the Whole, Hansard, Thursday March 5, 2020 afternoon session at 4:25 pm) This information is based on data sets available to the ICBC. Some fees will be excluded from the 5% cap, such as Crown and sheriff fees, filing fees, court fees, jury fees, disbursements where costs are assessed as special costs and disbursements for expert reports on liability where the court orders that they be excluded from the 5% cap. There is no other jurisdiction which imposes such a percentage cap on recoverable disbursements. (Per Hon. D. Eby in debate as a Committee of the Whole, Hansard, Thursday March 5, 2020 afternoon session at 2:10 pm)

[vii] As of the date of the last revision of this article. October 20, 2020, only the Expert Evidence Regulation, B.C. Reg. 210/2020 had been enacted, which does not provide for a $3000 cap on disbursements nor a 5% limit to the overall amount of disbursements that can be paid in an automobile personal injury accident.

[viii] Per section 12.1(6)

[ix] Alyn James Johnson, "Imperial Tobacco and Trial Lawyers: An Unstable and Unsuccessful Retreat" (2019), 57:1 Alta L Rev 29 at para 5

[x] Christian Morey, "A Matter of Integrity: Rule of Law, the Remuneration Reference, and Access to Justice" (2016), 49 UBC L Rev 275 at paras 43, 44