

B.C.'s hefty civil court fees struck down as unconstitutional

B.C. Justice Mark McEwan severely stomps the practice of making civil litigants pay thousands of dollars for their day in court

BY IAN MULGREW, VANCOUVER SUN MAY 22, 2012



Scales of justice.

Photograph by: Vancouver Sun files, .

After two years deliberation, B.C. Justice Mark McEwan has struck down Victoria's hefty civil court fees as unconstitutional.

In the 178-page ruling released Tuesday, Justice McEwan said that "some things cannot be for sale."

"The court is an essential forum of that common life, and cannot perform its necessary function if it, like so much else, is subject to the values of the marketplace the government has used to justify the fees."

The outspoken jurist, who recently attacked the province for starving the legal system of resources, called the fees a "bad idea" during 2010 proceedings.

But no one expected him to so severely stomp the practice of making civil litigants pay thousands of

dollars for their day in court - controversial levies that Victoria vigorously defended.

"Wow!" said lawyer Darrell Roberts, of the Trial Lawyers Association of B.C. who made submissions in the case.

"This is wonderful. I was never expecting this. He's done a great job."

Justice McEwan said civil litigants don't have to pay the exorbitant hearing day costs that Victoria argued had been a part of British justice for half a millennium.

He said the attorney general's approach to financing the courts revealed "a significant misunderstanding by the government of its responsibilities under, and the limitations on, its constitutional mandate..."

The justice pointedly quoted from the recent book - What Money Can't Buy, the Moral Limits of Markets - saying the "marketization of everything" is not good for democracy, "nor is it a satisfying way to live."

Given the current tension between the judges and the executive branch, his much-anticipated decision is even more pertinent and germane than two years ago when docket backlogs and resource scarcities were only beginning to be felt.

This constitutional throw-down arose from a typical family custody matter and its resolution could have far-reaching effects.

But lawsuits over the tragic 2006 sinking of the Queen of the North ferry were abandoned in part because of the hurdle posed by \$40,000 in fees and jury costs.

The public may not be an active participant in a private dispute between litigants, but Justice McEwan said it has an abiding and important interest in every case.

In this instance, a single woman pleaded that she should be spared the fees after losing a custody trial.

The legal tug of war with her ex-partner started in 2008 when the 43-year-old woman decided to return to Europe with her five-year-old daughter.

It cost her more than \$20,000 in lawyer's fees just to get to the eve of trial.

She then was forced to litigate herself because she couldn't pay the lawyer to appear in court.

Her husband, a University of B.C. instructor, also represented himself at the 10-day trial. Neither is happy: This expensive system failed both.

At the end of the proceedings, the woman asked Justice McEwan to waive the \$3,600 in court fees she owed.

But he said that unless she was declared indigent, he had no power to give her a break without declaring the fees unconstitutional.

At that point, he decided to hear arguments about their legitimacy.

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

Justice McEwan said because they were unconstitutional neither of the couple had to pay them.

The government had argued that the English and Welsh civil systems today are completely financed by user fees. If the litigant can't pay or is indigent and there is a provision for that.

In this province, Victoria said, court fees predate Confederation.

But B.C. hadn't collected such hearing-day fees since before the First World War and the present levies were imposed in 1998.

Victoria insisted the fees were intended to make the court more efficient and trials less lengthy.

But the Trial Lawyers Association of B.C. criticized the exorbitant and escalating tariffs saying Victoria was robbing the needy.

Roberts, who represented the lobby group, said the fees were abhorrent.

The Canadian Bar Association B.C. Branch said the fees make it impossible for people of modest means to have their day in court and disproportionately block first nations, the disabled, immigrants, lone

parents and women from access to justice.

In this case, the fees were more than the net income of a regular family for a month.

At the end of the last century, the Nova Scotia Supreme Court found similar hearing fees that increased with the length of the trial were unconstitutional.

That decision was never appealed.

The U.S. Supreme Court also has found such fees violated the American citizen's right to due process.

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