Civil Procedure
Winter Term 2024

Lecture Notes No. 1

I. INTRODUCTION

"Adversarial" Justice

Rule 1.04 (1)

> **General Principle**
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> 1.04 (1) These rules shall be liberally construed to secure the **just, most expeditious** and **least expensive** determination of every civil proceeding on its merits.

- **The importance of the adversarial principle cannot be overstated.** It colours the entirety of the field of litigation. As a matter of principle, adversarial proceedings may well be a very useful approach to dispute resolution. For the litigants, it is brutal.

- In normal circumstances the contest is fought by adversaries before a judge who acts as neutral umpire respecting the rules of the contest and its ultimate result. Whichever side convinces the trier of fact (judge or jury) on a **'balance of probabilities'** wins.

- While the Court is neutral, the realities of economic disparities and resources challenge the judge to ensure that the weaker party is not denied justice. Judges may have to provide some guidance to an unrepresented party just to keep the matter on track and allow other cases to be heard before the end of time.

- **Procedures should be proportional to what is at stake.** Lawyers should bear in mind what things cost and how long procedures take and should then mould them to suit the nature of the dispute and how much money is at stake – i.e. use some common sense (an underrated quality, much prized in practice).

What exactly are 'The Rules'?

There are various types and sources of procedural rules:

- There are regulations under the statutes that create the court in question which we refer to as "rules or procedure" or "rules of practice". We will be dealing primarily with the "Rules of Civil Procedure" that are created under the *Courts of Justice Act*, Section 66, for proceedings in the Superior Court and the Court of Appeal. We may touch on the intersection between the Rules of Civil Procedure and the Family Law Rules.

- Superior Courts (and some inferior courts) have an inherent jurisdiction to deal with procedural points.

- 'Practice Directions' issued by courts provide procedures in a given region for particular kinds of litigation.

Access to Justice

"Access to Justice" has become a catch-all phrase in relation to the ability of a person to have reasonable recourse to the law. While there is a lot of talk, there is unfortunately not a lot of money. Legal Aid has been cut back substantially in recent years causing a glut of self-represented litigants before the courts (nb: **there is no constitutional right to be represented by a lawyer)**. Where the courts have confronted such issues it is most often in relation to the imposition of additional road-blocks, such as fees charged for court time.

British Columbia (Attorney General) v. Christie
2007 SCC 21 (S.C.C.)

This case involved a British Columbia statute, the *Social Service Tax Amendment Act, 1992*, S.B.C. 1992, c. 22, which imposed a sales tax on legal services (payable by the lawyer delivering services even where the accounts were not paid by clients). The Applicant was a lawyer who took the position that the statute was unconstitutional particularly in that it be a disincentive for lawyers to take on matters for indigent clients. Ultimately the matter found its way to the SCC on the issue of whether there was a *general* Charter right to legal representation as an aspect of access to justice. The Court held there was no such general right although a right to counsel and representation might be constitutionally required in some situations (e.g. prosecution for serious crimes) on the strength of Sections 7 and 10(b). This is significant in that this "disparity of arms" does not prevent the normal procedures in civil proceedings being employed notwithstanding the imbalance of economic power between private litigants.

The Court held, *per curiam*:

> 10 **The respondent's claim is for effective access to the courts which, he states, necessitates legal services. This is asserted not on a case-by-case basis, but as a general right. What is sought is the constitutionalization of a particular type of access to justice — access aided by a lawyer where rights and obligations are at stake before a court or tribunal** (Court of Appeal, at para. 30). In order to succeed, the respondent must show that the Canadian Constitution mandates this particular form or quality of access. The question is whether he has done so. In our view, he has not.
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> 19 The rule of law is a foundational principle. This Court has described it as "a fundamental postulate of our constitutional structure"… that "lie[s] at the root of our system of government" …. It is explicitly recognized in the preamble to the Constitution Act, 1982, and implicitly recognized in s. 1 of the Charter, which provides that the rights and freedoms set out in the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"…
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> **20 The rule of law embraces at least three principles. The first principle is that the "law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power"…The second principle "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order"…The third principle requires that "the relationship between the state and the individual . . . be regulated by law"…**
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> 23 **The issue, however, is whether general access to legal services in relation to court and tribunal proceedings dealing with rights and obligations is a fundamental aspect of the rule of law. In our view, it is not. Access to legal services is fundamentally important in any free and democratic society. In some cases, it has been found essential to due process and a fair trial. But a review of 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.**
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> 24 The text of the Charter negates the postulate of the general constitutional right to legal assistance contended for here. It provides for a right to legal services in one specific situation. Section 10(b) of the Charter provides that everyone has the right to retain and instruct counsel, and to

be informed of that right "on arrest or detention". If the reference to the rule of law implied the right to counsel in relation to all proceedings where rights and obligations are at stake, s. 10(b) would be redundant.

25 Section 10(b) does not exclude a finding of a constitutional right to legal assistance in other situations. Section 7 of the Charter, for example, has been held to imply a right to counsel as an aspect of procedural fairness where life, liberty and security of the person are affected: see Dehghani v. Canada (Minister of Employment and Immigration), 1993 CanLII 128 (SCC), [1993] 1 S.C.R. 1053, at p. 1077; New Brunswick (Minister of Health and Community Services) v. G. (J.), 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46. But this does not support a general right to legal assistance whenever a matter of rights and obligations is before a court or tribunal. Thus in New Brunswick, the Court was at pains to state that the right to counsel outside of the s. 10(b) context is a case-specific multi-factored enquiry (see para. 86).

26 **Nor has the rule of law historically been understood to encompass a general right to have a lawyer in court or tribunal proceedings affecting rights and obligations. The right to counsel was historically understood to be a limited right that extended only, if at all, to representation in the criminal context**: M. Finkelstein, The Right to Counsel (1988), at pp. 1-4 to 1-6; W. S. Tarnopolsky, "The Lacuna in North American Civil Liberties — The Right to Counsel in Canada" (1967), 17 Buff. L. Rev. 145; Comment, "An Historical Argument for the Right to Counsel During Police Interrogation" (1964), 73 Yale L.J. 1000, at p. 1018.

27 We conclude that the text of the Constitution, the jurisprudence and the historical understanding of the rule of law do not foreclose the possibility that a right to counsel may be recognized in specific and varied situations. But at the same time, they do not support the conclusion that there is a general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations.

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Trial Lawyers Association of British Columbia v. British Columbia (A.G.)
2014 SCC 59 (S.C.C.)

The B.C. Rules of Civil Procedure provide for 'hearing fees' for the use of a courtroom during trial; $156 for the first half-day of a trial and rising to $624/day after ten days. The imposition of the fees was struck down at first instance in this case. At trial, McEwan J held that fees were within the legislative ambit of the province, but the level of fees rendered them unconstitutional as they went far beyond cost recovery. In the Court of

Appeal (*Vilardell v. Dunham*, 2013 BCCA 65), **Donald J.A.** largely agreed with the reasoning of the trial judge but cured the constitutional defect by enlarging the jurisdiction of a judge to order relief based on need:

> [26] **… What makes hearing fees constitutionally suspect is in their potential to impede persons who cannot afford them. Wealthy individuals and corporations may not like paying the fees but they are unlikely to alter their litigation strategy because of them. In that sense, the government efficiency objective is invidious because the fees impinge only on the economically disadvantaged. Only they, not the well-to-do, will be discouraged from pursuing their rights in a hearing of sufficient length to do justice to the issues. However, an effective exemption defeats the invidious purpose but allows the cost recovery objective to be achieved.**
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> [32] *Schachter v. Canada* is the leading case on constitutional remedies. Chief Justice Dickson in B.C.G.E.U. noted at 229 that "the rule of law is the very foundation of the Charter". Section 52(1) of the Constitution Act, 1982, states that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. In effecting a constitutional remedy under s. 52(1), Chief Justice Lamer for the majority in *Schachter* stated that the first step is to properly define the extent of the Charter inconsistency. In this case, **the constitutional inconsistency consists of an under-inclusive exemption from hearing fees, which restricts it to people who would be defined as impoverished. As I stated earlier, an enlarged interpretation of the indigency provision is necessary to uphold the constitutionality of hearing fees and remove a barrier to court access.**
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> [33] The next step is to determine the appropriate remedy for a constitutional violation, which can include severance, reading down or reading in provisions into the Rules. **Reading in is the most appropriate remedy in this case. Striking down the hearing fees or the exemption in its entirety would be undesirable for the reasons already given. This violation stems from an exemption which omits people who, while not impoverished, cannot afford the hearing fees. The effect of this omission limits their access to the courts, which violates the rule of law. The most effective way to deal with this omission is to read in the words "or in need" to Rule 20-5**.

The matter was then brought to the Supreme Court of Canada by interveners on the question of remedy. The appeal was allowed, and the legislation struck down with immediate effect.

Per McLachlin CJC:

> [40] **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.** 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. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed: *Christie v. British Columbia (Attorney General)*, 2005 BCCA 631 (CanLII), 262 D.L.R. (4th) 51, at paras. 68-9, per Newbury J.A.
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> [41] **This Court's decision in *Christie* does not undermine the proposition that access to the courts is fundamental to our constitutional arrangements. The Court in *Christie* — a case concerning a 7 percent surcharge on legal services — proceeded on the premise of a fundamental right to access the courts, but held that not "every limit on access to the courts is automatically unconstitutional" (para. 17). In the present case, the hearing fee requirement has the potential to bar litigants with legitimate claims from the courts.** The tax at issue in Christie, on the evidence and arguments adduced, was not shown to have a similar impact.
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> [46] **A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum — as tacitly recognized by the exemption in the B.C. scheme at issue here. But providing exemptions only to the truly impoverished may set the access bar too high. 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.**
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> [47] Of course, hearing fees that prevent litigants from bringing frivolous or vexatious claims do not offend the Constitution. There is no constitutional right to bring frivolous or vexatious cases, and measures that deter such cases may actually increase efficiency and overall access to justice.
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> [48] **It is the role of the provincial legislatures to devise a constitutionally compliant hearing fee scheme. But as a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial**

> **situation, bring non-frivolous or non-vexatious litigation to court. A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an amount such that anyone who is not impoverished can afford them.** Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims. This is in keeping with a long tradition in the common law of providing exemptions for classes of people who might be prevented from accessing the courts — a tradition that goes back to the Statute of Henry VII, 11 Hen. 7, c. 12, of 1495, which provided relief for people who could not afford court fees.

[Please note that Ontario courts do not charge hearing fees. However, there are filing fees and other charges from which Courts may order relief. For more information, see the MAG's Guide to Fee Waiver Requests.]