In a remarkable decision yesterday, the Supreme Court of Canada struck down British Columbia’s regime of court fees as unconstitutional: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59. A litigant was faced with a $3,600 bill for scheduling a 10-day trial. She could not pay the court fees — mainly because she had already paid $23,000 in legal fees, a point mentioned in passing by the Court. And she did not fall within an exemption for indigent litigants. Because it prevented her from accessing the courts, the court-fees regime was unconstitutional. According to the majority:

> [45] ...when hearing fees deprive litigants of access to the superior courts, they infringe the basic right of citizens to bring their cases to court. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court.

No provision of the Canadian Constitution expressly guarantees a general right of access to the courts. The case in which this dispute originated was a family-law matter, not a case pitting an individual against the state. Where, then, did the majority find its justification for striking down the court-fees regime?

Section 96 of the *Constitution Act, 1867* provides that judges of the superior courts shall be appointed by the Governor General. From this small acorn has a great body of constitutional law grown. Judicial independence must be protected. Administrative tribunals cannot exercise judicial power. Judicial review of administrative action cannot be ousted by privative clauses.
And now, “[t]he right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the Constitution” (para. 37). In this case, “the legislation at issue bars access to the superior courts... — by imposing hearing fees that prevent some individuals from having their private and public law disputes resolved by the courts of superior jurisdiction — the hallmark of what superior courts exist to do” (para. 35).

While there is fun to be had in figuring out what other branches of s. 96 will be recognized in future cases — time limits on judicial review, anyone? — my interest today is less in attacking the majority reasons (ably critiqued by Rothstein J. in dissent and by Leonid Sirota) than in assessing Cromwell J.’s concurring reasons.

For he said he would “prefer to resolve this case on administrative law grounds and find that it is unnecessary to address the broader constitutional issues raised by the appellants” (para. 70). In his view, the court-fees regime infringed on a common law right and was thus ultra vires its parent statute:

[74] The Attorney General submits, and I agree, that the common law right of access to civil justice allows court fees, but only if there is an exemption to ensure that no person is prevented from making an arguable claim or defence because he or she lacks the resources to carry on the proceeding. This is a flexible standard: whether a person has the ability to pay the fees depends not only on wealth and income, but also on the amount of their reasonable, necessary expenses and the magnitude of the fees.

[76] The trial judge found as a fact that the hearing fees are unaffordable and therefore limit access for litigants who do not fall within the exemptions for the indigent and the impoverished. This finding and the evidentiary basis for it are reviewed in the Chief Justice’s reasons, at paras. 52-55. Like the Chief Justice, I accept this key factual conclusion of the trial judge. It follows that the issue then becomes whether the exemptions under the Court Rules Act can be interpreted so that they are consistent with the common law right of access to civil justice, which is preserved, as the Attorney General submits, by the Court Rules Act.

[77] On that question, I agree with the Chief Justice and the trial judge: the plain meaning of the exemption, referring to persons who are “impoverished” and “indigent” cannot be interpreted to cover people of modest means who are prevented from having a trial because of the hearing fees.

But is resolution on common law grounds any less radical than the majority’s resort to constitutional theory?
First, what are common law rights? This was largely uncontroversial in the present case, because the Attorney General for British Columbia accepted that there is a common law right of reasonable access to civil justice. But it is controversial in many other cases, because judges must make important value judgments on history and tradition that, many argue, are better left to elected representatives. A critic might say that a better way to understand what the right of reasonable access to civil justice means in modern British Columbia is to look to the laws and regulations passed by politicians and their delegates.

Second, the judge must then formulate the right in question. Cromwell J. relies on Laws L.J.’s well-known judgment in *Witham*. But there, Laws L.J. referred to a “right of access to justice”, not a reasonable right, and not a right to access to civil justice. Where is the warrant for imposing these limitations? One might decry the majority’s stretching of the constitutional text (does an appointments provision really imply a right of access to courts?) but it at least has some textual basis. Cromwell J. also refers to an Ontario case, *Polewsky*, but there the adjective reasonable was not used. Rather, the right of access to courts was subjected to “the caveats of merit and proof of indigence” (para. 60).

This is hugely important, for the addition of “reasonable” allowed Cromwell J. to (1) accept that court fees are permissible in principle but (2) require that an exemption be made in cases of hardship. He then found (3) that these particular fees “are unaffordable and therefore limit access” (para. 76). This process, it seems to me, is just as creative as the majority’s approach. If anything, it is more controversial because it is based in the common law and not on any textual provision.

Moreover, one could imagine different judges concluding (1) that court fees are never permissible or (2) that exemptions are not always necessary or (3) that this particular fees regime was reasonable because it allowed for exemptions for impoverished litigants; indeed, the regime aimed to strike a delicate balance between the interests of individual litigants and the public interest in effective, efficient access to justice (see Rothstein J.’s dissent, paras. 103-112). It is difficult to perceive why the second set of answers is inferior to Cromwell J.’s set of answers; once more, a value judgment is required.

Third, though, again, this was not an issue in the present case, the judge must determine if the right is ousted by clear statutory language. How clear is clear? Another value judgment. And the consequences are significant. *Any* subordinate legislation that is inconsistent with a common law right is *ultra vires* absent express statutory authorization (para. 73).

My point is not to condemn common-law approaches to judicial review. And it is not to condemn Cromwell J.’s approach in this case, which followed a series of concessions by the Attorney General for British Columbia. I am simply pointing out that in administrative law, difficult and controversial value judgments can be as prevalent as they are in constitutional cases involving fundamental rights.
On the time limits question – the Australian High Court (HCA) has struck down provisions which do exactly that (Bodruddaza v Minister for Immigration and Multicultural Affairs (2007) 228 CLR 651). The time limit imposed was an absolute maximum of 84 days (28 + 56 days extension at HCA's discretion). It was the inability to extend past 84 days that was problematic. The constitutional context is different – Australia's constitution entrenches the HCA's jurisdiction to issue remedies of mandamus, prohibition and injunctions against officers of the Commonwealth. But in essence it has been found to have the same effect as s 96: prevent privative clauses from ousting review for jurisdictional error. So I wouldn't be surprised if s 96 also prohibits absolute, or at least very restrictive, statutory time limits.