Court Fee-waiver Processes in Canada: How Wrong Assumptions, Change Resistance and Data Vacuums Hurt Vulnerable Parties

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I. INTRODUCTION

The access to justice crisis in Canada requires a fundamental shift away from the needs of judges, lawyers and court administrators toward the needs of the public. This shift requires evidence-based, human-centered process redesign that is iterative and responsive to public feedback. Despite growing consensus from justice stakeholders about this need, there remains an intransigent failure to reform even clear, obvious examples of needlessly burdensome, complex and sometimes humiliating justice processes which disproportionately exclude and harm the most vulnerable members of society. This article examines a court process which epitomizes this problem: the process for a person with a low income to apply for a fee waiver to excuse them from paying court fees for their civil claim. I refer to this as a "fee-waiver process".

While the requirements to apply for a fee waiver vary by province, almost all regimes require applicants to complete significant paperwork, collect and provide documents supporting their financial and other personal circumstances, apply in person at a court registry, and in some cases even appear before a judge in open court. Some jurisdictions, like British Columbia, make fee-waiver application materials filed on paper available to the public via court record searches, adding a further layer of embarrassment and public exposure to a process which community legal advocates in the province describe as "humiliating" for people with a low income, as discussed below. This article argues that fee-waiver processes in Canada impose unnecessarily high administrative burdens on people with the fewest resources to navigate them.

The key word here is "unnecessarily". The two most likely assumptions underpinning this disproportionate and heavy-handed approach to excusing people

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from a couple of hundred dollars in court fees are that first, people are likely to lie about their need, or that second, making the process easier will lead to a flood of applications, depriving the court system of significant fee revenue. There is no available empirical evidence to support either assumption. However, there is empirical evidence from at least one public justice body, the British Columbia Civil Resolution Tribunal, to suggest the opposite is true, at least in British Columbia. That is, even when fee-waiver processes are simple and accessible, the percentage of fee-waiver applicants is lower than the percentage of people with a low income. Further, while there is no evidence of fraud or floodgates, there is strong evidence that the current process causes real harm for people with a low income. Frontline community legal advocates interviewed for this article consistently report that the current fee-waiver process in British Columbia denies access to the courts for their clients, some of the most vulnerable and disadvantaged members of society. In the face of this evidence, the failure to reform fee-waiver processes is unjustifiable, and arguably unconstitutional, as discussed below.

The article focuses on the fee-waiver process in British Columbia's superior courts, which represents a high-water mark of inaccessibility for processes of this kind in Canada. This is because British Columbia superior courts require a party to appear before a master or judge in almost all cases, which is just the last in a series of inordinately difficult steps imposed on people who often have intersecting barriers to accessing the justice system. While the British Columbia superior courts' process appears to be the most onerous in Canada, other provinces are not far behind,[1] and all have in common the fact that their processes are based on assumptions unsupported by empirical evidence, and are possibly informed by historical and enduring implicit bias and socio-economic stereotypes.[2] Courts have largely failed to examine or evolve these processes over the past century, despite society's changing understanding of the needs of people with a low income, and despite growing evidence that existing processes are harmful and inconsistent with the rule of law.

The article identifies the problems with court fee-waiver regimes, with reference to available data, supplemented by the frontline experience of community legal advocates in British Columbia. It also examines an alternative fee-waiver process

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[1] Note that inaccessible fee-waiver processes are also an issue in the United States, the United Kingdom and other common law jurisdictions. See, *e.g.*, Phong S. Wong & Richard A. Rothschild, "Increasing Court Access through Fee-Waiver Reform: California's Model" (2009) 43:2 Clearinghouse Rev. 115; Andrew Hammond, "Pleading Poverty in Federal Court" (2019) 128 Yale L.J. 1478; and United Kingdom, Ministry of Justice, *Review of the introduction of fees in the Employment Tribunals: Consultation on proposals for reform* (London: Ministry of Justice, January 31, 2017) online: <https://www.gov.uk/government/consultations/review-of-the-introduction-of-fees-in-the-employment-tribunals>.

[2] See, *e.g.*, Michele Benedetto Neitz, "Socioeconomic Bias in the Judiciary" (2013) 61 Clev. St. L. Rev. 137.

implemented by an administrative tribunal with jurisdiction over a variety of civil disputes, all of which previously fell within the courts' jurisdiction. Finally, with reference to key principles of accessible public program design, the article proposes 10 features of a human-centred framework for fee-waiver processes, which could be adapted to courts and tribunals in British Columbia and across Canada.

II. FEE WAIVERS IN CANADA: A BRIEF HISTORY

The court's inherent ability to waive fees for a party with a low income was first codified in an English statute dating back to 1494. This statute permitted parties to proceed *in forma pauperis* and excused them from paying fees to file writs.[3] While this Latin phrase is thankfully no longer used, most provinces and territories in Canada have a process by which individuals can apply to have their court fees waived. Largely, this process is set out in statute, regulations or court rules.[4] In most jurisdictions, the federally and provincially appointed courts administer fee waivers,[5] but in some provinces, at least historically, this responsibility was vested in provincial law societies or legal aid organizations.[6] In most cases, the process to apply for a court fee waiver, like many processes within our public justice system, has remained static over decades.

The most substantial change to fee waivers in Canada over the past century resulted from the Supreme Court of Canada's decision in *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*.[7] The case involved a challenge to the British Columbia court hearing fee scheme from a party to a family law proceeding who could not afford to pay the required court fees. The applicant was not "indigent"[8] or "impoverished", which was the threshold for a fee waiver at the time; however, she could not afford to pay the court fees without forgoing other necessary living expenses.

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[3] Paul W. Danahy, Jr. & Richard A. Hampton, "Proceedings in Forma Pauperis" (1956) 9:1 Fla. L. Rev. 65, at 65.

[4] See, *e.g.*, British Columbia's *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 20-5; Saskatchewan's *Queen's Bench Rules*, Rules 569-582; Ontario's *Administration of Justice Act*, R.S.O. 1990, c. A.6, s. 4.3. In contrast, Manitoba continues to have no statutory fee-waiver process.

[5] In British Columbia, Alberta and Ontario, for example, the fee-waiver process is administered by superior courts.

[6] See, *e.g.*, Law Reform Commission of Saskatchewan, *Access to Justice – Needy Person Certificates and Waiver of Fees*, 2013 CanLIIDocs 8, online: <http://www.canlii.org/t/7dq>. See also *Fee Waiver Act*, S.S. 2015, c. F-13.1001.

[7] [2014] S.C.J. No. 59, 2014 SCC 59 (S.C.C.) [hereinafter "*TLABC*"].

[8] Note that *Court of Appeal Rules*, B.C. Reg. 297/2001, Rules 38 and 56, and British Columbia Court of Appeal and British Columbia Supreme Court fee-waiver forms still refer to "indigent" and/or "indigency".

The Supreme Court of Canada found[9] that hearing fees are unconstitutional when they deprive people of access to the superior courts, as this right of access is implicitly protected under section 96 of the *Constitution Act, 1867*.[10] The constitutional threshold is that the court must have discretion to waive hearing fees in any case where the fees would effectively require parties to forgo reasonable necessities in order to bring their claims.[11] The Supreme Court of Canada found that because the British Columbia hearing fee scheme did not meet these constitutional requirements, it must be struck down.[12] While the *TLABC* decision altered the threshold for obtaining a fee waiver in British Columbia, the process to do so remains substantially the same.

This raises the question of whether the British Columbia superior court fee-waiver process is unconstitutional. The Supreme Court of Canada concluded that "hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts".[13] By extension, fee-waiver processes which create often insurmountable barriers for people with a low income to access the courts are arguably equally unconstitutional.[14] In other words, if access to the courts is a constitutionally protected right under section 96, then both the *process* to obtain a fee waiver and the monetary *threshold* to do so are relevant factors in determining the constitutionality of any hearing fee scheme. An in-depth consideration of this constitutional issue is outside the scope of this article but merits further exploration and research.

III. FEE WAIVERS IN BRITISH COLUMBIA

In British Columbia, a party seeking a fee waiver from the Supreme Court of British Columbia ("BCSC") must follow the requirements of Rule 20-5 of the *Supreme Court Civil Rules*.[15] The court has an "Indigency Applications" package consisting of 23 pages of court forms, the cover page of which is in Figure 1 below.[16] In

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[9] *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2014] S.C.J. No. 59, 2014 SCC 59, at paras. 29-30 (S.C.C.).

[10] (U.K.), 30 & 31 Vict., c. 3.

[11] *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2014] S.C.J. No. 59, 2014 SCC 59, at para. 46 (S.C.C.).

[12] *Id.*, at para. 68.

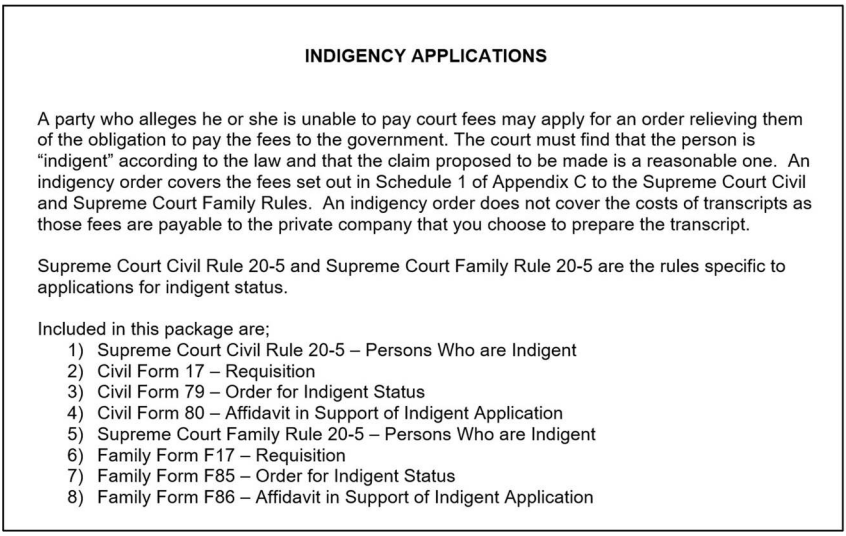
[13] *Id.*, at para. 32.

[14] For a discussion about the potential expansion of the s. 96 reasoning in *TLABC* to other access to justice issues, though not specifically fee-waiver processes, see Andrea A. Cole & Michelle Flaherty, "Access to Justice Looking for a Constitutional Home: Implications for the Administrative Legal System" (2016) 94:1 Can. Bar Rev. 14, at 29.

[15] B.C. Reg. 168/2009. Thank you to Dustin Ellis, Program Manager and Staff Lawyer for Access Pro Bono, for his helpful summary of the fee-waiver process at the Supreme Court of British Columbia.

[16] Online: <http://www.courts.gov.bc.ca/supreme_court/self-represented_litigants/

general, in non-family civil cases an applicant must draft four court forms: Civil Form 79; Civil Form 80; Civil Form 17; and either Civil Form 1 or Civil Form 66.



INDIGENCY APPLICATIONS

A party who alleges he or she is unable to pay court fees may apply for an order relieving them of the obligation to pay the fees to the government. The court must find that the person is "indigent" according to the law and that the claim proposed to be made is a reasonable one. An indigency order covers the fees set out in Schedule 1 of Appendix C to the Supreme Court Civil and Supreme Court Family Rules. An indigency order does not cover the costs of transcripts as those fees are payable to the private company that you choose to prepare the transcript.

Supreme Court Civil Rule 20-5 and Supreme Court Family Rule 20-5 are the rules specific to applications for indigent status.

Included in this package are;

1) Supreme Court Civil Rule 20-5 – Persons Who are Indigent
2) Civil Form 17 – Requisition
3) Civil Form 79 – Order for Indigent Status
4) Civil Form 80 – Affidavit in Support of Indigent Application
5) Supreme Court Family Rule 20-5 – Persons Who are Indigent
6) Family Form F17 – Requisition
7) Family Form F85 – Order for Indigent Status
8) Family Form F86 – Affidavit in Support of Indigent Application

Figure 1: Cover page for the BCSC's "Indigency Applications" package, consisting of 23 pages of court forms.

The Affidavit in Support of Order to Waive Fees (Civil Form 80)[17] requires an applicant to provide:

- the applicant's age;
- the names of dependants;
- the names of people contributing to household expenses;
- the applicant's employment status;
- a financial statement setting out monthly household income, expenses and assets;
- proof of government assistance benefits (if applicable);
- an exhibit describing the applicant's education and employment history;
- an exhibit describing the applicant's workplace skills; and
- if no pleading has been filed with the court, the applicant must draft the Petition or Notice of Civil Claim and the intended pleading must be attached to the fee-waiver affidavit.

Supreme Court Document Packages/Indigency Package.docx>.

[17] There is an inconsistency between the title for the form in the ″Indigency Applications″ package and the title of the actual court form.

This form must be notarized by a commissioner, although the court's commissioner will swear or affirm these documents for free. The applicant must draft an Order to Waive Fees, in Civil Form 79.[18] This form must be vetted by the court registry. The applicant must also draft a Requisition for a court master or judge to hear the application for the Order to Waive Fees. The applicant must then get on the court chambers list, wait to appear before a master or judge, and make submissions in support of the fee-waiver request. If the court grants the order, this must be entered in the court registry. The process for applying to waive fees in the British Columbia Court of Appeal ("BCCA") is nearly identical, requiring an affidavit with essentially the same exhibits and an in-person application before a justice of the appeal court.[19]

This process is burdensome and complex on its face. The rules and court forms use legal jargon and are not user-friendly. The process requires a party to complete many written and verbal tasks correctly before the court will consider the fee-waiver request. However, understanding the full extent of this complexity requires us to consider the hidden administrative burdens the applicant bears. First, a person must discover that fee waivers exist. This is unclear from the BCSC website, unless one knows to search for "indigency", which is not an obvious search term for an income-based fee waiver. At that point, a person might find the above-noted "Indigency Applications" package, though the cover page (in Figure 1 above) offers little guidance in determining which of the forms to complete, or the process to follow once this is done. To complete the forms, a person with a low income must collect a significant amount of information, described above, supporting their employment status, education, government benefit status and other personal details. For a person with a low income, that might mean taking time off work in order to obtain documents from financial institutions or government agencies during business hours. It might also mean taking public transit to do so, or paying for gas or parking, and perhaps also childcare. Given the complexity of the forms and the need to swear an affidavit and draft intended pleadings, a person with a low income may also have to take time off work and incur further transportation and childcare costs to get legal assistance from a community legal advocate or pro bono lawyer. A new round of such expenses may be necessary for the person to travel to file the documents at the court registry and, hopefully, but not always, appear before a master the same day.

When a person does appear before a master, they are required to wait for an indeterminate amount of time before their matter is called, and then, often unrepresented, they must appear before not just the master, but often a gallery of

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[18] There is an inconsistency between the title for the form in the "Indigency Applications" package and the title of the actual court form.

[19] See *Court of Appeal Rules*, B.C. Reg. 297/2001, Rules 38 and 56, and B.C. Court of Appeal Civil Rules Form 19, online: <https://www.bccourts.ca/Court_of_Appeal/practice_and_procedure/Civil_Rules_Forms.aspx>.

lawyers and their clients waiting to bring forward their own matters. In front of this audience, comprised of people who largely do not share the same socio-economic status as the fee-waiver applicant, the person with a low income must make submissions to support their application, laying out their personal information and circumstances in public.

Not surprisingly, several community legal advocates interviewed for this article reported that their clients find this to be a "humiliating" and "shameful" experience.[20] If the master grants the fee waiver, the applicant must return to the court registry to file the order. The applicant must have the Order for Fee Waiver before they can take even the first step in pursing their substantive legal claim, with all the complexity, cost and time associated with that process. If the master refuses to grant the fee waiver, an applicant has two choices: give up or go through another, even more complex process to appeal the master's order to a justice of the BCSC. This latter path is the one Jenny Ma took, with the help of pro bono counsel. Her case, which culminated in the recent BCCA decision in *Ma v. Zhao*,[21] illustrates how problematic fee-waiver processes are, both for parties and for the justice system as a whole.

IV. MA V. ZHAO: A YEAR LATE AND $200 SHORT

Ms. Ma brought her dispute with a former landlord to the British Columbia Residential Tenancy Branch ("RTB"), claiming the return of her $350 security deposit and other compensation related to the termination of her lease. The RTB ruled against her, and Ms. Ma decided to judicially review the tribunal decision. In May 2018, she followed the usual process at the BCSC to get an order waiving $200 in court fees. However, the master denied Ms. Ma's fee-waiver application on the basis that her claim was merely a monetary claim, and not a situation where she was on the verge of being evicted from her home. The master determined that Ms. Ma had enough funds to cover the court fees, despite her sworn affidavit stating that she was unemployed and her family income was $1,962 per month, far less than her monthly expenses. Ms. Ma had attested that she had no assets, and neither this nor her other financial information was in dispute. Assisted by pro bono counsel, Ms. Ma appealed the master's decision to a BCSC judge, who found that the master's decision was not "clearly wrong". Again, with the help of pro bono counsel, Ms. Ma appealed to the BCCA. After reviewing the court's decision in *TLABC*, the court found the master had erred by not explaining why she did not accept Ms. Ma's financial evidence, and by setting a higher standard for waiving fees for a monetary dispute than for emergency situations.[22] The three-judge panel allowed the appeal and ordered the fee waiver plus the reimbursement of any fees Ms. Ma had paid as

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[20] These interviews with community legal advocates are detailed later in this article.

[21] [2019] B.C.J. No. 1259, 2019 BCCA 248 (B.C.C.A.).

[22] *Ma v. Zhao*, [2019] B.C.J. No. 1259, 2019 BCCA 248, at paras. 25-28 (B.C.C.A.).

a result of the master's decision.[23]

While Ms. Ma was ultimately successful, her case is a depressing illustration of the disproportionate and burdensome impact that poorly designed court processes can have, both on the rights of people with a low income and on the justice system generally. The question of whether Ms. Ma was required to pay $200 in court fees occupied three separate hearings, five judges and masters in two levels of court, untold court staff, extensive pro bono effort, and took well over a year to resolve. Add to this the considerable effort and time it must have taken Ms. Ma to undertake all the steps necessary seek out pro bono assistance, and with that help, prepare and swear the affidavit with supporting documents, file a requisition, and appear in chambers to lay out her personal financial circumstances before not just the master but also court staff, lawyers and other members of the public. Add to that her tenacity in persevering with two appeals from the master's decision. Even assuming the help of generous pro bono counsel through all of this, it must have been a daunting and stressful process for Ms. Ma. All over a $200 court hearing fee.

V. VOICES FROM THE FRONTLINES: BRITISH COLUMBIA'S COMMUNITY LEGAL ADVOCATES

Unfortunately, Ms. Ma's experience is not unusual, according to community legal advocates in British Columbia, who often represent vulnerable people with barriers to accessing the justice system.

Amber Prince is a staff lawyer with Atira Women's Resource Society's Legal Advocacy Program. She routinely represents low-income women in a variety of legal matters and has assisted them with obtaining fee waivers at all levels of court and at tribunals in British Columbia. She says that recently she

> . . .had to pay for someone to get a petition for judicial review in because it was logistically impossible for us to get the affidavit done for the fee waiver in time. The client has person-with-a-disability status and would have surely been eligible for the fee waiver. I'm sure it's going to be a lot of effort to try to get that money reimbursed. The registry was doubtful it could be done and had no guidance on how to try to go about this.[24]

Prince laments that the fee-waiver process is unnecessarily complex, difficult and undignified for people with a low income. She explains that some of her other clients "forego the fee waiver because it's a lot of extra work, they run out of time on short deadlines and because it's stressful and humiliating to go into chambers — which is usually packed with people — to lay out their hardship". In her view, it would be much better for the superior courts to use a simplified desk order process like in the Provincial Court's small claims court, although Prince notes that in that process, an applicant still must "account for every penny", which is onerous, stressful and often humiliating. She queries whether, considering the *Ma v. Zhao* case, and the

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[23] *Id.*, at paras. 29-30.

[24] A. Prince, personal communication (January 7, 2020).

relatively small amount of money at stake, the fee-waiver process is the best use of the court's time.[25]

Nicky Dunlop is the executive co-ordinator of PovNet, an organization supporting poverty advocates, community workers and marginalized communities in British Columbia. Dunlop sees the same issues:

> PovNet's view . . . is quite simple. The more barriers you put in front of someone the less likely they are going to be to access justice. Fee waivers are one of those barriers. [These issues include] the gathering of evidence . . . and the extra step and extra appointment that it often requires as clients don't know that they need to bring the supporting documentation. We know that the more steps a client has to take, the lower their chance of success.[26]

Prince and Dunlop agree that the lack of data around the fee-waiver process in British Columbia makes it difficult to demonstrate the need for change.

Dr. Julie Macfarlane is the project director for the National Self-Represented Litigants Project ("NSRLP") and a recent recipient of the Order of Canada. She confirms that the NSRLP hears a lot of complaints about fee waivers from self-represented litigants ("SLRs"), for the reasons discussed above. She emphasizes how embarrassing it is for people that fee-waiver applications in British Columbia are made in court in front of spectators:

> SRLs talk a great deal about the shame and humiliation of not being able to afford a lawyer...I would have expected the primary emotion to be indignation or anger – and of course some people get there – but lots of folks just feel shame. They also talk about having to disclose financial circumstances in court, for example when pressed by a judge 'WHY don't you have a lawyer?'. I am sure that making an application for a fee waiver and providing personal financial information in open court is even worse. You would have to be really desperate and determined to want to do this.[27]

Dustin Ellis agrees. Ellis is a program manager and staff lawyer for Access Pro Bono, the largest provider of pro bono services for British Columbians with a low income. He says that:

> One of the problems with the fee waiver process is that it requires a host of information about an impoverished litigant to be taken. The client is asked a series of personal and financial questions in a courtroom full of lawyers and lay litigants. It is also easy to tell whether someone has obtained a fee waiver to file their documents. . .The affidavits in Support of Fee Waivers, including the exhibits containing the client's financial and work history, are available at the records department once filed.[28]

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[25] *Id*.

[26] N. Dunlop, personal communication (January 3, 2020).

[27] J. Macfarlane, personal communication (January 9, 2020).

[28] D. Ellis, personal communication (January 13, 2020).

Ellis's other main problem with the fee-waiver process in British Columbia is the time it takes, explaining that:

> Drafting the documents does not take a lot of time when you are used to them. We do about four to eight of these a month. . .the delay is waiting at the civil registry counter and in chambers prior to appearing before a master. Some days this goes smoothly, and it is possible for the client to appear both before a master for a fee waiver, and a judge for interim relief, before lunch. Other days the time it takes to see the master means it will not be possible for the client to meet with the judge on the same day.[29]

Kevin Love, a lawyer with the Community Legal Assistance Society ("CLAS"), says that that the fee-waiver process in B.C. is a barrier for CLAS's clients. He says that:

> When the BCSC rules were amended a while back, we had understood the idea to be that a litigant would simply need to produce a social assistance stub and that would be sufficient to waive fees. Of course, many low-income people are not on social assistance, but it seemed to at least be a recognition of the need to lower the barriers on this. When Rule 20-5 came in, it required a requisition, affidavit, and draft order, but we still thought the spirit would be that if you simply attached a social assistance stub to an affidavit, that would be all you need. However, we then started getting some masters demanding that the full affidavit setting out financials, job skills, work history, dependents etc. be filled out in every case, even if the client is on social assistance. So basically, we are back to where we began.[30]

The fee-waiver application is especially hard for SLRs when placed in the overall context of everything else they must do to resolve their legal problem, Love notes. For example:

> Take a low-income tenant trying to file for judicial review of an order of possession from the RTB giving them two days to get out of their rental unit. The judicial review process will usually require five to ten forms and two or three court appearances over the course of those two days. The client must apply to waive fees, file the judicial review, apply for an interim stay of the eviction, and depending on the situation possibly obtain short leave for the stay application, then argue the stay itself. And that's all before they ever argue the merits of their case.[31]

Disheartened, Love says that CLAS "has actually stopped doing fee waivers in most cases for clients we represent because it costs more than $200 of organizational resources to save the $200 filing fee. I can only imagine the court and registry resources don't warrant it either."[32]

VI. THE PROBLEM SUMMARIZED

Justice processes, like those in other sectors, encourage or discourage certain

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[29] *Id.*

[30] K. Love, personal communication (January 10, 2020).

[31] *Id.*

[32] *Id.*

behaviour. They create their own set of incentives and disincentives, some intentional, others inadvertent. Each step required in a process is a disincentive to completing it; the more steps a person must take to obtain a benefit, the lower their chance of success. In their book, *Administrative Burden: Policymaking by Other Means*, Pamela Herd and Donald Moynihan describe these barriers as "administrative burdens", a term used in passing earlier. They define "administrative burdens" as

> the costs that people encounter when they search for information about public services (learning costs), comply with rules and requirements (compliance costs), and experience the stresses, loss of autonomy, or stigma that come from such encounters (psychological costs).[33]

They argue that, unsurprisingly,

> those who are least advantaged tend to face more administrative burdens, even though they have fewer resources to manage and overcome them. Burdens reinforce inequalities in access to rights, including the most basic of citizenship in a democracy.[34]

As described above, the complex procedural steps required to waive relatively small amounts of court fees impose significant administrative burdens on people with a low income. These administrative burdens are, perhaps, meant to discourage people from wrongfully or fraudulently obtaining fee waivers to which they are not entitled. Herd and Moynihan acknowledge that "means-tested programs, that is, programs conditional on financial status, must do more to distinguish between the eligible and ineligible but, in creating administrative processes to do so, add more burdens".[35] However, they emphasize that designing a process that tolerates a small amount of fraud in order to increase general accessibility is better social policy than creating a fraud-proof process that honest applicants can rarely access. In other words, we need to carefully weigh the costs and benefits of creating significantly more barriers for *everyone*, in order to deter fraudulent behaviour from *someone*.[36]

While weighing our collective tolerance for fraud versus accessibility is an interesting public policy discussion, it is apparently only a hypothetical one in this case. This is because in British Columbia there is no empirical evidence suggesting that people wrongfully or fraudulently obtain fee waivers from the courts.[37] Data is

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[33] Pamela Herd & Donald Moynihan, *Administrative Burden: Policymaking by Other Means* (New York: Russell Sage Foundation, 2018), at 2.

[34] *Id*., at 6.

[35] *Id*., at 7.

[36] *Id*., at 12.

[37] The British Columbia Ministry of Justice's Court Services Branch, which is responsible for the financial administration of the provincial and federal courts in the province, confirms that it does not keep reliable statistics on the number of fee-waiver applications (B.C. Ministry of Justice Court Services Branch staff, personal communication (January 2, 2020)).

similarly unavailable from any province in Canada, and is scarce in the common law world generally. In the absence of this data, it is unreasonable to create policy based on an assumption of fraud among people with a low income. In fact, as discussed below, the data we do have supports that concerns about fraud, or about opening a floodgate of fee-waiver applications, are unwarranted.

While we have no evidence of fraud, we do have strong evidence that low income is correlated with other circumstances which impede access to justice, including mental and physical disabilities, mental health issues, housing and employment issues, substance use issues, and single parenthood, among others.[38] This is consistent with first-hand evidence from community legal advocates about the hardship caused by requiring people with these often intersecting and overlapping accessibility issues to shoulder crushing administrative burdens. As Love points out, "access to justice is rarely about getting over a single wall. It's about navigating an obstacle course. Everyone looks at each obstacle in isolation and says 'that's not that hard' but when you add them all up it's impossible for anyone to get to the end."[39]

Even if justice system actors were indifferent to the needs of vulnerable court users — and they are far from indifferent — the existing fee-waiver process in most provinces makes little sense from a court resources perspective. At a time when courts are struggling to meet their constitutional obligation to complete criminal trials according to prescribed time limits,[40] and trials are routinely postponed due to a lack of judge time, why are precious judicial resources allocated to parsing the documents and submissions of people asking to be excused from relatively small sums of money, in the absence of any evidence of fraud?

Part of the reason that fee-waiver applications are considered by a master or judge in British Columbia is because even if an applicant meets the financial criteria for a fee waiver, the court may deny an application if the underlying claim is frivolous, vexatious or an abuse of process.[41] This court rule comes from *obiter* in *TLABC* which states that there is no obligation on a court to waive fees in the case of vexatious or frivolous filings.[42] Of course, the Supreme Court of Canada did not mandate that courts must screen for vexatious or frivolous claims before granting a

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[38] See, *e.g.*, Allison Fenske & Beverly Froese, *Justice Starts Here: A One-Stop Shop Approach for Achieving Greater Justice in Manitoba* (November 2017), at 2, online: Canadian Centre for Policy Alternatives <https://www.policyalternatives.ca/sites/default/files/uploads/publications/Manitoba%20Office/2017/11/Justice_Starts_Here_PILC.pdf>; and Deborah Rhode, "Access to Justice: Connecting Principles to Practice" (2004) 17 Geo. J. Leg. Ethics 369, at 403.

[39] K. Love, personal communication (January 10, 2020).

[40] *R. v. Jordan*, [2016] S.C.J. No. 27, 2016 SCC 27 (S.C.C.).

[41] *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 20-5.

[42] *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2014] S.C.J. No. 59, 2014 SCC 59, at para. 47 (S.C.C.).

fee waiver — it merely stated that courts are not required to provide a fee waiver for such claims.

Courts, by virtue of their inherent jurisdiction as well as authority conferred in court rules, already have the power to dismiss claims which are vexatious, frivolous or amount to an abuse of process. The data vacuum regarding fee waivers and fraud extends to an absence of evidence supporting any correlation between applications for fee waivers and parties bringing vexatious or frivolous claims. For this reason, unnecessarily importing this additional requirement puts an undue burden on 100 per cent of applicants to identify what is statistically a very small percentage of vexatious or frivolous cases in general. In a recent report from the NSRLP reviewing Canadian family cases between 2013 and 2017, as well as civil cases between 2013 and 2014, the researchers found only a total of 19 British Columbia cases in which a court designated a self-represented party as vexatious or what the NSRLP describes as "vexatious lite". Parties were described as "vexatious lite" where they acted similarly to vexatious litigants, but were, for whatever reason, not formally deemed vexatious by the court. The NSRLP research demonstrates that even when we use an expansive definition of vexatiousness, there are remarkably few parties who fit it. For this reason, it would make sense to decouple financial need and screening for vexatiousness in order to avoid having judges or masters adjudicate every fee-waiver application. This would reduce unnecessary complexity, delay and court resources.[43]

VII. KEY PRINCIPLES FOR ACCESSIBLE PUBLIC JUSTICE SYSTEMS

While formulated as design considerations for public programs generally, Herd and Moynihan outline four basic normative assumptions that are equally helpful in guiding the development and provision of public justice services:

1. Programs should be designed to be simple, accessible, and respectful of the citizens they encounter. If the public sector provides a service, it should be one that is visible enough to be seen, simple enough to comply with, and not psychologically taxing;
2. Burdens should be minimized to the greatest extent consistent with protecting important public values, such as cost and program integrity;
3. Burdens should be evidence-based, identifying the multiple values involved and the likely effects of burdens on those values, and informed by logic and empirical evidence rather than political rhetoric; and
4. Burdens can affect some groups more than others and so we should be

[43] Note that in some jurisdictions, parties who obtain a fee waiver are also excused from paying the opposing parties legal and court fees, if they lose their claim. This is an issue which involves balancing several competing justice considerations, including fairness to parties who incur costs defending or bringing successful disputes to court against a party with a fee waiver.

> especially careful about costs on those with limited resources or who are in programs that are specifically meant to help those with limited means. When possible, burdens should be designed to be minimal enough not to exclude those that struggle with them the most.[44]

Applied to fee-waiver processes, these four design considerations would require wholesale redesign to reduce administrative burdens on people with a low income. An example of how this could work, as well as a framework with features for a human-centred approach to court fee waivers, is outlined below.

1. Case Study: The British Columbia Civil Resolution Tribunal Fee-waiver Process

The British Columbia Civil Resolution Tribunal ("CRT") is Canada's first online administrative tribunal.[45] Built from the ground up using human-centred design, the CRT began resolving disputes in 2016.[46] The CRT is statutorily authorized to waive tribunal fees;[47] however, the process for doing so is not prescribed in the *Civil Resolution Tribunal Act*,[48] and is instead determined by the CRT's internal rules and processes. In designing the fee-waiver process, the CRT worked with community legal advocates to create a proposal based on two key assumptions. First, because barriers to accessing justice tend to intersect,[49] people who are unable to afford court or tribunal fees are also more likely to face other barriers to accessing the justice system, including physical and mental health issues, employment, childcare, transportation and housing challenges, and difficulty reading or writing in English. Second, in the absence of any empirical evidence, the CRT assumed that there is no epidemic of people fraudulently obtaining fee waivers in the justice system. From a resource perspective, the CRT also considered that requiring people to provide supporting documentation in every fee-waiver application would be an unwarranted drain on the CRT's resources, since staff would have to review applications and

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[44] Pamela Herd & Donald Moynihan, *Administrative Burden: Policymaking by Other Means* (New York: Russell Sage Foundation, 2018), at 13.

[45] The author is the Chair of the Civil Resolution Tribunal and was appointed to this position in 2014.

[46] Civil Resolution Tribunal, online: <https://civilresolutionbc.ca/>.

[47] *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25, s. 62(2)(m)(ii) provides that the CRT may make rules, "respecting fees, including rules (ii) authorizing the tribunal to waive fees applicable under this Act for a person who cannot afford the fees".

[48] S.B.C. 2012, c. 25.

[49] See, *e.g.*, Allison Fenske & Beverly Froese, *Justice Starts Here: A One-Stop Shop Approach for Achieving Greater Justice in Manitoba* (November 2017), at 2, online: Canadian Centre for Policy Alternatives <https://www.policyalternatives.ca/sites/default/files/uploads/publications/Manitoba%20Office/2017/11/Justice_Starts_Here_PILC.pdf>; and Deborah Rhode, "Access to Justice: Connecting Principles to Practice" (2004) 17 Geo. J. Leg. Ethics 369, at 403.

supporting documentation, and follow up on missing and incomplete information.

These assumptions, validated by community legal advocates, led the CRT to design a fee-waiver process that is simple, takes less than a minute to complete, requires no documents and, in most cases, results in an instant fee waiver. Here is how it works. A party to a dispute completes a plain-language form, either online or on paper, which in most cases requires them simply to click on a button indicating they are on a government assistance program, click on another button confirming this is true and acknowledging the statutory penalty for providing false or misleading information to the CRT,[50] and then click the "Submit" icon.

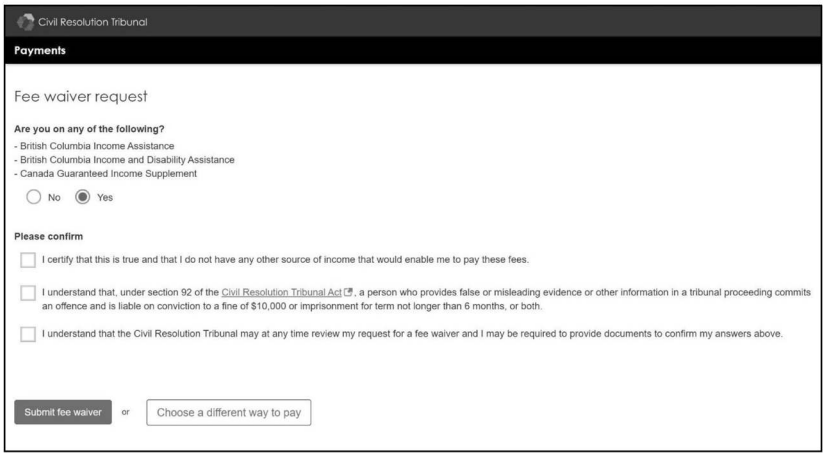

Figure 2: Civil Resolution Tribunal online fee-waiver form for parties who receive government assistance.

Where a person does not receive government assistance, the form asks for the party's household income, the number of people in the household, and the value of any owned real estate. The CRT system automatically compares the household income to Statistics Canada's low-income cut-off ("LICO").[51] The CRT's thresholds add 30 per cent to LICO, as LICO is generally considered to be too low to accurately reflect low-income status in Canada. The form requires parties to acknowledge the statutory penalty for providing false or misleading information to the tribunal and acknowledge that the tribunal may ask for supporting documentation later, if necessary. Where a party receives government assistance, or otherwise meets the objective criteria described above, the CRT system automatically and instantly applies a fee waiver, without the party needing to provide any supporting documentation.

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[50] *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25, s. 92(1).

[51] Statistics Canada, *Low income cut-offs (LICOs) before and after tax by community size and family size, in current dollars*, online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110024101>.

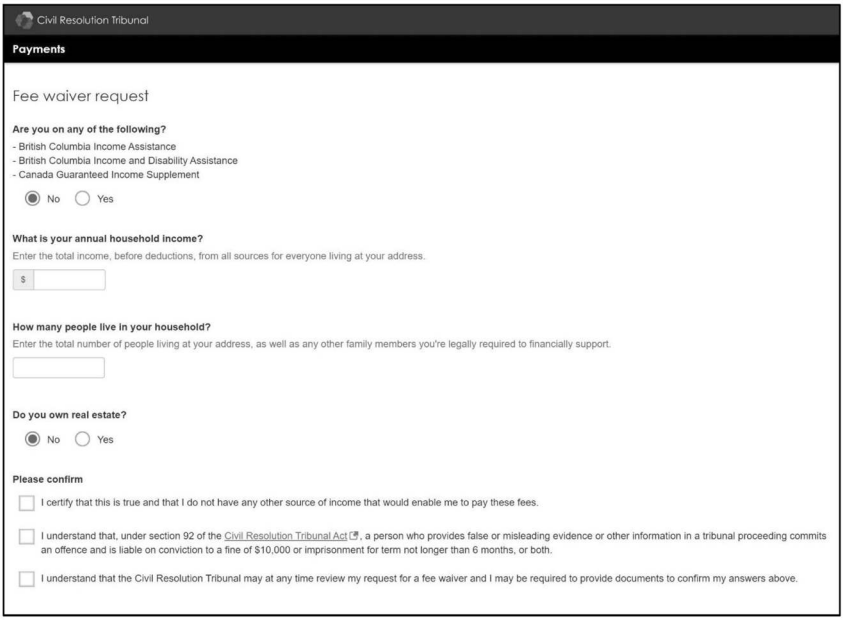

Figure 3: Civil Resolution Tribunal fee-waiver form for parties who do not receive government assistance but have a low income. The form asks for household income and real estate asset information.

A CRT fee waiver excuses an applicant or respondent from paying any of the fees associated with their dispute. A party applies for and obtains their fee waiver at the same time they file their application for dispute resolution or response. Because of this, parties are not required to re-enter even basic information like name, address and phone number as this data has already been included in the dispute application. If a party does not qualify for a fee waiver under the CRT's normal guidelines, they may send the tribunal an email asking for a fee waiver based on other circumstances, and in these cases a staff member will consider whether to issue a fee waiver, even if the party does not meet the usual income and asset thresholds. Additionally, if there is something about the dispute that causes staff to suspect that the party is not entitled to a fee waiver (for example, their small claims dispute is about an expensive car), the staff member will ask the party for supporting documentation. However, after 3.5 years of operation and 14,482 disputes, CRT staff report that even in cases where they have requested supporting documentation, they have never encountered a circumstance which justifies revoking a fee waiver.[52]

Further, of the 14,482 disputes the CRT has handled, parties have requested fee

[52] This data collection and analysis was prepared by CRT staff on January 7, 2020.

waivers in only 3 per cent of cases, despite the simplicity of obtaining one.[53] This number is concerning only in that it is lower than it should be. Applying LICO, Statistics Canada estimates that 12.7 per cent of Canadians have a low income, and therefore a similar percentage of CRT participants should be applying for a fee waiver.[54] This data suggests that there is no widespread problem of people wrongfully applying for fee waivers in tribunals and courts.[55] It also suggests that courts and tribunals in Canada could significantly reduce the burden on low-income people applying for fee waivers, without inviting an overwhelming number of unmeritorious applications. The advantage of doing so is considerable, not just in terms of increasing access to justice for people with a low income, but also in freeing up valuable court staff and judicial resources for disputes, namely criminal and family matters, which are frequently delayed due to a lack of capacity.[56] In many cases, public bodies are called upon to weigh fairness against limited resources. In this case there is no conflict; both values are reinforced by creating a simpler, faster process for those to whom the justice system belongs, but who cannot afford to access it.

2. Framework for a Human-centred Court Fee-waiver Process

The CRT's fee-waiver process for parties with a low income is not a one-size-fits-all solution. However, it is a useful example of how human-centered design, consistent with Herd and Moynihan's principles for accessible public program design and validated by evidence, could be used to create a respectful, accessible fee-waiver process that meets the needs of parties with a low income. While each court or tribunal has its own operational needs, the following are features of a fair, accessible and respectful fee-waiver process:

1. The court or tribunal should not require a person to provide supporting documents unless there is a reasonable basis for believing that they are not entitled to a fee waiver;
2. The criteria for granting a fee waiver should be objective, easily quantifiable, and rely on a person's participation in an existing government

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[53] This data collection and analysis was prepared by CRT staff on January 7, 2020 and covers July 13, 2016 to December 31, 2019.

[54] Statistics Canada, *Canadian Income Survey, 2017*, online: <https://www150.statcan.gc.ca/n1/daily-quotidien/190226/dq190226b-eng.htm>. In fact, the percentage of CRT fee applicants should be higher than 12.7 per cent, given that the CRT adds 30 per cent to the LICO thresholds.

[55] Unless, and this is highly unlikely, there is something uniquely honest about people with small claims, condominium disputes, or motor vehicle personal injury disputes in British Columbia. The CRT obtained jurisdiction over strata disputes in July 2016, small claims $5,000 and under in June 2017, motor vehicle personal injury disputes $50,000 and under in April 2019, and society and co-operative association disputes in July 2019.

[56] *R. v. Jordan*, [2016] S.C.J. No. 27, 2016 SCC 27 (S.C.C.).

assistance program or on their aggregate income and assets. Applicants should not be required to provide exhaustive financial, education and employment information in the absence of a reasonable basis for believing that the person is not entitled to a fee waiver;

3. Despite this, there should be a residual discretion, ideally at a staff level, to grant fee waivers despite an applicant's failure to meet established income or asset thresholds, where there are other circumstances which justify the fee waiver;
4. Courts and tribunals should grant fee waivers automatically where applicants meet established criteria, or, at a minimum, staff should have discretion to quickly approve routine fee-waiver applications. Judicial resources should not be engaged in the process, except where a party appeals a fee-waiver denial;
5. Applications for fee waivers should be available remotely, so a person does not need to appear in person at court or tribunal registries to apply for them;
6. The application form for a fee waiver should be written at a Grade Six reading level or lower, given that 42 per cent of people in Canada have a literacy level that permits them to read only simple materials;[57]
7. A person's signature, either written or electronic, should be enough to authenticate an application, without the need for it to be notarized;
8. Courts and tribunals should inform people, in plain language, of the consequences of providing misleading information, as well as the body's right to ask for supporting documentation should the need arise;
9. The fee-waiver application form should be tested with community legal advocates, and ideally their clients, to gather feedback from people who experience overlapping and intersecting barriers to accessing justice, including, but not limited to, having a low income; and
10. Courts and tribunals should gather statistics on the number of fee-waiver applications, as well as the percentage of approvals, denials (with reasons) and revocations. These statistics should be published in court and tribunal annual reports.

Some of these features of a reformed fee-waiver process have been recommended by law commission reports in Canada, but, unfortunately, several key proposals have not been implemented.[58]

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[57] Donald G. Jamieson, "Literacy in Canada" (2006) 11:9 Paediatric Child Health 573, at 573.

[58] Manitoba Law Reform Commission, "Access to Justice", 2012 CanLIIDocs 358, online: <http://www.canlii.org/t/2fj4>.

VIII. CONCLUSION

There is strong evidence from frontline community legal advocates that the fee-waiver process in British Columbia's superior courts harms people with a low income through its needless complexity, burdensomeness and lack of consideration for human dignity. This process has been in place for generations, unexamined and unsupported by data, within a justice system which, ironically, prides itself on its commitment to logic, evidence-based reasoning and rationality. The fee-waiver process is irrational, as it subverts the public policy goal it purports to advance: the removal of access to justice barriers for people with a low income. Evidence from the CRT suggests that even hypothetical rationales for the administrative burdens associated with the fee-waiver process, namely concerns about fraud or opened floodgates, are unjustified. To the extent a fee-waiver process unjustifiably impedes access to the courts and the enforcement of legal rights for the most vulnerable members of society, the process is incompatible with the rule of law and arguably unconstitutional.

Fee-waiver processes across Canada are almost certainly not the only areas of our public justice system predicated on unfounded assumptions. What do we really know about how our justice system works? What evidence do we have about who it admits and who it abandons? Do we know the real administrative burdens participants in our criminal and civil justice systems bear to access their rights? Do we simply accept those systems and the rules, processes and forms they are comprised of as immutable? While this article focuses on a specific blind spot in our public justice system, it is hard not to suspect that, in the absence of data, the public justice system might be one large blind spot, punctuated by only small pinpricks of light where empirical evidence has managed to shine through, largely due to research by non-profit organizations like the NSRLP, the Canadian Forum on Civil Justice, and others. If so, I hope this article invites all of us, as justice stakeholders, to fearlessly re-examine some of the foundational assumptions underlying our justice system and ask ourselves if they hold true when viewed through the reality of people's lived experiences. Looking at justice processes from a critical, human-centred perspective would cause a necessary shift from accepting the status quo as absolute to questioning, examining and reconstructing everything to better give effect to the rule of law.