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The Right to Counsel: Policy Reasons for Fundamental Reforms to Promote Access to Justice

Adrian Scotchmer

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THE RIGHT TO COUNSEL:
POLICY REASONS FOR FUNDAMENTAL REFORMS TO
PROMOTE ACCESS TO JUSTICE IN LIGHT OF THE *CHRISTIE*
DECISION*

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THE RIGHT TO COUNSEL:
POLICY REASONS FOR FUNDAMENTAL REFORM TO
PROMOTE ACCESS TO JUSTICE IN LIGHT OF THE
CHRISTIE DECISION

This article argues that it is highly undesirable that legal costs impede, and often preclude access to counsel. Even if access to counsel is not a constitutional right in itself, as the Supreme Court of Canada held in Christie, the arguments advanced by the plaintiff in Christie when supplemented by other considerations, establish the importance of access to counsel as a matter of policy. As such, the law societies and the governments of Canada ought to do more to promote access to counsel. Specifically, the law societies ought to reduce market-entry and market-conduct restrictions and increase the use of existing means; the federal and provincial governments ought to increase funding, provide for litigation insurance, and establish independent bodies to regulate paralegals and lawyers. This article explores the current dispute resolution regime in Canada and proposes a new approach to the way justice is viewed.

I

INTRODUCTION

The costs of litigation, by way of fees and taxes, impede and sometimes even preclude access to justice to such an extent that a fundamental re-examination of how the government and the law societies fail to allow for access to the justice system is needed. The recent Supreme Court of Canada decision in *Christie v. British Columbia* [*Christie*]¹ brought the problem into stark relief. This paper will argue that it is highly undesirable how legal costs impede, and sometimes even preclude, access to counsel. If access to counsel is not a constitutional right in itself as the Supreme Court of Canada held in *Christie*, the arguments advanced by the plaintiff in *Christie* establish

¹ 2007 SCC 21, [2007] 1 S.C.R. 873, 280 D.L.R. (4th) 528 [*Christie*].

the importance of the right to counsel as a matter of policy such that the law societies and the governments of Canada ought to do more to promote access to counsel.

To make this argument this paper is organized in the following manner: Firstly, this paper will argue that the right to counsel is essential to access to justice and as such, to the rule of law. This argument was advanced by the plaintiff in the *Christie* case and is reinforced by a consideration of Dyzenhaus' publicity condition of the rule of law.² To deny this condition would result in a denial of the public character of the law and the fundamental premise of the adversarial system. This denial would also support a tenuous distinction between the process and substance of the law as well the illusory distinction between positive and negative rights. Denying that access to counsel is fundamental to access to justice is tantamount to an abandonment of the principles of the rule of law. Secondly, this paper will suggest that the right to counsel is a constitutional right in itself with reference to the *B.C.G.E.U. v. British Columbia (Attorney General)* [*BCGEU*]³ as well as s. 7 and s. 15 of the *Charter*. The force of these arguments grounds a right to counsel, if not as a matter of constitutional necessity, then at least as a matter of policy.

This paper will suggest that the law societies of Canada and the governments of Canada ought to do more to enhance access to counsel. A precondition to this argument is to present the alleged rationales for the existing regulatory structure that can be considered causes of high legal costs. The specific recommendations put forth in this paper are that the law societies ought to reduce market-entry barriers, decrease the duration of legal training and articling, facilitate mobility among legal professionals in Canada, and allow for the use of alternatives to lawyers. The law societies should also reduce market-conduct restrictions by removing suggested or mandatory fees for professional services, removing advertising restrictions, and removing some of the restrictions on business structure. Finally, the law societies should encourage the use of existing mechanisms—such as contingency fees and alternative dispute resolution—that increase access to counsel. Finally, the government ought to enhance access to

² See David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation, and the Apartheid Legal Order*, (Oxford: Hart Publishing, 2003).

³ [1988] 2 S.C.R. 214 at para. 25, 53 D.L.R. (4th) 1 [*BCGEU*]

counsel by removing any taxes on legal services, increasing the funding for the legal system, establishing an independent body separate from the law societies to regulate paralegals, establishing a no-fault/no-tort accident compensation insurance scheme, providing litigation insurance, and requiring the law society to reform in the ways listed.

In the interests of according the greatest attention and analysis to the issue of the right to counsel and its bearing on access to justice issues, this paper will be unable to address broader access to justice issues.⁴ Further, this paper simply points out that some combination of the above-mentioned recommendations would improve access to counsel, leaving the precise combination required undetermined, as that is beyond the scope of this paper. The effectiveness of the plain language movement, greater provision of free legal information, and any move to increase the number of students admitted to law school for the purpose of increasing access to justice shall also be left to future research.

II

RIGHT TO COUNSEL IS AN ASPECT OF THE RULE OF LAW

A. ENDORSEMENT OF ARGUMENTS MADE ON BEHALF OF THE PLAINTIFF IN THE *CHRISTIE* CASE

The Supreme Court of Canada held in *Christie* that the right to counsel is not constitutionally protected as an aspect of the rule of law. However, the arguments advanced in *Christie* on behalf of the plaintiff were strong enough to establish that as a matter of policy

⁴ Of course there are many differing ways in which access to justice is now understood. Rod MacDonald views access to justice in the sense of access to courts and to counsel as characterizing the first of five “waves” in the access to justice movement. Subsequent initiatives to promote access to justice have focused on institutional design, demystifying the law, enhancing preventative law, and providing for proactive access to justice. Roderick A. MacDonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, W.A. Bogart and Frederick H. Zemans, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: The Law Society of Upper Canada, 2005) 20.

better protection ought to be afforded to this right. In the *Christie* decision the court conceded the fundamental importance of the rule of law, and further conceded that access to counsel can be an important aspect of the rule of law. Nevertheless, the Court asserted that the historical record, jurisprudence and constitutional text failed to confer an entitlement to counsel as a general constitutional right. This paper will examine the soundness of these arguments with respect to whether or not the right to counsel should be a right as a matter of policy, if not as a matter of constitutional necessity

It is not obvious from the mere fact that the right to counsel has historically been denied that it therefore follows that the right to counsel is not a right since the fact that a society has failed to live up to certain ideals does not denigrate the importance of those ideals. While s. 15 claims require historical background to establish discrimination, simply because history suggests that no right exists does not mean that the modern conception of justice does not require access to counsel. One must consider that an argument that appeals to the status quo in order to justify the status quo is unpersuasive by virtue of being entirely circular. From a policy standpoint, it is evident that the historical record is not of over-riding persuasive force, given the numerous injustices that have been permitted to occur in the past. So the mere fact that something is supported by historical practice is not of overwhelming prescriptive value.

This paper seeks to analyze the *Christie* decision on policy grounds. However, it should be noted that there is judicial precedent that would appear to constitutionalize the right to counsel. As such, this jurisprudence shall be dealt with in the next section when this paper examines the extent to which the right to counsel is a constitutional right in and of itself.

After examining the constitutional text itself, the Supreme Court found that the rule of law does not encompass a constitutional right to counsel. While deference must be given to the Supreme Court's decision, the argument put forth by Mr. Christie is still persuasive enough to be taken seriously on policy grounds. Firstly, the court recognizes that the Constitution expressly recognizes the right to counsel "on arrest or detention" but states that it would be redundant for the drafters of the Constitution to have included this provision under s. 10b if there were a general right to access to

counsel in any and all cases.⁵ This interpretation relies upon the assumption that the drafters were meticulous in their drafting and would not want to waste words were it possible to avoid doing so. Alternatively, it is possible that this section is there for emphasis, in view of its particular importance in the criminal context, and therefore worthy of explicit recognition. That being said, such a determination would not preclude a determination that the right to counsel is inherent in the *Charter* or the rule of law. This point can be elucidated by way of example, namely, the *Charter* fails to recognize the right to privacy in express terms, yet it has come to be understood as a nascent right in cases such as *R. v. O'Connor*.⁶

The Supreme Court of Canada's understanding of the rule of law should include access to counsel. While it is true that "(t)he rule of law is one of the most evocative of those animating principles—on a par with federalism and democracy, an independent judiciary, respect for minorities and the protection of the most vulnerable of our society,"⁷ the Supreme Court of Canada feels that the rule of law only encompasses three principles. Firstly, the rule of law implies that the law is supreme.⁸ Secondly, the rule of law requires the creation and maintenance of an actual order of positive laws.⁹ Finally, the relationship between the state and the individual must be regulated by law.¹⁰ This paper will attempt to show that the rule of law must include access to counsel; any other definition of the rule of law is underinclusive.

The right to counsel is inherent in the concept of access to justice, which in turn is inherent in the rule of law. The first point, that access to the courts is inherent to the rule of law is necessary for

⁵ *Christie*, *supra* note 1 at paras. 23-25.

⁶ [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235.

⁷ Warren J. Newman, "The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation" (2005) 16 Nat'l J. Const. L. 175 at 176 [Newman, "Rule of Law"].

⁸ *Reference re: Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867*, [1985] S.C.R. 721 at para. 64-68, 19 D.L.R. (4th) 1.

⁹ *Ibid.*

¹⁰ *Reference re: Secession of Quebec* [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385; *British Columbia v. Imperial Tobacco Ltd.* 2005 SCC 49, [2005] 2 S.C.R. 473, 257 D.L.R. (4th) 193.

the term ‘law’ to be meaningful and is discernible from the three principles of the rule of law. According to the first principle of the rule of law—that the law is supreme—access to the courts is implied; if there were no access to the courts then the rule-making body would be supreme rather than the law. According to the second principle—that there be the creation and maintenance of an actual order of positive laws—access to the courts is required in order for the term ‘law’, as opposed to the arbitrary dictates of the rule-making body, to be meaningful. Finally, the third principle—that the relationship between the state and the individual be regulated by law—also requires that there be access to the courts since the alternative would imply regulation by fiat rather than law. By depriving citizens of access to the courts, rulers could simply pass whatever arbitrary laws they desired, break them as they saw fit, and thereby ensure that the relationship between sovereign and subject could not realistically be said to be regulated, or, if so, would be regulated by whim more so than law.

The rule of law is a process whereby laws can be seen as ‘legitimate’ and ‘regular’¹¹ rather than ‘arbitrary’.¹² This necessitates access to the courts.

The Supreme Court of Canada in *Christie* seemed to be willing to accept the idea that access to the courts was inherent in the rule of law.¹³ The court also did not disavow the judgment passed in *BCGEU*. In *BCGEU*, the Supreme Court found that “(t) here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.”¹⁴ In *BCGEU* it was also held that:

“(i)t would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the *Charter* and should not first

¹¹ Arbitrariness is the antithesis of regularity and regularity is presupposed in the rule of law. See generally A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan & Co. 1959) at 185 – 193.

¹² This is Griffiths distinction between “legitimacy” and “arbitrariness.” J A G Griffith, “The Common Law and the Political Constitution” (2001) 17 LQR 42 at 46.

¹³ *Christie*, *supra* note 1.

¹⁴ *BCGEU*, *supra* note 3.

protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court.”¹⁵

The court continues to make the claim more forcefully, stating:

“Of what value are the rights and freedoms guaranteed by the *Charter* if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the *Charter* if court access is hindered, impeded or denied? The *Charter* protections would become merely illusory, the entire *Charter* undermined.”¹⁶

Nevertheless, because so many people represent themselves in court, the Supreme Court was of the view that a denial of the right to counsel did not impair access to counsel. The Supreme Court may have been sympathetic to the idea, as argued by the Crown, that to read a right to counsel into the unwritten principle of the rule of law, would be to make the rule of law into more than it is and to demean the importance of actual constitutional principles. On this point, Warren J. Newman states:

“The principle of the rule of law, pivotal though it is as a basic value (some might well claim the *grand norm*) of the Canadian constitutional system, should not be assumed to operate in the same manner, or with the same direct legal force, as a *provision* of the Constitution of Canada. Whilst the rule of law can be invoked in furtherance of the interpretation and application of constitutional provisions, and can thereby influence—sometimes profoundly—the response as to whether a given statute or regulation is consistent with the terms of the Constitution, the courts should not, in my view, attempt to use the rule-of-law principle independently to invalidate such legislation.”¹⁷

¹⁵ *Ibid* at para. 24.

¹⁶ *Ibid*.

¹⁷ Newman, “Rule of Law”, *supra* note 7 at 186.

This view is unconvincing. The rule of law is required to ensure that the Constitution is respected, as maintained in *BCGEU*. Therefore, the rule of law necessarily governs the interpretation of the Charter itself. The fact that this makes the rule of law quite important is not an objection to this argument. If it is necessary (as it is) for the rule of law to be interpreted quite expansively in order to make sense of the Constitution itself, then so be it. There is no alternative. Access to the courts, in turn, is required for the rule of law to make sense, as previously articulated, and therefore no limits are imposed on mere access. However, access to counsel is required for the law to be properly understood, otherwise this access is simply illusory. In light of the complexity of the law, granting mere access without the right to counsel is relatively meaningless in the same way that granting mere access if the law were written in another language would be meaningless. Therefore, the Supreme Court's view in *Christie* is mistaken because the right to counsel is inherent in the rule of law, since the right to counsel is integral to meaningful access to the courts. To say otherwise would be to grant an empty right, akin to granting the right to an all-you-can-eat restaurant devoid of food. More eloquently, the Canadian Bar Association stated that "without legal aid, access to justice is a hollow phrase, as many people simply cannot take advantage of their legal rights."¹⁸ The rule of law is the very basis of a democracy, and presupposes meaningful access to the courts, which implies the right to counsel. Without the rule of law, the constitution itself would make little sense. The fact that the right to counsel is inherent in the notion of access to the courts, is evident from the complexity of the law, a point made clear by Dyzenhaus.

B. DYZENHAUS' PUBLICITY CONDITION OF THE RULE OF LAW IMPLIES THE RIGHT TO COUNSEL

Dyzenhaus finds two unwritten characteristics of the rule of law. Firstly, he finds what he refers to as the "publicity condition of law", which is the idea that it is "inherent in the notion of substituting

¹⁸ Canadian Bar Association, News Release, "CBA Announces Legal Team to Lead Court Challenge on Constitutional Right to Legal Aid" (19 February 2005), online: <Canadian Bar Association http://www.cba.org/CBA/News/2005_Releases/2005-02-19_lacounsel.aspx>.

or replacing arbitrary measures with legal rules that the rules be known....”¹⁹ He goes on to state that, secondly, “it is implicit in the notion of the Rule of Law that the state’s obligation is not one of merely disclosing the law, but rather one of disclosing the law in a fashion which makes it accessible to the individual....”²⁰ This apparently involves positive assistance from the state since “...the fact that many citizens cannot, without the state’s assistance, respond to or cope with that law suggests the Rule of Law will be undermined if that assistance is not forthcoming.”²¹ Dyzenhaus’ contention is well-founded. It is apparent that if it were a satisfactory solution to represent oneself in court, many more people would be taking advantage of this option rather than expending tens of thousands of dollars on legal fees. Unfortunately, self-representation is not a satisfactory solution. Indeed, the complexity and seriousness of a case may require access to counsel in order for the accused to receive a fair trial.²² The legal profession cannot ‘have their cake and eat it too’, either the law is complex and lawyers are necessary, or it is not, and as such, there is no need for lawyers. Clearly, the legal system feels that there is a need for lawyers, and so the complexity of the legal system must be conceded, and with that comes an admission that the right to counsel must be afforded protection.

C. TO DENY ASSISTANCE WOULD BE TO DENY THE PUBLIC CHARACTER OF THE LAW

The right to counsel is also apparent in light of a consideration of the public character of the law. The court has found the existence of a right to counsel in cases where the state is attempting to use its coercive power to infringe upon the liberty interests of an accused. However, there is no principled distinction for providing the right to

¹⁹ Canada, McCamus Commission, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (Toronto: Queen’s Printer, 1997) (Chair, John D. McCamus) at 67-74 [McCamus, “Blueprint for Legal Services”].

²⁰ *Ibid.*

²¹ *Ibid.*

²² Anne-Marie Langan, “Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario” (2005) 30 *Queens L.J.* 825 at 844 [Langan, “Scales of Justice”].

counsel in criminal cases but not in civil cases. Punitive or criminal penalties are not necessarily much more damaging than pecuniary or civil penalties. Both are extremely important to our existence as individuals.

Firstly, the distinction between criminal and civil trials cannot rely on the fact that in criminal cases the state is directly involved in prosecuting the accused, whereas in civil cases the state is not directly involved. Such a formulation of the principle runs counter to the realities of society. The government or state is frequently involved in civil disputes and, more often than not, is the target of lawsuits. More importantly, even if it is not directly involved as a litigant, its involvement is still immense. This latter point is evident from an attention to the public character of the law. The state regulates all civil lawsuit activity. Moreover, as Owen Fiss has made clear, the regulation and implementation of the law is paid for with public funds in order to govern all of society.²³ Therefore, it is not legitimate to simply let people purchase as much or as little justice as they are able to afford. Justice is not a private good available to the highest bidder. It is a public good necessary for the preservation of a free and democratic society.²⁴

Secondly, the proposed distinction cannot rely on the fact that in criminal cases the accused's liberty interests are at stake whereas in civil lawsuits they are not. The problem with drawing this distinction is apparent by noting how a person's liberty can be more adversely affected by a landlord-tenant dispute, an immigration hearing, an appeal for *Ontario Works*, *CPP* or *OSDB* or a suit in torts, than it is in a criminal matter.²⁵ As was argued in the Report of the Ontario Legal Aid Review:

²³ Owen Fiss, "Against Settlement" (1984) 93 Yale L.J. 1073 at 1085 [Fiss, "Against Settlement"].

²⁴ Admittedly, in economics terms, justice could be conceived of as something other than a public good, in the sense of being excludable but that would distort the meaning of justice beyond recognition. The other characteristic of a private good is whether or not it is rival. Justice is not rival since by its very nature justice for one must be justice for all. If it were not, it would not be justice.

²⁵ McCamus, "Blueprint for Legal Services", *supra* note 19 at 67-74.

“it is not difficult to imagine cases involving no risk of incarceration in which the claim for legal aid appears stronger than in some kinds of cases involving that risk. Thus, a young adult charged with a first offence who has difficulty communicating and for whom a conviction might result in a loss of employment and other negative consequences that may flow from acquiring a criminal record may appear to make a stronger claim for legal aid than someone who has been convicted several times before, faces an overwhelming and uncomplicated case, is able to communicate and is knowledgeable about the justice system, and risks only a short period of incarceration about which he or she is not particularly troubled.”²⁶

In addition, this report points out other instances in which liberty interests are at stake outside of the criminal context, such as refugee hearings, involuntary civil commitment of a psychiatric patient, family law disputes, and so on.²⁷ Therefore, a consideration of the public character of the law reveals that the provision of legal counsel in criminal matters but not in civil matters cannot be maintained by appealing solely to the role of the state, since the state is intimately involved in civil trials. Further, the liberty interests at stake in civil trials can sometimes be jeopardized to an even greater extent. There is no principled reason to provide for the right to counsel only in criminal cases. As such, it is evident that, on policy grounds, the right to counsel ought to be afforded greater protection.

D. THE DISTINCTION BETWEEN THE PROCESS AND SUBSTANCE OF THE LAW IS TENUOUS

The right to counsel must also be considered in light of the evolving common law.²⁸ The Supreme Court of Canada held in *Christie* that there is a defensible distinction between the process and the substance of the law: the right to counsel is a procedural right that does not have constitutional status; the rule of law relates only to the

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Trevor C.W. Farrow, “Privatizing Our Public Civil Justice System” (2006) 9 *News & Views on Civil Justice Reform* 16 at 16 [Farrow, “Privatizing”].

substantive content of the law.²⁹ This view is unfortunate given that the rules of civil procedure, for example, are designed to facilitate the function, fairness, and equality of the law. Without proper adherence to and the full utilization of proscribed legal procedure, courts would be unable to produce well-reasoned and considered legal opinions. Without these well-reasoned opinions, the foundations of precedent would falter and result in the loss of confidence in the judicial system. It logically follows that the rule of law cannot be separated out from procedural fairness. Further, the common law is formed and advanced through judicial precedent. If landmark cases like *Donoghue v. Stevenson* had never been heard, then one might not have modern tort law.³⁰ Therefore, the process of the law generates the substance of the law and so the two cannot be separated.

E. THE ADVERSARIAL SYSTEM PRESUPPOSES THE RIGHT TO COUNSEL

The importance of the right to counsel is evident from a consideration of the nature of the adversarial system. Underpinning the adversarial system itself is the idea that through the use of an adversarial system, justice is best achieved. Given the complexity of the law, experts in the law are needed. Thus, the adversarial system presupposes rough equality in professional standards and knowledge as between the parties engaged in the dispute; if this were not the case then it is difficult to see how justice could best be served by an adversarial system. However, a dispute in which one party is unrepresented upsets the balance of the system³¹ and will likely end up being unfair to the unrepresented litigant.³² A survey of unrepresented litigants conducted by Anne-Marie Langan revealed that they were significantly disadvantaged by this situation, having “difficulties drafting their own pleadings and filling out court forms, understanding court procedures and negotiating with opposing

²⁹ *Christie*, *supra* note 1.

³⁰ Andrew Pirie, “Critiques of Settlement Advocacy” in Colleen Hanycz, Trevor Farrow & Frederick Zemans, eds. *The Theory and Practice of Representative Negotiation* (Toronto: Emond Montgomery, 2008) 278 [Pirie, “Settlement Advocacy”].

³¹ Langan, “Scales of Justice”, *supra* note 22 at 828.

³² *Ibid.* at 839-40.

counsel.”³³ Further, judges and court staff are often frustrated by the lack of knowledge of civil procedure and legal arguments on the part of the unrepresented litigant.³⁴ The right to counsel is important insofar as we believe in the value and efficacy of an adversarial system.

A judge may attempt to rectify this inequity by providing assistance to the unrepresented party. This action would help preserve the integrity of the adversarial system insofar as the parties’ advocacy power would be roughly equal. However, the adversarial system only functions properly if it is governed by a neutral arbiter who decides between the two parties. Consequently, the independence of the judge is immediately drawn into question if the judge assists the unrepresented party. In essence, it is unfair to the opposing counsel³⁵ when a judge provides assistance to an unrepresented party.³⁶ An unrepresented party draws into question the utility of the adversarial system itself. Justice, in a modern adversarial system, is best served by each party having access to counsel who can understand the law and advance the best interests of the client.

F. DISTINCTION BETWEEN POSITIVE AND NEGATIVE RIGHTS IS ILLUSORY

The resistance to the provision of counsel may be founded in the traditional distinction between positive and negative rights. Unfortunately for the proponents of this view, this distinction is illusory. The traditional distinction between positive and negative rights holds that negative rights are pre-governmental rights—which are rights possessed prior to the institution of government—³⁷ that are costless³⁸ since they merely protect individuals from governmental

³³ *Ibid.* at 843-44.

³⁴ *Ibid.* at 829.

³⁵ *Ibid.* at 841-43.

³⁶ *Ibid.*

³⁷ John Hasnas, "Toward a Theory of Empirical Natural Rights" (2005) 22 Social Philosophy and Policy 111 at 112 [Hasnas, "Theory"].

³⁸ See e.g. Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000) [Ignatieff, "Rights Revolution"]. Michael Ignatieff’s work although concerned exclusively with the *Canadian Charter of Rights and Freedoms*, fails to make any

action, and are not protections afforded by the government.³⁹ Consequently, it has been thought that “(t)raditionally, the protections of the Constitution have been viewed largely as prohibition constraints on the power of government, rather than affirmative duties with which government must comply.”⁴⁰ On this view, the government has no obligation to do anything,⁴¹ but if it chooses to act, it must merely “refrain from acts that deprive citizens of protected rights”.⁴²

Conversely, positive rights are thought to be post-governmental rights that arise after the institution of government and that cost money by requiring affirmative action on the part of the government⁴³ to act, provide, or protect.⁴⁴ So it has been that in *Dunmore v. Ontario (Attorney General)*, it was stated that “there is no constitutional right to protective legislation *per se*.”⁴⁵ In *Gosselin v. Quebec (Attorney General)* it was found that “s.7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice” and that “(n)othing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person.”⁴⁶ As a result, the court found the government under no positive obligation to help citizens, although they did leave open the possibility that such a duty may occur in the future, depending upon the case in question.⁴⁷ Similarly, in *Vriend v.*

mention of the cost of our negative rights, almost as if to say that it is costless to protect rights.

³⁹ David P. Currie, “Positive and Negative Constitutional Rights” (1986) 53 U.Chi.L.Rev. 864 at 866 [Currie, “Rights”].

⁴⁰ Susan Bandes, “The Negative Constitution: A Critique” (1990) 88 Mich. L.R. 2271 at 2273 [Bandes, A Critique].

⁴¹ *Ibid.* at 2274.

⁴² *Ibid.* at 2272.

⁴³ I. Friedman, “Poverty, Human Rights and Health” (1999) South African Health Review 1 at 7.

⁴⁴ Bandes, “A Critique”, *supra* note 40 at 2272.

⁴⁵ *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016 at para. 35, 207 D.L.R. (4th) 93 [*Dunmore*].

⁴⁶ *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429 at para. 81, 221 D.L.R. (4th) 187 [*Gosselin*].

⁴⁷ *Ibid.*

Alberta, the Court noted that positive obligations had not yet been found, (although the Court left open the possibility that positive obligations could be found in the future).⁴⁸ In *Christie* the court was wary of the cost that would stem from recognizing a general right to counsel. They pointed out that the “fiscal implications of the right sought cannot be denied. What is being sought is not a small, incremental change in the delivery of legal services. It is a huge change that would alter the legal landscape and impose a not inconsiderable burden on taxpayers.”⁴⁹ Unfortunately, rather than supporting the distinction between positive and negative rights, cost considerations eradicate that distinction.

An analysis of the Charter of Rights and Freedoms shows, firstly, that many of the rights contained therein are positive even in the traditional sense, in that they are not pre-governmental and they require affirmative state action and therefore cost money. The legal rights protected under ss. 7 to 14 of the Charter, in some instances, demand affirmative action: s. 10 provides for the right to counsel when one has been arrested, s. 11 imposes the duty on police officers to supply information, s.14 requires the government to provide the assistance of an interpreter where warranted, and s. 10⁵⁰ further imposes obligations on the government to ensure that a fair hearing transpires.⁵¹ Moreover, affirmative action by the state is mandated by the protections afforded to Canada’s official languages under ss. 16 to 22 to take affirmative action in certain instances to ensure that both official languages are maintained in Canada.⁵² This is also true of the protections under s. 23 governing minority language educational rights. The democratic rights protected under ss. 3 to 5 of the Charter require affirmative action by the government in the sense that it must hold elections.

⁴⁸ *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 185 [*Vriend*].

⁴⁹ *Christie*, *supra* note 1 at para. 14.

⁵⁰ *Canadian Charter of Rights and Freedoms*, ss. 7-14, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

⁵¹ William W. Black, “The Charter of Rights and Freedoms” in William Kaplan & Donald McRae, eds., *Law, Policy and International Justice: Essays in Honour of Maxwell Cohen* (Kingston: McGill-Queen’s Press, 1993) 302.

⁵² *Ibid.*

Most importantly, the remaining *Charter* rights as well as non-*Charter* rights under s. 26 of the *Charter* despite being considered to be ‘negative’ rights according to a traditional analysis, are actually identical to positive rights. This is the case because all negative rights, to be meaningful, are positive in the sense that they can only be enjoyed after the institution of government. That negative rights require state action is expressly recognized under s. 24 of the *Charter* which mandates that all of the rights contained therein be enforced.⁵³ For instance, the right to vote requires the provision of voting booths, the right to a trial by a jury requires a criminal justice system and so forth.⁵⁴ As such, they are not pre-governmental, but are political rights, requiring substantial affirmative state action and therefore, state funding. The extent to which someone can enjoy a negative right is largely contingent upon the amount of money allocated to law enforcement, the judiciary, the criminal justice system and the various ministries that allow for the enjoyment of the right in question,⁵⁵ whether that be via providing deposit insurance, fire protection, assigning property rights, providing benefits to the populace at large in order to secure the requisite social solidarity of the populace, or other, more subtle means.

In order to elucidate the point of this section, it may be of assistance to consider one of the archetypal negative rights, as traditionally defined, namely, the right to private property. This right is enshrined in the American constitution and, like the right to privacy, is implied in the Canadian constitution. Moreover, it is recognized under s. 26 of the *Charter* which affirms all pre-existing rights, such as the right to property as recognized according to statute, by virtue of registration, and common law principles. This right is identical to most positive rights since it is not pre-governmental, requires affirmative state action⁵⁶ and therefore requires state funding.

⁵³ *Charter*, *supra* note 49 s. 24.

⁵⁴ Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38 *University of British Columbia L. Rev.* 539 at 550 [Young, "Politics of Social Justice"].

⁵⁵ Stephen Holmes & Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.W. Norton and Company, 1999) at 223 [Holmes & Sunstein, "Cost of Rights"].

⁵⁶ C.B. MacPherson, "The Rise and Fall of Economic Justice and Other Essays: The Role of State, Class and Property in Twentieth-Century Democracy" (Toronto: Oxford University Press, 1985) 143.

Firstly, this right requires affirmative state action. The government must define, assign,⁵⁷ interpret and enforce this right.⁵⁸ As David Currie has pointed out “property, like contract, entails a right against third parties that is worthless without government help.”⁵⁹ Without these actions this right would be meaningless. Most obviously police, fire departments, courts and prisons have to be paid for.⁶⁰ Less obviously, this right may require the provision of benefits to those without property so as to ensure the continued compliance of the citizenry in respecting this right as well as the requisite maintenance of social cohesion so as to preserve confidence in the future, without which this right is meaningless.⁶¹ The preceding example highlights the fact that while rights protect citizens from the government, they also require governmental action to prevent, punish and deter nefarious actions taken by their fellow citizens. In this way, rights cannot be achieved simply by placing restrictions on what the government can do. In reality, they require action by the government. But all of these actions require funds and so these affirmative actions on the part of the state require funding.

It should therefore be evident that there is nothing pre-governmental about negative rights. The government as a whole is necessary in order to ensure that the citizenry can exercise their rights, since the government affords the citizenry with the necessary preconditions for the enjoyment of their rights. Absent the police, army, fire department, Canada Deposit Insurance Corporation and poverty reduction programs, to name but a smattering of governmental programs, then a Hobbesian state of affairs is all too likely to develop.⁶² Citizens would have little without the government;⁶³ at best they would develop some sort of collective, defense-providing type of system. We would not all be “Robinson

⁵⁷ Ran Hirschl, “‘Negative’ Rights vs. ‘Positive’ Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order” 22 *Human Rights Quarterly* 22 (2000) 1060 at 1072 [Hirschl, “Entitlements”].

⁵⁸ Holmes & Sunstein, “Cost of Rights”, *supra* note 55 at 50.

⁵⁹ Curries, “Rights”, *supra* note 39 at 876.

⁶⁰ Holmes & Sunstein, “Cost of Rights”, *supra* note 55 at 78.

⁶¹ Holmes & Sunstein, “Cost of Rights”, *supra* note 55 at 209.

⁶² Thomas Hobbes, *Leviathan* (London: Penguin Classics, 1968)

⁶³ Holmes & Sunstein, “Cost of Rights”, *supra* note 55 at 59

Crusoe's" on our own separate islands. Instead, we would still live with or near other people, but it is more plausible that in the absence of government, life would be "nasty, brutish and short."⁶⁴ All of the aforementioned services are provided by the government. Furthermore, they are unlikely to be provided by the private sector owing to the free-rider problem.⁶⁵ So the notion that any right is costless is difficult to defend. At a minimum, rights must be enforced by the government since "the value of rights...directly depends on the availability of effective instruments for remedying violations of those rights."⁶⁶ Finally, in order for any right to exist all of the various branches of government have to be called upon in order to secure the necessary social cooperation to ensure that rights become a reality.⁶⁷ To use more Marxist terminology, "it is the function of the state and law to maintain the structure of productive relations by providing norms and institutions which allow those relations to flourish."⁶⁸ In fact, "even those constitutional duties which are most clearly phrased in the negative may be enforceable only through affirmative governmental exertions" such that "the portrayal of government as

⁶⁴ *Supra* note 62 at 186.

⁶⁵ Harvey Rosen *et al.*, *Public Finance in Canada*, 2nd ed. (Toronto: McGraw Hill, 2003) at 520 [Rosen, "Public Finance"]. Most of the services provided by the government are 'public goods'. Public goods are 'nonrival' and 'nonexcludable', meaning that the consumption of this good by one individual does not decrease the ability of another to consume it and that individuals cannot feasibly be prevented from enjoying the good. As a result, there is considerable scope for the 'free-rider' problem to emerge. Since public goods are nonexcludable then there is no reason for any one person to pay for it, rather than to simply 'free-ride' off someone else who does. Yet when everyone thinks in this fashion then the good in question simply will not be provided. The government solves this problem by mandating that each individual fund this service and thereby eliminates the ability to free-ride, and ensures that the good in question will be provided.

⁶⁶ Christopher P. Manfredi, "Appropriate and Just in the Circumstances: Public Policy and the Enforcement of Rights under the Canadian Charter of Rights and Freedoms" (1994) 27 *Canadian Journal of Political Science* 435 at 435 [Manfredi, "Appropriate and Just"].

⁶⁷ Holmes & Sunstein, "Cost of Rights", *supra* note 55 at 15.

⁶⁸ This is not to say that the current level of expenditure, or the way that money is expended is optimal, only that at least some is necessary. See generally Michael Mandel, "Democracy, Class and Canadian Sentencing Law" in Stephen Brickey & Elizabeth Comack eds., *The Social Basis of Law: Critical Readings in the Sociology of Law* (Toronto: Garamond Press, 1986) at 137.

passive and uninvolved is sharply at odds with the reality of government as pervasive regulator and architect of a vast web of social, economic, and political strategies and choices.”⁶⁹

An examination of the other Charter rights, and those protected under s. 26 of the *Charter* reveals how they too are actually positive rights, even if they have been traditionally understood as negative in nature. Briefly, they all require enforcement, and, in particular, s. 3 requires the expenditure of funds to hold an election, s. 10 requires expenditure to ensure a fair hearing. More subtly, s. 2 rights may require the government to afford protection of these rights. Importantly, s.7 and s. 15, on a natural reading would appear to protect positive rights, a contention that shall be addressed in a subsequent section of this essay. It is evident then that the Charter already affords protection to numerous positive rights, and that therefore, the right to counsel cannot be objected to based on the fictitious belief that the Constitution only protects negative rights, *contra* the majority’s view of the role of the Constitution as exemplified in *Hunter v. Southam*.⁷⁰

Therefore, the right to counsel cannot be objected to solely because it costs money, or requires affirmative state action, or is not a pre-governmental right. Admittedly, there are other reasons for the neglect of positive rights. On one view ‘positive rights’ cause more conflicts than negative rights because they have to do with the distribution of resources.⁷¹ The courts have been frequent objectors to the notion that this would then immerse the court in the role of assessing policy, which is not their core area of expertise.⁷² Others object to positive rights because they are, apparently, aspirational in nature.⁷³ Another reason for the inattention to the cost of rights is due to the belief that negative rights are worthy of more protection than

⁶⁹ Bandes, “A Critique”, *supra* note 40 at 2283.

⁷⁰ [1984] 2 S.C.R. 145 at para 19, 11 D.L.R. (4th) at 641.

⁷¹ Katherine Eddy, “Welfare Rights and Conflicts of Rights” (2006) 12 Res Publica 337.

⁷² Christopher P. Manfredi & Antonia Maioni, “Courts and Health Policy: Judicial Policy Making and Publicly Funded Health Care in Canada” (2002) 27 Journal of Health Politics, Policy and Law 217.

⁷³ J. K. Mapulanga-Hulston, “Examining the Justiciability of Economic, Social and Cultural Rights” (2002) 6 The International Journal of Human Rights 29 at 30.

other interests that could be framed as positive rights.⁷⁴ However, none of these reasons are persuasive in light of an understanding of cost considerations.

Positive rights are not more aspirational than negative rights. All rights cost money to protect. Therefore, all rights can always be protected to a greater extent. As a result, all rights are in a sense, aspirational.⁷⁵ With the respect to the notion that to recognize the right to counsel would be tantamount to the court making a policy decision, this objection is quelled by a consideration of the importance of the right to counsel in a modern-day democracy in order for the concepts of access to justice and the rule of law to make sense. Also, the notion that ensuring access to justice is not an area of judicial expertise is tenuous. Furthermore, failing to consider budgetary choices, due to a deference to “executive privilege” is itself to make a choice in favour of the status quo. The “slippery slope argument is that by avoiding imposition of any affirmative duties, the judiciary can also avoid value judgments. The argument is fatally flawed because it fails to see the implicit value choices on which it rests and the impossibility of avoiding the question of values.”⁷⁶

Finally, the idea that negative rights, as traditionally understood, are more worthy of protection than positive rights is odd, since at the base of all other rights is the idea that every human being deserves respect and fair treatment by virtue of being human.⁷⁷ Yet if all other laws are premised on this one principle, and if this one principle is not being achieved, then this is clearly a problematic situation. As Michael Ignatieff points out, “agency is the key idea in rights” which means “the capacity of individuals to set themselves goals and accomplish them as they see fit”⁷⁸ yet minimal positive rights to food, clothing and shelter are necessary to have any agency.⁷⁹ In this way, negative rights are meaningless without a minimum

⁷⁴ Jeremy Waldron, “Waldron and Pildes on Dworkin’s Theory of Rights” (2000) 29 *Journal of Legal Studies* 301.

⁷⁵ Holmes & Sunstein, “Cost of Rights”, *supra* note 55 at 119.

⁷⁶ Bandes, “A Critique”, *supra* note 40 at 2332-2333.

⁷⁷ Ian Greene, *The Charter of Rights* (Toronto: James Lorimer and Company, 1989) at 1.

⁷⁸ Ignatieff, “Rights Revolution”, *supra* note 38 at 23.

⁷⁹ Hirschl, “Entitlements”, *supra* note 57 at 1072.

amount of positive freedom. Since negative rights are meaningless without government assistance, this assistance is provided, even though this costs money. It is plausible then that money should be provided for positive rights since positive rights are required in order to enjoy negative rights.⁸⁰ In particular, the right to counsel cannot be objected to solely because it is a positive right, and, most importantly, given its importance, it should be afforded protection. Admittedly, it could be argued that in a democracy people are entitled to demand and receive precisely as much justice as they desire. However, despite the strong, majoritarian appeal of this view, substantive democracy requires a certain level of justice regardless of what individuals within that society may want. In much the same way, democracy requires elections regardless of whether or not the members of any particular democracy want elections. This necessarily entails, as Professor Farrow argues, that the importance of justice must always trump that of efficiency.⁸¹

III

RIGHT TO COUNSEL IS A CONSTITUTIONAL RIGHT IN ITSELF

It has been argued that the right to counsel is very important and that it is inherent to the idea of access to courts which is inherent to the rule of law. However, it is also plausible that the right to counsel is a constitutional right in itself.

A. THE SUPREME COURT'S REFUTATION OF BCGEU WAS LEFT LARGELY UNARGUED

In the scant thirty paragraphs that the Supreme Court provided in the way of a judgement in the *Christie* case they did not succeed in differentiating the *Christie* case sufficiently from *BCGEU* which recognized a constitutional right to access to the courts. The Court reasoned in *Christie* that the government is entitled to pass laws with respect to the administration of justice, such as one that levies a tax on legal services. Yet this assertion was unargued and it is more plausible that the opposite is true. If it were the case that the

⁸⁰ Currie, "Rights", *supra* note 39 at 877.

⁸¹ Farrow, "Privatizing", *supra* note 28 at 17.

government could pass laws in relation to the administration of justice that preclude access to justice then there would be no point in saying that there was a right to access to justice in the first place. If there is a constitutional right to access to justice, then clearly the government cannot pass laws in relation to the administration of justice that curtail that right (subject to s.1). The tax in question was not ‘in relation to the administration of justice’ in the administrative sense (as would be the case with a rule setting judges’ salaries, their hours of operation, and so forth,) rather it precluded access in the case of Mr. Christie’s clients. The tax imposed on Mr. Christie led directly to Mr. Christie’s insolvency and the inability of his clients to receive legal counsel. In this way, the tax was equivalent to picketing in front of a courthouse in its effect and the Supreme Court failed to distinguish picketing from a tax precluding access to a lawyer.

B. S. 7 GROUNDS CONSTITUTIONAL RIGHT TO COUNSEL

It has been unconvincingly argued in the past, in large part by the courts of this country, that there is no positive duty upon the state to provide for the basic welfare of its citizens, including ensuring that the right to counsel is provided for. Margot Young has pointed out the absurdity of such a position by showing that “(t)he fundamental justifications of democracy, citizenship, individual autonomy, equality and justice that inform why we protect what we protect as constitutional rights are as strongly supportive of social and economic rights as they are of civil and political rights.”⁸² Nevertheless, the Supreme Court has not been persuaded by such arguments. For instance, in *Dunmore v. Ontario*, no constitutional right to protective legislation was found⁸³ While in *Gosselin v. Quebec* it was found that “(n)othing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person.”⁸⁴ As a result, the court found the government under no positive obligation to help citizens, although they did leave open the possibility that such a duty may be found in

⁸² Young, “Politics of Social Justice”, *supra* note 54 at 541.

⁸³ *Dunmore*, *supra* note 45.

⁸⁴ *Gosselin*, *supra* note 46.

the future, depending upon the case in question.⁸⁵ In light of the preceding discussion regarding the illusory distinction between negative and positive rights, it is evident that insofar as the state is obligated to respect negative rights, it can clearly be shown to have an obligation to provide for positive rights as well.

Even if one were unaware of the similarity between positive and negative rights, it is sufficient to note that a natural reading of section 7 would appear to confer a right to counsel. This is apparent on two possible grounds. Firstly, the first clause in section 7 grants a right *to* life, liberty and security of the person, if this clause is taken to be free-standing, as Justice Arbour had argued.⁸⁶ Secondly, in light of the public character of the law, as previously articulated, a denial of the right to counsel is tantamount to the state *depriving* a person of their life, liberty and security of the person.

C. S. 15 GROUNDS CONSTITUTIONAL RIGHTS TO COUNSEL

It must be remembered that s. 15 allows for equality under and before the law as well as the equal protection and equal benefit of the law.⁸⁷ In order to ensure that this is the case it would seem to be necessary to find a right to counsel, particularly in light of considerations that have been previously mentioned, such as the nature of the adversarial system. In addition, in *Law v. Canada (Minister of Employment and Immigration)*, Justice Iacobucci stated that the purpose of s. 15 is to “prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.”⁸⁸ Access to counsel is most necessary when human dignity and freedom are threatened. It

⁸⁵ *Ibid.* at para. 81.

⁸⁶ *Gosselin*, *supra* note 46 at para. 308-309.

⁸⁷ Mary Eberts, “The Equality Provisions of the Canadian Charter of Rights and Freedoms and Government Institutions” in Clare F. Beckton & A. Wayne Mackay eds., *The Courts and the Charter* (Toronto: University of Toronto Press, 1985) 153.

⁸⁸ *Law v. Canada (Minister of Employment and Immigration)* [1999] S.C.R. 497 at para. 51, 170 D.L.R. (4th) 1

would seem to be the case then that s. 15 affords a right to counsel. However, discrimination can only be found if the court determines that an enumerated or analogous ground in s. 15 has been violated. The judicial interpretation of s. 15 so far has not envisaged income as analogous grounds of discrimination and, as such, it may appear to be the case that it is difficult to found a s. 15-based claim for the right to counsel.

That being said, the court could still conclude that income should be an analogous ground of discrimination, as Faye Woodman has argued, owing to the fact that “low-income, the lower-class, or the underprivileged share many of the disadvantages of individuals with enumerated characteristics. They lack political power, and may constitute ‘discrete and insular minorities’.”⁸⁹ There is at least a plausible argument to be made that the right to counsel is a constitutional right in itself, and as such, it should, from a policy standpoint, be afforded greater attention.

IV

CAUSES OF HIGH LEGAL COSTS – ALLEGED RATIONALES FOR THE EXISTING REGULATORY STRUCTURE

It has been shown that the right to counsel is extremely important and that the legal costs that impede that right are highly undesirable. If costs are one of the main barriers to access to the legal system then that which lowers those costs will likely be the most effective method of increasing access to justice. Consequently, this paper shall presently extol the rationales underlying the self-governing power and independence of the Law Societies of Canada.

The rationales underlying the self-regulating power of the Law Societies of Canada and its independence are distinct. The general rationale underlying the regulation of lawyers is to protect consumers and to ensure the quality of services offered to them.⁹⁰ The

⁸⁹ Faye Woodman, "The Charter and the Taxation of Women" (1990) 22 *Ottawa Law Review*, 625 at 650 [Woodman, "Taxation of Women"].

⁹⁰ Competition Bureau, *Self-regulated professions - Balancing competition and regulation* (Gatineau: Competition Bureau, 2007) at 14 [Competition Bureau, "Self-regulated professions"]. See also Benjamin Hoon Barton, "Why Do We Regulate

general rationale underlying the self-regulation of lawyers is to protect the independence of the judicial system itself.⁹¹

As set out in the Competition Bureau's report,⁹² and supported by the vast majority of economists,⁹³ an efficient allocation of resources stems from ensuring that goods are produced and purchased in the framework of a competitive market place, except in instances of market failure. Generally, competition serves the interests of the consumer since "consumers have access to the broadest range of services at the most competitive prices and that producers have the maximum incentive to reduce their costs as much as possible and meet consumer demand."⁹⁴

Unfortunately, private markets are not always efficient. When they are not it is called an instance of 'market failure'. Market failure is when a market fails to allocate resources efficiently. The four main types of market failure occur when a market actor is capable of abusing market power, when externalities are present, when the good in question is a public good, or when there is asymmetric information.⁹⁵ In such cases regulatory intervention may be able to improve the market, but if carried out improperly, this regulation could have an anti-competitive effect that could worsen the situation.⁹⁶ The two main sources of market failure in the provision of legal services are information asymmetries and externalities.

Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation" (2001) 33 Ariz. St. L.J. 429 at 436 [Barton, "Conduct Regulation"].

⁹¹ Barton, "Conduct Regulation", *supra* note 90 at 483.

⁹² Competition Bureau, *supra* note 90 at 17.

⁹³ U.K., Justice 1 Committee's Inquiry into the Regulation of the Legal Profession, *An Economic Perspective on the Regulation of Legal Service Markets* by Frank H. Stephen, at 2, online: Scottish Parliament <<http://www.scottish.parliament.uk/business/committees/historic/justice1/inquiries-02/j1-lps-pdfs/lps-099.pdf>> [Stephen, "Paper to Scottish Parliament"].

⁹⁴ Competition Bureau, "Self-regulated professions", *supra* note 90 at 14.

⁹⁵ Rosen, "Public Finance" *supra* note 65.

⁹⁶ Competition Bureau, "Self-regulated professions", *supra* note 90 at 17.

A. ASYMMETRIC INFORMATION

An information asymmetry occurs when there is an imbalance of information between two or more parties. The severity of this problem varies with the type of good that the consumer seeks to purchase. The quality of a ‘search’ good is apparent to the eventual consumer after it has been found, the quality of an ‘experience’ good becomes apparent to the eventual consumer after it has been tried, however, the eventual consumer is never fully capable of assessing the quality of ‘credence’ goods even after having experienced them.⁹⁷ Legal services are credence goods. When a consumer purchases legal services, that consumer is unable to tell—even after having received the legal service in question—whether or not the service was of high quality. This owes to the information asymmetry between the two parties. This information asymmetry, in turn, is what necessitated the purchase of the legal service in the first place.⁹⁸

Asymmetric information, in turn, can lead to the problems of adverse selection and moral hazard. Adverse selection is the tendency for the mix of unobserved traits to become undesirable from the perspective of the uninformed party.⁹⁹ In the case of legal services it would mean that there would be a tendency for firms to offer lower quality services (without a corresponding decrease in the price of those services) to their clients. They would be able to do this because their customers are unable to ascertain the quality of the services, because the consumers are purchasing a credence good.¹⁰⁰ However, since consumers are also aware of their own inability to distinguish between high and low quality service providers, they will be unwilling to pay for high price goods out of a fear that high quality will not accompany that price.¹⁰¹ As a result, providers of the highest quality (and highest-priced service) may exit the market, leaving an overall pool of even lower quality service providers. This downward

⁹⁷ *Ibid.* at 18.

⁹⁸ Stephen, “Paper to Scottish Parliament”, *supra* note 93 at 3.

⁹⁹ Rosen, “Public Finance”, *supra* note 65.

¹⁰⁰ Competition Bureau, “Self-regulated professions”, *supra* note 90 at 19.

¹⁰¹ Stephen, “Paper to Scottish Parliament”, *supra* note 93 at 3.

cycle on prices and quality would continue until only the lowest quality services for the lowest price would be provided.¹⁰²

Asymmetric information can also result in moral hazard problems. Moral hazard is the tendency for people to act in their own interests rather than those of their clients. As a result, a client may prefer higher quality and higher cost legal services, but be provided only with high cost services of lower quality owing to the fact that, due to the information asymmetry, the consumer is purchasing a credence good. Alternatively, the consumer may desire a good of lower quality and lower cost yet the provider may still provide higher quality and higher cost services. This could easily transpire since the legal professional is responsible for evaluating the legal problem, suggesting the appropriate remedy and attempting to implement it, and therefore has a financial incentive to suggest an expensive remedy knowing full well that the client is not in a position to question such advice. If the client were able to properly question this advice, he or she would not be seeking the attorney's services.¹⁰³

Regulation of the legal market can correct for the adverse selection problem by providing market entry restrictions that ensure the provision of high quality legal services and thereby reduce the uncertainty about the quality of services that are paid for.¹⁰⁴ Regulation of the legal market can also correct for the moral hazard problem by providing market conduct restrictions by setting maximum prices or by ensuring a minimum standard¹⁰⁵ that prevent legal professionals from exploiting their clients' informational disadvantage.¹⁰⁶ It should be noted that these problems are less acute for repeat users of the justice system, such as companies for whom use of legal services may be routine.¹⁰⁷ However, for the average person, use of the justice system is infrequent.¹⁰⁸ Admittedly, if a robust

¹⁰² Competition Bureau, "Self-regulated professions", *supra* note 90 at 19.

¹⁰³ Stephen, "Paper to Scottish Parliament", *supra* note 93 at 3-4

¹⁰⁴ Competition Bureau, "Self-regulated professions", *supra* note 90 at 19. See also Stephen, "Paper to Scottish Parliament", *supra* note 93 at 3.

¹⁰⁵ Competition Bureau, "Self-regulated professions", *supra* note 90 at 20.

¹⁰⁶ Stephen, "Paper to Scottish Parliament", *supra* note 93 at 4.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

system of information transfers between past clients and prospective clients of legal services could be implemented then this would diminish the problems that stem from the information asymmetry between clients and lawyers.¹⁰⁹ However, the asymmetrical information problems that arise from the purchase of legal services result from the fact that the good being purchased is a credence good. As such, the transfer of information from consumers who have experienced the quality of this good from some suppliers will only mitigate and not obviate the information asymmetry problem.

B. EXTERNALITIES

Externalities arise when the party purchasing a given product does not pay the true social cost of that product. The total cost that accrues to society may diverge from the private cost paid by the consumer when there are externalities. There can be positive externalities—where a benefit accrues to a third party or society at large from the transaction in question—and negative externalities—where a cost is imposed on a third party, or society at large owing to the transaction in question.¹¹⁰ In the context of the legal system, negative externalities can arise from low quality service, when poorly argued or incomplete cases are presented to the courts. Such cases result in poor quality decisions for the parties involved in the dispute. These decisions have a negative effect on society as well owing to the force of precedent. This, in turn, grounds the regulation of legal service providers to ensure that these providers attain a certain minimum standard that will protect the public at large from this effect. Further, high-quality services can result in positive externalities accruing to society at large in much the same as low-quality services have negative effects. For example, well-argued and well-presented cases often result in higher-quality decisions from the courts simply because the court is more properly informed of the issues and the law in question.

¹⁰⁹ *Ibid.*

¹¹⁰ Rosen, “Public Finance”, *supra* note 65.

V

THE LAW SOCIETY SHOULD ENHANCE ACCESS TO COUNSEL: THE
EXISTING REGULATORY STRUCTURE FAVOURS THE PROFESSION'S
INTEREST OVER THE PUBLIC INTEREST

The existing regulatory structure, in an effort to combat the asymmetrical information and externality-based problems inherent in the provision of legal services, has functioned, whether by intention or in effect, too much like a cartel, enacting regulations that are in its own interests but contrary to those of the public.¹¹¹

The theoretical need for regulation is clear. Most countries have conferred the regulatory power on the profession itself. In the proceeding section, an analysis of the various law societies' regulatory effects on the legal services markets is undertaken.

A. REDUCE MARKET-ENTRY BARRIERS

Market entry restrictions have been erected to combat the adverse selection problems stemming from the information asymmetry between lawyers and their clients. Market entry barriers ensure that those who enter the legal profession are of high quality, thus preventing low quality professionals from practicing law. However, in economic terms, the regulation that has been enacted by the law societies of Canada appears to protect its members from competitive forces and thereby ensure, rather than correct for, market failure. As stated by the Competition Bureau: by "creating, enhancing or preserving the market power of incumbents" law societies ensure a lower supply of quality of services at higher prices than would prevail in a competitive.¹¹²

The law societies have over-corrected for the potential problem of low quality lawyers to the detriment of those who would prefer to purchase service of a lower quality and also of a lower price. Further the law societies' regulatory efforts have resulted in some consumers being simply unable to purchase any legal services

¹¹¹ Stephen, "Paper to Scottish Parliament", *supra* note 93 at 14.

¹¹² Competition Bureau, "Self-regulated professions", *supra* note 90 at 21.

whatsoever.¹¹³ Such barriers protect incumbents and insulate them from outside competitive pressures, further lessening the quality of service.¹¹⁴ This is of benefit primarily to current lawyers and is not in the interest of the populace.

It is true that regulation ensures that the market will not fail, but the law societies have made excessive use of the regulatory methods available with severe consequences for access to counsel. This paper endorses the findings of the Competition Bureau: “jurisdictions that maintain higher standards than others should look to the outcomes of less regulated jurisdictions when defining the minimum necessary level of qualification.”¹¹⁵

1. DECREASE DURATION OF LEGAL TRAINING AND ARTICLING

A barrier to entry employed by the law societies is the onerous legal training and articling required to become a lawyer. Lawyers in Canada must have completed at least two years of undergraduate education (although most have completed their Bachelor’s degree), a three year common law degree, (or, in Quebec, a civil law degree) and the bar admission course of the province in which the wish to practice.¹¹⁶

The rationale for these standards is to ensure that lawyers are of high quality. However, if the goal of this exercise is to have high quality lawyers then that can be achieved through allowing law students to pursue optional additional accreditation. It does not make any sense to force all law students to complete all of the above requirements since it thereby forces all prospective buyers to buy legal services of a certain quality, with no regard for their own interests and preferences. Unless the law societies can demonstrate by more than simple assertion that these standards are the absolute minimum that are required in the public interest, then the duration of this accreditation process must be reduced. A reduced accreditation

¹¹³ Barton, “Conduct Regulation” *supra* note 90 at 441.

¹¹⁴ Competition Bureau, “Self-regulated professions”, *supra* note 90 at 21.

¹¹⁵ *Ibid.* at 9.

¹¹⁶ *Ibid.* at 63.

period will decrease the salaries of lawyers and thereby increase access to justice. Such a development is in the public interest.

Firstly, it seems unlikely that the three years it takes to acquire a law degree are necessary in light of the fact that all of the required courses are completed by the end of the first year at most law schools. The result is that students end up with legal knowledge of areas in which they are never going to practice, paid for by their eventual customers. It is interesting to note that for any other service we do not demand the best, but rather simply the competent. We do not need the best plumbers, taxi cab drivers, school teachers, paramedics or lawyers; we need what is good enough from a societal perspective, not from the legal profession's perspective. In addition, in light of the fact that in Quebec one can enter law school after a mere two years in CEGEP,¹¹⁷ either Quebec's standards are far too low, or the rest of Canada's are far too high. In light of the access to justice problem in Canada, the latter seems far more plausible. Finally, this is also true of the requirements for the bar admission course, which vary from ten weeks in British Columbia to a year in Alberta.¹¹⁸ The Competition Bureau's excellent work on this matter is especially pertinent in this respect: "the FLSC did not provide the Bureau with a rationale for the dissimilarities across the country. Furthermore, given the National Mobility Agreement (see below), which allows lawyers to move freely among jurisdictions regardless of the legal training course or articling period required by their home jurisdictions, the reason for the discrepancies is not apparent."¹¹⁹

2. FACILITATE MOBILITY AMONG LEGAL PROFESSIONALS IN CANADA

The National Mobility Agreement (NMA), which has been implemented by all provinces (except Quebec) allows for lawyers to temporarily practice outside of the province in which they are a member of the Bar. However, restrictions on permanently practicing

¹¹⁷ Collège d'enseignement général et professionnel, "What is CEGEP?" online: CEGEP <<http://www.cegep.com/menu1/whatscegep.htm>>.

¹¹⁸ Competition Bureau, "Self-regulated professions", *supra* note 88 at 65.

¹¹⁹ *Ibid.*

in that province are still great. The law societies should attempt to facilitate mobility among legal professionals so that they are best able to respond to changes in demand which will ensure an efficient allocation of legal service providers among jurisdictions and thereby enhance service and increase access to justice. In particular, the territories should sign the NMA.¹²⁰

The law societies should attempt to facilitate legal work by foreign lawyers by removing the restrictions that currently prevent foreign lawyers from practicing as foreign legal consultants. For example, the law societies should consider removing the requirement that foreign legal consultants have residency in the province in which they are offering advice.¹²¹ Increasing mobility promotes competition and is in keeping with broader international trends. For example, the European Union has been a concerted effort to eliminate such barriers in the legal profession, as well as other fields.¹²²

3. ALLOW FOR THE USE OF ALTERNATIVES TO LAWYERS

Lawyers licensed by their respective law societies are the only ones who are permitted to supply continuing legal advice in Canada. The rationale for this should be familiar: to increase the quality of legal services. This is likely true, but it also restricts the supply of legal advice and increases the salaries of lawyers thereby reducing access to counsel.¹²³ As recommended by the Competition Bureau, law societies should not prohibit related service providers—such as paralegals—from performing legal tasks except in instances where there is very strong evidence to suggest that to do so would result in harm to the public.¹²⁴

The arguments against the greater use of paralegals amount to the familiar worry over the likely reduction in the quality of legal services. This objection is not convincing. Consumers who wish to use the service of lawyers may do so, while those who wish to use the

¹²⁰ *Ibid.* at 66.

¹²¹ *Ibid.* at 67-68.

¹²² Stephen, “Paper to Scottish Parliament”, *supra* note 93 at 6.

¹²³ Competition Bureau, “Self-regulated professions”, *supra* note 90 at 25.

¹²⁴ *Ibid.* at 70.

services of paralegals may do so. It is already evident whether or not someone is a lawyer or a paralegal and the choice of the appropriate balance between the quality of the service and the price of that service should be left to the consumer, rather than to the law societies. In sum, the extent of market entry barriers have been demonstrated to be very beneficial to lawyer's salaries. The same cannot be said of the public interest.¹²⁵

B. REDUCE MARKET-CONDUCT RESTRICTIONS

Market conduct restrictions have been erected to combat the moral hazard problems stemming from the informational asymmetry between lawyers and their clients. These restrictions ensure that those in the legal profession conduct themselves in the interests of the public at large. The moral hazard problem stems from an exploitation of the information asymmetry problem by lawyers, which to some extent could be addressed through greater emphasis on ethical education for law students. Regardless, the current restrictions employed by the law societies of Canada impede access to counsel with no resulting benefit to consumers and therefore should be removed.

1. REMOVE SUGGESTED OR MANDATORY FEES FOR PROFESSIONAL SERVICES

British Columbia and New Brunswick set a maximum percentage to which lawyers are entitled under contingency fee agreements. This may be done to prevent the moral hazard problem of lawyers providing higher quality services, at higher cost, than is required by their client.¹²⁶ Unfortunately, this measure also directly impedes access to counsel by preventing those clients with 'riskier' cases from having access to a lawyer since lawyers may be unwilling

¹²⁵ *Ibid.* at 27. The Competition Bureau found that salaries for lawyers in the united states increased entry salaries by more then \$10 000 – a total transfer from consumers to lawyers of 19 percent of lawyers' wages and a total welfare loss of more than \$3 billion

¹²⁶ Competition Bureau, "Self-regulated professions", *supra* note 90 at 31.

to take on more risky cases¹²⁷ unless the contingency fee is commensurate with the amount of risk. The necessity of the British Columbia and New Brunswick measures is dubious in light of the fact that every other province feels that this restriction is unnecessary.¹²⁸ These measures also diminish access to justice by reducing price competition as prices effectively converge on the maximum price.¹²⁹ A much better solution to the potential for moral hazard would be to publish survey data of average prices.¹³⁰

2. REMOVE ADVERTISING RESTRICTIONS

Many of the law societies prohibit comparative advertising based on price, impose limits on the size, style and content of advertisements, and restrict the ability of professionals to advertise as specialists or experts in a certain field of law.¹³¹ Presumably these restrictions are in place to protect consumers from misleading or false advertising. Regrettably, these actions are superfluous given that misleading and false advertising is already prohibited under *The Competition Act*.¹³² More importantly the restrictions impair access to counsel by increasing lawyers' fees at the expense of the public¹³³ by way of preventing prospective consumers from having access to pertinent information about the prices and types of services available. The restrictions that are currently employed—purportedly in the interests of preventing the consumer from the harmful effects of information asymmetry problems—seem primarily to exacerbate information asymmetries and have the undesirable consequence of lessening access to counsel.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.* at 76.

¹²⁹ *Ibid.* at 31.

¹³⁰ *Ibid.* at 32.

¹³¹ *Ibid.* at 72-75.

¹³² *Competition Act* R.S.C. 1985, c. C-34.

¹³³ Competition Bureau, "Self-regulated professions", *supra* note 90 at 30. Muxondo and Pazderka in 1980 and 1983 found advertising restrictions responsible for increasing income by 10 percent with no noticeable decline in quality.

3. REMOVE SOME OF THE RESTRICTIONS ON BUSINESS STRUCTURE

With the exception of Quebec and Ontario, multi-disciplinary law practices are effectively prohibited in Canada by virtue of the prohibition on others sharing in legal fees.¹³⁴ The potential that a client's bill may act as a cross-subsidy for another aspect of a multi-disciplinary practice, or that there may be a conflict of interest within a multi-disciplinary practice, is a legitimate worry. However, such a worry is likely outweighed by the fact that such organizations have proven to be successful in Ontario and Quebec. A multi-disciplinary practice can help law firms raise equity and invest in capital that is of benefit to the consumer.¹³⁵ Furthermore, such a practice creates economies of scope¹³⁶ which can result in substantial cost savings for consumers¹³⁷ and can thereby increase access to counsel. The Clementi report urged that the UK consider removing many of the restrictions on alternative business practices.¹³⁸ The UK government broadly accepted the recommendations in the Clementi report¹³⁹ and recently passed the Legal Services Bill.¹⁴⁰ In light of the severity of the current access to justice problem, it seems likely that the balance struck in Canada is not in the best interests of the public.

¹³⁴ *Ibid* at 77.

¹³⁵ U.K., Department of Constitutional Affairs, *The Benefits Of Multiple Ownership Models In Law Services* by James Down & Carlos Lapuerta (2005) at 8-9, online: Department of Constitutional Affairs <<http://www.dca.gov.uk/legalsys/dow-lapuerta.pdf>>.

¹³⁶ Stephen, "Paper to Scottish Parliament", *supra* note 93 at 11.

¹³⁷ Competition Bureau, "Self-regulated professions", *supra* note 90 at 78-79.

¹³⁸ U.K., Secretary of State for Constitutional Affairs, *Review of the Regulatory Framework for Legal Services in England and Wales* (Final Report) by Sir David Clementi (2004) at 105, online: Legal Services Review <http://www.legal-services-review.org.uk/content/report/report-chap.pdf> [U.K., "Clementi Report"].

¹³⁹ U.K., Department of Constitutional Affairs, *The Future of Legal Services: Putting Consumers First* (Presented to Parliament by the Secretary of State for Constitutional Affairs and Lord Chancellor by Command of Her Majesty) (Norwich: TSO Stationery Office, 2005) at 17, online: Department of Constitutional Affairs <<http://www.dca.gov.uk/legalsys/folwp.pdf>>.

¹⁴⁰ *Legal Services Act, 2007* (U.K.) 2007, c. 29.

C. INCREASE THE USE OF EXISTING MEANS

This paper has proposed that the current lack of access to counsel is unacceptable and that fundamental reforms in the way the law is delivered to citizens would likely increase access to counsel. However, there is also substantial scope for increasing the use of existing means that have been shown to increase individuals' access to counsel.

1. CONTINGENCY FEES

This paper has addressed the point that maximum limits on fees lawyers may charge to clients likely impedes access to counsel by preventing lawyers from taking on cases that they may have taken on if the contingency fee was commensurate with the risk that they faced. This subsection makes a slightly different point: that contingency fees increase access to counsel by providing low income-clients with access to counsel that they would not otherwise receive. This benefit is enormous and, as such, the use of contingency fees is to be greatly encouraged. Further, contingency fees address the moral hazard problem by ensuring that a prudent lawyer will no longer pursue a case when the costs outweigh the benefits since the lawyer's fee derives from the potential award to the plaintiff.¹⁴¹

2. ADR/SETTLEMENT

In light of the fact that between 92% and 98% of lawsuits settle,¹⁴² there is substantial scope for improving access to justice through the use of mediators. Mediators need not be lawyers¹⁴³ and, as such, need not cost as much as lawyers. While the use of mediation fails to enhance access to counsel, this objection to the use of mediators is not a death knell; access to counsel is itself a means towards access to justice rather than an end in and of itself. To be

¹⁴¹ Stephen, "Paper to Scottish Parliament", *supra* note 93 at 10.

¹⁴² J. Macfarlane, "The Mediation Alternative" in *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery, 1997) 6 at 6-8 [Macfarlane, "Mediation Alternative"].

¹⁴³ Competition Bureau, "Self-regulated professions", *supra* note 90 at 62.

clear: if there is a more fruitful way of achieving justice, then that path should be pursued. When parties settle they mitigate numerous direct costs in terms of their time, money, disrupted lives, and emotional and psychological energy that would have been expended in a full-fledged court case. They also mitigate many of the indirect opportunity costs that stem from having to use their time at court rather than in another manner.¹⁴⁴

The main attraction of settlement is that it can allow for ‘pareto-efficient’ results, wherein both parties are made as well off as they can be.¹⁴⁵ Settlement functions in a more humane way. More attention is paid to the interests of those involved in the dispute and allows the disputants to adopt innovative solutions¹⁴⁶ beyond those normally issued by a court but that nonetheless satisfy both parties to a greater extent than a court ruling might.¹⁴⁷ Settlement also allows for parties to come to a better understanding of each other¹⁴⁸ and can thereby help clear up disputes premised on a failure to communicate or misattributions.¹⁴⁹ Perhaps most importantly, settlement can ensure that disputes that are primarily resource-based, rather than rooted in principle, do not proceed to lengthy litigation.

Unfortunately, ADR and settlement, rather than promoting access to justice, can actually deny access and dilute justice. ADR and settlement, when they have become the only realistically affordable option for parties, preclude access to the courts and thereby deny parties the opportunity to have their dispute ruled on by a judge. In effect, access itself is denied because there is no choice in how to proceed. Financial considerations prevent access to the courts.

¹⁴⁴ Pirie, “Settlement Advocacy”, *supra* note 30 at 292-3.

¹⁴⁵ Carrie J. Menkel-Meadow, “Why Hasn’t The World Gotten to Yes? An Appreciation and Some Reflections” (2006) 22 *Negotiation Journal* 485 at 493 [Menkel-Meadow, “Some Reflections”].

¹⁴⁶ *Ibid.* at 487.

¹⁴⁷ Pirie, “Settlement Advocacy”, *supra* note 30 at 297

¹⁴⁸ B. Mayer, *The Dynamics of conflict Resolution: A Practitioner’s Guide* (San Francisco: Jossey-Bass, 2000), at 8-21.

¹⁴⁹ W. Felstiner, R. Abel, & A. Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming, claiming...” (1980-81) 15 *Law and Society Review* 631, at 631-54, 641.

Alternatively, to the extent that access to ‘justice’ of a sort is granted, it is a diluted form of justice. As Owen Fiss has pointed out, “(t)o settle for something means to accept less than some ideal.”¹⁵⁰ In this sense, ADR and settlement are far from ideal since, as this paper has previously made clear, the law should not arbitrate and enforce private interests but rather should uphold people’s rights. In law, someone either has a right or does not, and the other party either has offended that right or has not. There is no reason why those who have offended should be punished more or less than they deserve, nor that those who have been harmed should be compensated by the offender by more or less than they deserve. Each should be punished or compensated according to what the law requires. This is the imperative of justice and the rule of law, and also makes a peaceful democracy possible.

In addition, the law is publicly created and uses public resources and so should not be used solely for private purposes without regard to societal interests. Owen Fiss notes that “adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates.”¹⁵¹ He goes on to imply that these officials have a duty “not to maximize the ends of private parties...but to explicate and give force to the values embodied in authoritative texts such as the constitution and statutes....”¹⁵² Professor Farrow expands this view by stating that a democratic society requires a justice system, not a private system of dispute settlement.¹⁵³ Therefore, once the imperatives of justice are taken into account, it is obvious that settlement, while it may sometimes be ‘pareto-efficient’ for the particular members involved, is not pareto-efficient for society at large.

Similarly then, settlement is not ‘pareto-efficient’ for society at large because, as Professor Farrow notes, the rule of law and justice is integral to a democratic society.¹⁵⁴ Yet settlement, by virtue of

¹⁵⁰ Fiss, “Against Settlement”, *supra* note 23 at 1086.

¹⁵¹ *Ibid.* at 1085.

¹⁵² *Ibid.*

¹⁵³ Farrow, “Privatizing”, *supra* note 28 at 16.

¹⁵⁴ *Ibid.*

having no precedent value,¹⁵⁵ precludes the evolution of the common law¹⁵⁶ and thereby diminishes the extent to which the rule of law governs our affairs. Yet the rule of law is integral to most notions of a democracy and was laid out as such in *Reference Re Secession of Quebec*.¹⁵⁷ It is not convincing for proponents of settlement to point out that most settlements do not involve questions that would be likely to bring about a change in the law; it is logically impossible to know which case with which set of facts and circumstances will bring about a major change in law.

Settlement would lose much of its appeal were it possible for access to justice to be truly secured. Therefore, if the law societies and governments refuse to adopt any of the other recommendations put forth in this paper then ADR and settlement should be encouraged. However, the main mechanism to promote access to justice is the courts. Such access to the courts requires access to counsel and necessitates that measures be taken that enhance access and preserve justice. Those measures have been the subject of previous sections of this paper as well as the sections that follow.

VI

THE GOVERNMENT SHOULD ENHANCE ACCESS TO COUNSEL: RECOMMENDATIONS

A. REMOVE TAXES ON LEGAL SERVICES

Cameron Murphy discusses tax deductibility as a way of securing greater access to justice.¹⁵⁸ He considers removing the tax deductibility of legal fees across the board, or allowing individuals to deduct taxes so as to put them on par with corporations.

It should be noted that taxes makes it possible to have access to justice in the first place, by making it possible to have courts, judges, and so forth. So getting rid of a tax on legal services generally

¹⁵⁵ Macfarlane, "Mediation Alternative", *supra* note 142 at 6-8.

¹⁵⁶ Fiss, "Against Settlement" *supra* note 23 at 1085.

¹⁵⁷ *Reference re Secession of Quebec*, *supra* note 10.

¹⁵⁸ Cameron Murphy, "Tax deductibility and litigation: reducing the impact of legal fees and improving access to system" (2004) 27 Univ. of NSWLJ 240 at 240-242.

is merely a displacement of *where* people are taxed since, unless services are cut, the tax will have to be made up for elsewhere. However, a specific tax when one has to use legal services, as opposed to a general tax imposed on everyone, seriously limits access to justice by making it *that* much more expensive. Indeed, in the case of *Christie* this additional tax rendered him insolvent and unable to offer his services to his clients.

B. INCREASE FUNDING OF THE LEGAL SYSTEM

The state should increase funding to the legal system. Firstly, in light of the illusory distinction between positive and negative rights and the importance of many positive rights, it is important that legal aid be expanded beyond its current parameters.¹⁵⁹ At a minimum, legal aid should be restored to its previous levels to address the increase in unrepresented litigants.¹⁶⁰ Secondly, general taxes should be raised to allow for more courts and judges which will reduce waiting times and thereby increase access to justice.

C. SIMPLIFY COURT PROCEDURES

The government of Ontario should be commended for its efforts to simplify the legal system. In order to simplify the system without decreasing quality, the Ontario government commissioned a report on civil justice reform, recently completed by the Honourable Coulter A. Osborne, which contains many excellent recommendations on how to streamline judicial procedure.¹⁶¹ For example, the Honourable Coulter Osborne recommended that time limits be imposed on pre-trial discovery hearings and that litigation budgets be set.

¹⁵⁹ McCamus, “Blueprint for Legal Services”, *supra* note 19 at 67.

¹⁶⁰ Langan, “Scales of Justice” *supra* note 22 at 825-862, 834-836. Negative perceptions of lawyers (that they are too expensive and untrustworthy), also had an effect in leading to unrepresented litigants.

¹⁶¹ Ontario, Civil Justice Reform Project, *Summary of Findings and Recommendations*, (Chair, Coulter A. Osborne Q.C.), online: Ministry of the Attorney General for Ontario http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf [Ontario, “Reform Project”].

D. ESTABLISH AN INDEPENDENT BODY SEPARATE FROM THE LAW
SOCIETY TO REGULATE PARALEGALS

In Ontario, paralegals are regulated under the *Law Society Act* by the *Law Society of Upper Canada*.¹⁶² The rationale for the regulation of paralegals is to prevent individuals from being taken advantage of by paralegals especially because the service offered is a credence good. The rationale for the regulation to be conducted by the Law Society is due to the fact that the Law Society is best equipped to assess the competency of prospective paralegals, since it is the expert body already charged with ensuring the quality of legal professionals. Unfortunately, this establishes a startlingly troubling conflict of interest between the interests of the Law Society of Upper Canada and paralegals. The Law Society has an obvious interest in restricting the scope of the paralegal practice. A professional group should never be regulated by its potential and, in some cases, direct competitors. Given the fact that the Law Society guards its self-regulating power on the basis that lawyers must remain independent from the government in order to ensure the integrity of the justice system—if lawyers were regulated by the government the conflict of interest would be too great—it is surprising that the Law Society fails to appreciate the parallel argument with respect to the danger of paralegals being regulated by the Law Society. Paralegals should be regulated, but they should be regulated by an independent body separate from the law society. This prescription applies to jurisdictions other than Ontario as well.

E. Establish No-Fault/No-Tort Accident Compensation
Insurance

A no-tort accident compensation scheme for personal injuries would diminish the severity of the access to counsel problem. Such a scheme, as seen in New Zealand, delivers better on the three goals of the tort system: deterrence, compensation and justice. By delivering superior compensation and justice, as well as equally good deterrence as compared to their previous tort system, the implementation of a system similar to that found in New Zealand could greatly reduce the

¹⁶² *Law Society Act*, R.S.O. 1990 c. L.8.

pressure on the justice system and allow more access to more needy claimants.

Firstly, tort law has a negligible deterrent effect. The poor performance of *negligence* torts to deter is theoretically sound. Tortfeasors who were negligent do not foresee a possibility that their conduct could cause harm and persist in spite of that possibility as is true for reckless behaviour, rather, they simply “ought to have known” that their behaviour could cause.¹⁶³ The empirical evidence of the deterrence of negligence is at best equivocal, as was conceded by Klar despite his spirited defence of tort law.¹⁶⁴ In fact after New Zealand replaced their tort system with a no-fault accident compensation scheme there was no increase in the rate of accidents; motor vehicle accidents actually decreased.¹⁶⁵ Further, even if tort law does have a deterrent effect, this role can be filled by other existing mechanisms, such as regulatory controls, professional conduct codes, penal and quasi-penal sanctions, and more effective penalty rating of insurance premiums.¹⁶⁶

Most importantly, tort law fails to compensate people adequately; no-fault accident compensation compensates people to a much greater extent. Tort law, according to the Slater report,¹⁶⁷ affords no compensation to one-half to two-thirds (or 50%-66%) of injuries, is subject to enormous delay, is extremely inefficient by virtue of the transaction costs (court fees, administrative fees, legal fees) that use more than 50 cents of every dollar, as compared to 80 to 90 cents of every dollar going to victims under no-fault, and is akin to a lottery in that one’s injury must pass a series of tests, the results of which are not predictable. Klar disputed Slater’s contention that tort law was cost-ineffective, claiming that transaction costs only account

¹⁶³ Non-negligence (i.e. intentional) torts are subject to criminal penalties that likely have greater deterrence than civil damages would.

¹⁶⁴ L. Klar, “The Osborne Report: “No” to No-Fault”, (1989) 68 Can. Bar Rev. 301 [Klar, “No-Fault”]; Ontario, Ontario task Force on Insurance, *Final Report of the Ontario Task Force on Insurance* (Toronto: Ministry of Financial Institutions, 1986) at 301-314, 309 (Chair: David W. Slater) [Ontario, “Slater Report”].

¹⁶⁵ Craig Brown, “Deterrence in tort and no-fault: the New Zealand experience” (1985) 73 Calif.L.Rev. 976 at 994.

¹⁶⁶ Ontario, “Slater Report”, *supra* note 164 at 60-70.

¹⁶⁷ *Ibid.*

for 35.3% of expenses.¹⁶⁸ Regardless, this percentage is still high compared to New Zealand's administrative costs of 7% and ignores the fact that those who go uncompensated by tort law are entitled to no compensation whatsoever.¹⁶⁹ By contrast, as Palmer notes, New Zealand's scheme offers comprehensive coverage at low cost by eliminating waste. Palmer notes that, in the realm of medical malpractice in the United States, only 2 per cent of injured patients receive compensation with only half of the funds awarded actually going to the victims.¹⁷⁰

Finally, it is argued that tort law better delivers justice. Some academics argue that tort law better reflects people's view of justice by ensuring that, in the words of Klar, there is "some individual responsibility for individual actions, at least in a humanely modified form," and that this "is central to what reasonable people regard as just." This view is inaccurate and unfortunate. Firstly, many torts are already covered by some form of insurance which renders the corrective justice argument moot. Secondly, even if the tortfeasor does not have insurance, and is paying out-of-pocket, then corrective justice is still not achieved since the severity of the penalty enacted upon the tortfeasor is entirely contingent upon their financial situation rather than the wrongfulness of their act. Thirdly, the severity of the penalty is also contingent upon chance rather than the guilt of the tortfeasor, since a tortfeasor found guilty of negligence could end up causing a great deal of injury, very little injury or no injury depending upon chance. This means that the tortfeasor is made to pay primarily in proportion to chance rather than their own wrongdoing. Fourthly, the tortfeasor can be made to pay in no-tort schemes in any case through the use of penalty adjusted insurance premiums as well as quasi-penal, penal and regulatory measures. Moreover, the justness of corrective justice itself is debatable. The reason for why this is the case stems from the nature of negligence itself. Tort law makes the negligent tortfeasor pay since, as between an innocent person and a careless tortfeasor, a careless tortfeasor

¹⁶⁸ Klar, "No-Fault" *supra* note 164; Ontario, "Slater Report", *supra* note 162 at 301-314, 306-7.

¹⁶⁹ Geoffrey Palmer, "New Zealand's Accident Compensation Scheme: Twenty Years On" (1994) 44 U.Tor.L.J. 223 at 227 [Palmer, "New Zealand Scheme"].

¹⁷⁰ *Ibid.* at 244.

should have to pay. However, carelessness is something that everyone is susceptible to, as Feldthusen notes.¹⁷¹ Someone who is negligent is not necessarily a terrible person. This factor, when considered in combination with the fact that tort damages can be more adversely punitive than a criminal sentence despite requiring a much lower standard of mens rea, means that tort law can sometimes be overly onerous on a tortfeasor. Most importantly, privileging corrective justice over compensation does not seem particularly just to the “statistically inevitable victims of injury” who are uncompensated.¹⁷²

It is evident that only those few who knew they were very likely to win a very large settlement benefit from tort law. These people are extremely rare. It is far more rational to prefer the no-tort compensation scheme since it is far more likely that one will be better served by such a system. It is this pre-accident perspective that must be the basis of informed policy choices¹⁷³ and not the post-accident perspective.

It is also quite important that no-fault compensation eliminates the need for the use of race-based and gendered-statistics.¹⁷⁴ In tort law the defendant is not required to fix societal injustices, but only to put the plaintiff in the position that he or she would have been in but for the accident. Therefore, when calculating damages, judges rely on gendered and race-based statistics to calculate damages.¹⁷⁵ Unfortunately, this practice treats people differently through no fault of their own but simply by virtue of their race or sex. It literally amounts to saying that one sex or race is worth more than one or the other, which is against the principles of human dignity, equality, and justice. Conversely, a no-tort accident compensation scheme, drawing as it does upon collective revenues would compensate individuals equally for identical injuries. It thereby fulfills the promise of all advanced, civilized societies: treating each and every member with the respect and dignity that they deserve

¹⁷¹ Bruce Feldthusen, “If This is Torts, Negligence Must Be Dead” in Allen M. Linden *et. al.* eds., *Canadian Tort Law: Cases, Notes and Materials*, (Toronto: Butterworths, 2004) 773 at 773-775 [Feldthusen, “This is Torts”].

¹⁷² Palmer, “New Zealand Scheme”, *supra* note 169 at 247.

¹⁷³ Feldthusen, “This is Torts”, *supra* note 171 at 774-775.

¹⁷⁴ Jamie Cassels, *Remedies: The Law of Damages* (Toronto: Irwin Law) at 137-149.

¹⁷⁵ *Ibid.* at 138-139.

regardless of their race or gender, and fairly compensating and caring for those subjected to misfortune.

F. PROVIDE LITIGATION INSURANCE

Access to justice is such a problem that Justice Gomery described the current trajectory as “suicidal”, while Chief Justice McLachlin has repeatedly decried the sorry state of affairs.¹⁷⁶ The goal of a civil litigation scheme would be to insure all individuals against the risk of law suits being brought against them and insure all individuals against the risk of having to use legal means to redress grievances. Therefore, funds would be provided to individuals to either defend a claim or mount a claim in the event that this risk transpires. The appropriate methods to ensure that people do not make excessive use of such an insurance scheme is a matter of detail that remains to be worked out, but could include limits on the number of claims an individual may make. This proposal is not optimal since it would bar people from being able to make legitimate claims if they had exceeded their quota. The reality is that most people make highly infrequent use of the legal system, so the likelihood of barring such claims is low. It is also true that ensuring a person for a few claims is better than not insuring anyone against any claims at all, as is the case currently.

The goal of civil litigation insurance is to ensure all individuals against risk. Risk, is not something that can be managed alone and, as such, gives rise to the need for insurance. Most people do not have legal insurance, hoping that they do not need it. Some people save for contingencies of this sort, but it is difficult to determine how much money to save, since an individual simply does not know if they will need to make use of the legal system or not. Fortunately, if the aforementioned individual were to seek insurance with a group of other individuals (a process known as risk-pooling) then the problem would be mitigated because of the law of large numbers. The law of large numbers states that as you average together more and more numbers in a certain range, the average becomes more and more

¹⁷⁶ Philip Slayton, "Medicare for the justice system" *Canadian Lawyer* 31:10 (October 2007) [Slayton, "Medicare for Justice"].

stable. This is why the CAW has purchased group litigation insurance, and the results so far, have been positive.¹⁷⁷

One strong objection to this proposal is that it is not obvious why such an insurance scheme must be required. The answer lies in the fact that people tend to discount their future. In essence, when the benefits of a proposal are far in the future, people tend to opt for smaller rewards in the present rather than larger rewards in the future. It is for this reason that people do not save enough, smoke too much and do not exercise enough. It is also for this reason that it is mandatory that people purchase health insurance through the government.

It could then be objected that there is no reason for the government to provide this insurance rather than the private sector. After all, automobile insurance is also mandatory, yet it is provided by the private sector. Given that very little litigation insurance is provided at present it seems likely that this is an area of market failure ripe for public provision. If not, then insurance can be purchased through the private sector. What is important is that litigation be insured, because it is far too expensive to attempt to deal with the risk once it occurs. This proposal would increase access to counsel immeasurably. It may be difficult to get such a proposal passed, and it will take extensive study and strong resistance to established interests, but such was the same battle faced by every province in Canada before health insurance was implemented.¹⁷⁸

G. REQUIRE LAW SOCIETIES TO REFORM OR RISK LOSING THEIR SELF-GOVERNING POWER

While it is clear that lawyers should be regulated and should be independent from the government, it is less clear why lawyers should be left to govern themselves. It is not necessary for lawyers to self-regulate in order to maintain their independence from the government. This could just as easily have been achieved by

¹⁷⁷ Wydrzynski, Hildebrandt, & Blonde, "The CAW Prepaid Legal Services Plan: A Case Study of an Alternative Funding and Delivery Method for Legal Services" (1991) 10 Windsor Y.A.J. 22 at 70.

¹⁷⁸ Slayton, "Medicare for Justice", *supra* note 176.

conferring regulatory power over lawyers to an independent third-party. Placing the suppliers of a service in the position of regulators of the supply of that service renders the law societies in a position akin to that of OPEC, where the suppliers of a service are also its regulators. In other words, the self-regulating power of the law societies effectively places lawyers in the position of members of a cartel.¹⁷⁹ While the profession itself is in the best position to know what regulations would be in the public interest, the mere fact that the profession has knowledge of the public interest does not imply that actions will be taken in the public interest.¹⁸⁰ In light of the theoretical conflict of interest between the profession's mandate to regulate in the public interest and its ability to engage in cartel-like behaviour, as well as the previously examined empirical results showing that the profession has engaged in regulation to the detriment of the public interest, it is manifestly evident that the law societies must undertake fundamental reforms to improve access to counsel. If not, the governments of the various provinces and territories of Canada should seize (by way of statute) the regulatory powers of their respective law societies. Adding to what has previously been said regarding the importance of the right to counsel in a modern democracy, Philip Slayton drives the point home stating that: "It is a scandal that most Canadians lack recourse to the law and the legal system, a vital part of government, because they cannot afford to pay legal fees. It is as if the right to vote in a general election were only given to those with an income above a certain level."¹⁸¹ The Clementi report, largely enacted through the Legal Services Bill, recommends removing self-governing power from the law societies and providing that power to an independent regulator, the Legal Services Board, chaired by a lay-member.¹⁸² Admittedly, in England the body that represented the legal profession was also the one that was supposed to regulate it, in which case there was a more obvious conflict of interest there than in Canada where the Canadian Bar

¹⁷⁹ Stephen, "Paper to Scottish Parliament", *supra* note 93 at 5.

¹⁸⁰ *Ibid.*

¹⁸¹ Philip Slayton, "Why should lawyers be allowed to regulate themselves?" *Globe and Mail* (August 3, 2007).

¹⁸² U.K., "Clementi Report", *supra* note 138 at 50, 105.

Association fulfills the former function.¹⁸³ However, while these organizations may be different in name, they have not acted differently in practice.

VII

FUTURE RESEARCH

While this paper has attempted to detail some of the numerous methods available to increase access to counsel it has not focused on the effectiveness of the plain language movement and access to free legal information in terms of facilitating that transition. The failure to use plain language and provide free legal information restricts the understanding of the law by the populace¹⁸⁴and thereby increases the severity of the lack of access to counsel problem.¹⁸⁵ Unfortunately, this complaint is not novel. Lawyers engage in debates of interpretation, such that difficulty in understanding the law may be inherent to the law itself. The effectiveness of facilitating greater use of plain language and providing more free legal information are topics beyond the scope of this paper, but, to the extent that it is possible, would appear to reduce the severity of the access to counsel problem.

Secondly, if either access to counsel is taken more seriously, or the prescribed incentivizing effects detailed throughout the rest of this paper do increase access to counsel, the increased demand for counsel will have to be met. As such it should seriously be considered whether or not increasing law school entrance class sizes will be necessary to address the needs of the Canadian population. Further, increasing the number of students admitted to law school in the first place may help mitigate the access to counsel problem since an increased supply decreases cost.¹⁸⁶ While law schools take the best students, it does not necessarily follow that the depths of the possible

¹⁸³ Michael W. Milani, "Why look to the UK? Canada's system of lawyer regulation works well" *Globe and Mail* (August 8, 2007).

¹⁸⁴ Ontario, "Reform Project", *supra* note 161 at 46.

¹⁸⁵ Rod MacDonald, "Access to Justice and Law Reform" (1990) 10 Windsor Y.A.J. 287.

¹⁸⁶ Barton, "Conduct Regulation", *supra* note 90 at 441.

entrants who could do a perfectly competent job have been reached. This view is lent credence by the per capita enrolment rate variation across provinces. The proper balance between ensuring a sufficient number of future lawyers and maintaining a quality pool of students in law school should be struck and is an area ripe for future research.

Finally, it has been beyond the scope of this paper to assess what the optimal combination of the aforementioned prescriptions ought to be. As a result, this is an area that would benefit greatly from future research.

VIII

CONCLUSION

The importance of access to counsel in terms securing access to justice necessitates fundamental reform by the governments and law societies in order to promote access to counsel. This is evident from the arguments advanced by the plaintiff in *Christie*, which, when supplemented by the other arguments advanced in this paper, establish the importance of the right to counsel as a matter of policy, such that the law societies and the governments of Canada must do more to promote access to counsel.

Building upon the arguments advanced by the plaintiff in *Christie*, this paper has argued, firstly, that the right to counsel is an integral part of access to justice, which in turn is integral to the rule of law. This view is reinforced by a consultation with Dyzenhaus's publicity condition of the rule of law. To deny that access to counsel does not form part of the rule of law is tantamount to denying the public character of the law and the nature of the adversarial system which presupposes a right to counsel. Further, it relies upon a faulty distinction both between the process and substance of law and between positive and negative rights. Secondly, in addition to access to counsel forming part of the rule of law, it is also a constitutional right in itself, as is apparent from *BCGEU* and sections 7 and 15 of the *Charter*.

Even if this paper has failed to demonstrate that access to counsel is a constitutional right either by virtue of being inherent in the notion of the rule of law or being a constitutional right by itself,

the force of these arguments should be sufficient to demonstrate that—on policy grounds—access to counsel ought to be secured. Access to counsel should be promoted by the law societies and the government of Canada.

The law societies ought to reduce market-entry barriers by decreasing the duration of legal training, facilitating mobility among legal professionals and allowing for the use of alternatives to lawyers. Market-conduct restrictions ought to be removed as well, such as those on mandatory fees, advertising, and business structure. The use of contingency fees and ADR should, in certain circumstances, be promoted as well.

The governments of Canada should promote access to counsel by removing taxes on legal services, increasing the funding of the legal system, simplifying court procedures, and establishing an independent body separate from the law societies to regulate paralegals. Further, litigation insurance ought to be implemented in addition to a no-fault/no-tort accident compensation insurance scheme. Finally, a systemic failure on the part of the law societies to implement the suggested reforms should jeopardize the ability of the law societies to retain their self-governing power, which has been vested in them only insofar as they advance the public interest.

It has been beyond the scope of this paper to assess the degree to which public legal information, pro bono work, and the plain language movement ought to be enhanced, though the case for these initiatives seems evident. In addition, the expansion of enrolment in law schools seems like a fruitful means through which access to counsel can be promoted. This paper has focused on objective, financial barriers to access to justice. Ensuring access to counsel is just the beginning of improving access to justice. Future initiatives to promote access to justice should seek to reduce educational barriers, physical barriers, and subjective barriers such as those stemming from language, culture, power, history, and systemic discrimination. Finally, the end goal of access to justice is much broader in ambition: to achieve substantive justice in terms of outcomes. In this light, access to counsel is a modest goal, but one whose urgency demands attention and the reforms prescribed.