

2008

Supreme Court of Canada Constitutional Cases 2007: Defining Access to Justice

Patricia Hughes

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Hughes, Patricia. "Supreme Court of Canada Constitutional Cases 2007: Defining Access to Justice." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 42. (2008).

DOI: <https://doi.org/10.60082/2563-8505.1164>

<https://digitalcommons.osgoode.yorku.ca/sclr/vol42/iss1/18>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

Supreme Court of Canada Constitutional Cases 2007: Defining Access to Justice

Patricia Hughes*

I. INTRODUCTION

“Access to justice” is a broad concept that not only encompasses physical and financial access to courts and tribunals, but may include any developments in law or practice that allow people to enforce their rights, protect themselves from diminution of their rights or otherwise defend themselves legally, and the use of the legal system to claim a share in the “goods” and realization of the values that are said to characterize Canadian society.

A paper written about the use of technology as relevant to access to justice defines access to justice as asserting a claim or defence, or creating, enforcing, modifying or discharging a legal obligation, acquiring information about the courts or tribunals or the process, participating in proceedings, as well as a just and transparent process that includes “among other things, timeliness and affordability” and allows evaluation of “all aspects [of the justice system’s operations], particularly its fairness, effectiveness and efficiency”.¹

To this definition, in one sense extensive, but in another limited to the legal system and legal rights, I would add that the results of efforts to increase access to justice must be not only technically successful, but substantively meaningful. Perhaps the most basic understanding of the concept is that economic status should not affect the ability to “access justice”. In other words, that while no one may be explicitly prevented from filing a lawsuit, defending him or herself or claiming discriminatory or ill treatment at the hands of government, for example, the right has

* Patricia Hughes, formerly the Dean of Law at the University of Calgary, is the Executive Director of the Law Commission of Ontario.

¹ Washington State Access to Justice Technology Principles (Adopted by the Washington State Supreme Court December 3, 2004), online at: <<http://www.wsba.org/atj/thewashingtonstateaccesstojusticetechnologyprinciplesasadoption3.doc>>.

little meaning if one cannot afford the process of doing so effectively. Barriers to access do not lie only in court processes or otherwise in the legal system itself, however, and they are not only financial; they may be found in people's sociological and psychological circumstances. For example, one study of the use by abused women in immigrant communities indicated that

[m]ost participants identified the interplay of cultural norms and structural oppression as very profound barriers to the justice system for abused immigrant women. All the women, no matter what their country of origin, described their social lives as deeply rooted in patriarchal structures. Structural constraints, such as language barriers, perceived racism in the criminal justice system and social service agencies, and a lack of adequate ethnocultural services and representation were also identified as disincentives to seeking help in cases of abuse.

Participants cited dependency on the abuser for financial support and immigration sponsorship as another major barrier. As well, most of the women stated that a lack of knowledge of criminal and civil legal protection in cases of abuse served as a disincentive to contacting the justice system. They indicated they would not contact the police if they needed assistance and protection from a violent husband or partner, or would do so only in very extreme cases of physical violence.²

Many of the factors identified in the above passage could be alleviated if the legal system were sufficiently responsive to the full reality of these women's lives; to achieve this goal, in finding "solutions" to domestic violence, law must take into account not only the criminal act of assault, but the need for "mediation" of cultural context, the development of trust, provision of information in an effective way and the need for resources to assist with employment and housing. The way the law interacts with immigrant women who have been subject to violence is merely one illustration of the broader understanding of access to justice. Seen this way, "access to justice" includes not only non-constitutional areas of law, but also a wide variety of constitutional cases, including, for example, equality decisions; for some purposes, one might include at least some of these cases in any discussion of access to justice jurisprudence.

² Baukje Miedema & Sandra Wachholz, *A Complex Web: Access to Justice for Abused Immigrant Women in New Brunswick* (March 1998), at 6, online at: <http://www.swc-cfc.gc.ca/pubs/pubspr/complexweb/complexweb_e.html#summary>.

Several decisions by the Supreme Court of Canada relate to these various understandings of access to justice. I will assess two decisions that involve the basic question of financial barriers to accessing the legal system, *British Columbia (Attorney General) v. Christie*³ and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*,⁴ one decision dealing with a procedural matter, *Alliance for Marriage and Family v. A. (A.)*⁵ and one decision that raises a broader conception of access to justice that involves potentially conflicting equality and religious claims: *Bruker v. Marcovitz*.⁶ Another decision that falls into this category, *Hislop v. Canada*, where the meaning of “full justice”, deals with whether the declaration that a statutory provision is unconstitutional is both prospective and retroactive.⁷ The Supreme Court held that it would be only rarely that the remedy would be retroactive to when the relevant provision of the *Canadian Charter of Rights and Freedoms*⁸ came into force and that *Hislop* was not that rare case. *Hislop* is discussed at length elsewhere in this volume and I do not consider it further.

II. THE DECISIONS

1. No One May Sleep under Bridges — But Not Everyone Needs To

*Christie*⁹ is an access to justice case in the most minimalist or basic sense, since it is concerned with the financial ability of litigants to obtain effective representation in court and with the related or obverse issue of the capacity of lawyers to represent low-income litigants as their regular work. *Christie* challenged, unsuccessfully, whether taxing legal services is a denial of the rule of law and the Charter. *Christie* illustrates the principle that how one frames the issue can more or less dictate the result, or, one might say, an example of how a little more access to justice (or more modestly, the legal system) can be denied because the

³ [2007] S.C.J. No. 21, [2007] 1 S.C.R. 873 (S.C.C.) [hereinafter “*Christie*”].

⁴ [2007] S.C.J. No. 2, [2007] 1 S.C.R. 38 (S.C.C.) [hereinafter “*Little Sisters (No. 2)*”].

⁵ [2007] S.C.J. No. 40, 2007 SCC 40 (S.C.C.).

⁶ [2007] S.C.J. No. 54, [2007] 3 S.C.R. 607 (S.C.C.).

⁷ [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429 (S.C.C.) [hereinafter “*Hislop*”].

⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11 [hereinafter “Charter”].

⁹ *Supra*, note 3.

court chooses to treat it as a big increase in access to justice (or the legal system).

Fifteen years ago, British Columbia enacted the *Social Service Tax Amendment Act (No. 2), 1993*¹⁰ imposing a 7 per cent tax on legal fees, the only professional fees so taxed. This legislation was a response to a judicial finding that predecessor legislation was *ultra vires* under section 7 of the Charter on grounds of vagueness.¹¹ Ostensibly, the tax was intended to fund legal aid; however, the proceeds were included in the province's general revenue and it was not possible to track whether, as the Supreme Court of Canada said, "how much (if any) of the tax collected was put towards legal aid, or other initiatives aimed at increasing access to justice".¹²

The facts were sympathetic, since Christie was a lawyer who served poor and low-income people and charged these clients low fees. An earlier challenge had been unsuccessful because, although the Court of Appeal held that there was a constitutional right to access to the legal system, it found that there was no evidence to show that anyone was denied that right because of the tax.¹³ Christie sought to remedy that deficiency by adducing affidavit evidence from individuals who stated that the tax prevented their obtaining legal advice and from himself about the debilitating effect on his practice of the tax.¹⁴ Christie also maintained that he had to take the tax out of the fees he was already charging, rather than add it to his fees, because his clients did not want

¹⁰ S.B.C. 1993, c. 24.

¹¹ The *Social Service Tax Amendment Act, 1992* provided that legal fees were subject to the *Social Service Tax Act*, with some exceptions, including where there was not a "connection" between the legal services and British Columbia. The legislation was challenged by the B.C. Branch of the Canadian Bar Association ("CBA BC") and the Law Society of British Columbia, and the Court held the "connection" provision to be vague: *Canadian Bar Assn., British Columbia Branch v. British Columbia (Attorney General)*, [1993] B.C.J. No. 407, 101 D.L.R. (4th) 410 (B.C.S.C.). In response, the legislature enacted the statute at issue in *Christie*, which the Law Society and CBA-BC challenged, unsuccessfully, on the basis that the tax it provided for was not a direct tax and therefore *ultra vires* the province: *Canadian Bar Assn. v. British Columbia (Attorney General)*, [1994] B.C.J. No. 1013, 91 B.C.L.R. (2d) 207 (B.C.S.C.). Yet another challenge to the legislation, by an individual lawyer, was also unsuccessful: *John Carten Personal Law Corp. v. British Columbia (Attorney General)*, [1997] B.C.J. No. 2460, 40 B.C.L.R. (3d) 181 (B.C.C.A.), application for leave to appeal dismissed, [1998] S.C.C.A. No. 205 [hereinafter "*John Carten, Personal Law Corp.*"]. The history is taken from *Christie v. British Columbia (Attorney General)*, [2005] B.C.J. No. 217, 250 D.L.R. (4th) 728, 2005 BCSC 122 (B.C.S.C.) [hereinafter "*Christie (B.C.S.C.)*"].

¹² *Christie*, *supra*, note 3, at para. 1.

¹³ *John Carten Personal Law Corp.*, *supra*, note 11, at paras. 12-14.

¹⁴ Nevertheless, the Court in *Christie* implies that even had it found that there is a general right to counsel, it would have dismissed the case because of an inadequate evidentiary record: *Christie*, *supra*, note 3, at para. 28.

to or, more to the point, could not, pay larger fees. Because his clients often did not pay him or were late in paying him, he was faced with paying the tax out of his low income. He could not or did not pay the tax and the provincial government seized moneys from his bank account. The chambers judge accepted as fact that

... some of Mr. Christie's clients could not obtain needed legal services if Mr. Christie did not act for them ... if Mr. Christie were to charge them his hourly rate plus the social services tax, they could not pay him ... if Mr. Christie is not paid the minimum amount which he charges, in most of his cases he could not continue to practice law, thus denying those individuals access to justice.¹⁵

In addition to accepting the affidavit evidence, the chambers judge also took notice of her own experience with unrepresented litigants to conclude that "many self-represented individuals in a wide variety of cases are denied effective access to justice when they cannot afford appropriate legal representation".¹⁶

Christie also deposed that the costs of running his practice increased because he had to hire a part-time bookkeeper and take more time from his practice to supervise the accounting. Justice Koenigsberg was less responsive to the inconvenience and administrative costs Mr. Christie argued that he faced because of the tax than to the financial barriers to the clients, saying that these facts were not determinative of the constitutionality of the tax.

The Court of Appeal in the earlier *Carten* case thought that if they found that the tax prevented people from retaining lawyers, legal aid would be available to these potential litigants.¹⁷ In *Christie*, the chambers judge pointed out that Mr. Christie's clients did not qualify for legal aid because they had "modest incomes" and she "inferred" from the evidence in the case, "buttressed by common knowledge in the courts, that legal aid is no longer widely available, if it ever was, to all litigants except those charged with criminal offences".¹⁸

In reaching the conclusion that the tax was unconstitutional, Koenigsberg J. had characterized the issue she had to decide narrowly, explicitly rejecting the broader characterization proposed by counsel for the Attorney General:

¹⁵ *Christie* (B.C.S.C.), *supra*, note 11, at para. 82.

¹⁶ *Id.*, at para. 74.

¹⁷ *John Carten Personal Law Corp.*, *supra*, note 11, at para. 14.

¹⁸ *Christie* (B.C.S.C.), *supra*, note 11, at para. 80.

The issue of the tax is not whether the government must provide and pay for legal counsel in any matter requiring legal services, but whether the state can impose an additional financial burden on those seeking to obtain legal services.¹⁹

Thus she held that the tax was unconstitutional to the extent that it applied to services provided low income people, that is, persons below the level of assets and income defined by the Family Duty Counsel Program.²⁰

The majority of the Court of Appeal upheld this decision, proceeding on the basis that the case was simply about whether the tax on legal services was unconstitutional, not whether the government has an obligation to provide affordable legal services.²¹

Taking the position that certain core aspects of access to justice are constitutionally guaranteed, Newbury J.A., for the majority in the Court of Appeal, defined “core aspects of access to justice” as follows:

... reasonable and effective access to courts of law and the opportunity to obtain legal services from qualified professionals, that are related to the determination and interpretation of legal rights and obligations by courts of law or other independent tribunals.²²

Members of the judiciary have stressed the importance of the ability of litigants to effective access to the legal system and thus to justice in other contexts, as well. For example, McLachlin C.J.C. has observed that:

The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical. Unfortunately, many Canadian men and women find themselves unable, mainly for financial reasons, to access

¹⁹ *Id.*, at para. 81.

²⁰ *Id.* Justice Koenigsberg said that she would have granted a declaration “that the *Act* is *ultra vires* legal services provided for the enforcement or protection of civil or criminal law constitutional rights regardless of the income level,” but was bound by *Carten* in which the majority of the Court of Appeal decided otherwise. Her holding is thus limited with respect to income, but does not appear limited to constitutional cases. The dissent in *Carten* also made his holding limited: McEachern C.J.C. held that the tax was unconstitutional because it applied to litigation involving the enforcement of constitutional rights, as well as other litigation, and concluded that it did constitute a minimal impairment, since it “could have been imposed just on legal bills that do not relate to the exercise or protection of guaranteed rights”: *John Carten Personal Law Corp.*, *supra*, note 11, at para. 101 (B.C.C.A.).

²¹ *Christie v. British Columbia*, [2005] B.C.J. No. 2745, 262 D.L.R. (4th) 51, at para. 41 (B.C.C.A.) [hereinafter “*Christie* (B.C.C.A.)”].

²² *Id.*, at para. 30.

the Canadian justice system. Some of them decide to become their own lawyers. Our courtrooms today are filled with litigants who are not represented by counsel, trying to navigate the sometimes complex demands of law and procedure. Others simply give up. Recently, the Chief Justice of Ontario stated that access to justice is the most important issue facing the legal system.²³

Yet in *Christie*, a decision of “The Court”, the Supreme Court rejected the opportunity to alleviate, to at least some degree, the problem identified by the Chief Justice. Having defined the issue as a general right to counsel, the Court pointed out that a constitutional right to legal services as a means to access to justice would apply to those who did not have difficulty accessing legal services, such as corporations, as well as all aspects of legal services, including advice. Thus

the logical result would be a constitutionally mandated legal aid scheme for virtually all legal proceedings, except where the state could show this is not necessary for effective access to justice.²⁴

It would be, the Court imagines, costly (“a not inconsiderable burden on taxpayers”),²⁵ since there are already many unrepresented litigants and, even worse, if they did not have to fund their own cases, other persons would bring lawsuits who would not do so if funded representation were not available.

Compared to cases such as *G. (J.)*, in which Lamer C.J.C. went to considerable effort to limit his decision,²⁶ in *Christie*, the Court went beyond the narrow confines of the case (the validity of charging a tax on legal fees) to deliver the message that it does not believe that there is a broad constitutional right to paid legal representation, although there may be a more circumscribed right, as in criminal law or in Crown custody proceedings.²⁷ It takes this approach despite recognizing that

²³ “The Challenge We Face”, Remarks of the Right Honourable Beverley McLachlin, P.C., presented at the Empire Club of Canada (Toronto: March 8, 2007), online at: <<http://www.scc-csc.gc.ca/court-cour/ju/spe.dis/bm07-03-08-eng.asp>>. The Chief Justice’s reference to the Chief Justice of Ontario’s comments comes from Tracey Tyler, “The Dark Side of Justice”, *Toronto Star*, March 3, 2007. Melina Buckley refers more extensively to judicial *ex curia* statements about the importance of legal representation for access to justice in “Searching for the Constitutional Core of Access to Justice” (2008) 42 S.C.L.R. (2d) 567.

²⁴ *Christie*, *supra*, note 3, at para. 13.

²⁵ *Id.*, at para. 14.

²⁶ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.) [hereinafter “*G. (J.)*”].

²⁷ In both cases, state-funded legal representation may be provided if required for a fair trial, but only if the trial judge cannot provide sufficient assistance without becoming too

Christie's concern was about access to the legal system by persons of low income.²⁸ It describes Christie's claim as being "for effective access to the courts which, he states, necessitates legal services. This is asserted not on a case-by-case basis, but as a general right" to "access aided by a lawyer".²⁹ In these cases, since the individual must show that he or she requires the assistance, the onus does not lie on the state to show that the individual does not require it, as the Court fears would result from a more broadly exercised right.³⁰

The relationship between and among the Charter's rights and freedoms requires careful consideration. As the Court has noted, in some ways the rights and freedoms are linked to each other. Thus "notions of human dignity underlie almost every right guaranteed by the *Charter*".³¹ Although "dignity" should not be treated as a distinctive right, it is an "underlying value".³² It is not unreasonable, therefore, to read the rights and freedoms as incorporating the concept of dignity or, at least, being informed by it. One might expect that this shared commitment would result in the rights overlapping to some extent, rather than treating the rights as silos. In *Christie*, the Court "reads down" the Charter by approaching the rights as separate and distinct elements. Thus section 10(b) would be "redundant" if there were a general right to counsel. One might argue that section 10(b) addresses the criminal context with its different demands and expectations and is about "retaining" counsel (not about who pays for it) and, importantly, about being informed of that right. Still, the Court is not suggesting that section 10(b) is the only provision addressing the right to counsel, for it points to section 7's guarantee, as interpreted, of "a right to counsel as an aspect of procedural fairness where life, liberty and security of the person are affected", albeit through "a case-specific multi-factored enquiry".³³

interventionist. In criminal cases, factors such as the economic and educational circumstances of the accused, the seriousness of the charge and potential penalty, the complexity and length of the trial and the reason why legal aid was denied are taken into account: *R. v. Rowbotham*, [1988] O.J. No. 271, 41 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Rain*, [1998] A.J. No. 1059, 1998 ABCA 315 (Alta. C.A.). In child protection proceedings, the seriousness of the interest at stake, the complexity of the proceedings and the capacities of the parent must be considered: *G. (J.)*, *supra*, note 26, at para. 75.

²⁸ *Christie*, *supra*, note 3, at paras. 3-5.

²⁹ *Id.*, at para. 10.

³⁰ *Id.*, at para. 13.

³¹ *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307, at para. 76 (S.C.C.) [hereinafter "*Blencoe*"].

³² *Id.*, at para. 78.

³³ *Christie*, *supra*, note 3, at paras. 24-25.

The Court has considered the relationship between the different guarantees and the Charter as a whole in a number of decisions. While some judges have suggested that the guarantees should be interpreted as discretely as possible, the more widely held view is that the Charter is a holistic document and that it should also be interpreted in conjunction with the unwritten normative principles.

The opinions in *B. (R.) v. Metropolitan Toronto Children's Aid* illustrate the different approaches.³⁴ Chief Justice Lamer preferred to maintain the guarantees within relatively strict boundaries. For example, he defined “liberty” in section 7 narrowly as referring to physical movement. He viewed section 7’s protection as limited to the loss of physical liberty as a result of the operation of the legal system because he believed that section 2, among other provisions, encompassed other forms of liberty:

... I am unable to believe that the framers would have limited the types of fundamental freedoms to which they intended to extend constitutional protection in such explicit terms, in s. 2, and then, in s. 7, conferred “general” protection by using a generic expression which would, unless its meaning were limited, include the freedoms already protected by ss. 2 and 6, as well as all freedoms that were not listed. This approach is clearly contrary to the principles of legislative drafting that require that a general provision be placed before the provisions for its specific application. Moreover, if s. 7 were to include any type of freedom whatever, provided that it could be described as fundamental, we might seriously question the need for and purpose of s. 2. Either it is redundant, or s. 7 should then be considered to be a residual provision so that we can make up for anything that Parliament may have left out.³⁵

Justice La Forest, on the other hand, maintained that

liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance ...³⁶

including “the [parental] right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such

³⁴ *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 (S.C.C.).

³⁵ *Id.*, at 343.

³⁶ *Id.*, at 370.

as medical care”.³⁷ In *G. (J.)*,³⁸ Lamer C.J.C. declined to consider whether *G. (J.)*’s section 7 liberty interest had been contravened, since he concluded that her security interest had been infringed and that her treatment was not in accordance with the principles of fundamental justice.³⁹ Justice L’Heureux-Dubé, with whom Gonthier and McLachlin JJ. (as she then was) agreed, found a liberty violation, as well, agreeing with the broader understanding of liberty expressed in other decisions.⁴⁰ The Court has adopted the broader interpretation. In *Blencoe*, for example, Bastarache J., speaking for the majority, endorsed the view that the liberty interest encompassed personal autonomy and the freedom to make fundamental life decisions.⁴¹ In *Christie*, the Court seems to have resuscitated the narrower view about the nature of Charter guarantees, one akin to the “watertight compartments” of the old federalism jurisprudence.

Chief Justice Dickson established some of the basic interpretative principles for the Charter in *Big M Drug Mart* and these have not been subsequently disowned, except perhaps by a failure to abide by them. There he said that one of the factors to be considered in determining the meaning of a right or freedom is reference, “where applicable”, to “the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*”. One might read this as ensuring that “associated” rights and freedoms are given as different an interpretation and scope as possible. Yet this rigid approach is inconsistent with other principles of constitutional interpretation. For example, one principle is that interpretation of the constitution “should be ... generous rather than ... legalistic” and one that should be “aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*’s protection”, as long as it does not overshoot the mark.⁴² Even when the Charter explicitly guarantees a right, it does not mean that a similar or related right might not be found in another section, intended to address a different context. This is consistent with an evolutionary approach to Charter interpretation that recognizes that the framers could not have contemplated all forms a right would take or all contexts that might attract the application of a right in the future: in short, the “living

³⁷ *Id.*

³⁸ *G. (J.)*, *supra*, note 26.

³⁹ *Id.*, at para. 56.

⁴⁰ *Id.*, at paras. 117-18.

⁴¹ *Blencoe*, *supra*, note 31, at paras. 49ff.

⁴² *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 344 (S.C.C.).

tree” approach, in contrast to a “frozen rights” approach.⁴³ A nuanced approach to interpreting the guarantees does not mean that each guarantee becomes meaningless, although it does mean that interpreting the constitution may be a somewhat more complex task.

Regardless of whether the Court is prepared to extend rights, it should consider whether its approach might diminish rights already recognized. The *Christie* Court does not consider how the imposition of a tax on legal services affects the ability of litigants to take advantage of the Charter’s section 10(b) and section 7 guarantees relating to the right to legal representation, particularly as recognized in section 7. It would be necessary to show that the interests affected in the civil action involve the right to liberty or security and that the imposition of the surcharge does prevent access and that it is inconsistent with substantive administration of justice.⁴⁴ Admittedly, this might stretch the interpretation of section 7 beyond where the Court has taken it to date, but it is appropriate that the Court at least consider how new developments impact rights already acknowledged. One cannot assume that if the tax prohibits private representation, the litigant will simply fall into the category of those warranting state-funded legal counsel.

Christie challenges the Court’s view of the rule of law and its willingness to treat the unwritten principles as substantive principles. Justice Newbury, for the majority at the Court of Appeal, placed this claim within the context of

the interplay between unwritten principles and written provisions, between lofty descriptions of the fundamental nature of the rule of law and the courts’ traditional deference to parliamentary supremacy.⁴⁵

As Newbury J.A. explained, after ringing expressions of the importance of the unwritten principles, the Supreme Court of Canada has narrowed its view of the rule of law to one of procedure and has treated the significance of the principles less seriously.

The courts below treated the rule of law expansively, depending in part on Dickson C.J.C.’s comments in *British Columbia Government*

⁴³ *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 155 (S.C.C.): “[A constitution] must ... be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.”

⁴⁴ *Reference re Motor Vehicle Act (B.C.)* S. 94(2), [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.) [hereinafter “*B.C. Motor Vehicle Act*”].

⁴⁵ *Christie* (B.C.C.A.), *supra*, note 21, at para. 28.

Employees' Union v. British Columbia (Attorney General).⁴⁶ There the Chief Justice of British Columbia had, on his own motion, issued an injunction against the picketing of the province's courthouses as part of a legal strike by the courthouse employees. In upholding the injunction and the finding that the picketers would have been in criminal contempt had they continued to picket, Dickson C.J.C. emphasized the importance of access to the courts and implied that this refers not only to physical access, but also more generally. He stated, "[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."⁴⁷ He adopted the Court of Appeal's observation in that case that

[W]e have no doubt that the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. It is the preservation of that right with which we are concerned in this case. Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, interference from whatever source falls into the same category.⁴⁸

Justice Southin, dissenting in *Christie* at the Court of Appeal, stated that

the words "rule of law" in the preamble [to the *Charter*] do not create any substantive independent ground upon which a court can find duly enacted legislation to be "inconsistent with the provisions of the Constitution" and therefore of no force and effect.⁴⁹

Having chosen to frame the issue differently from the more contextual way it was articulated by the lower courts, as a general constitutional right to counsel, the Supreme Court of Canada agreed with the dissent in the Court of Appeal:

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

⁴⁶ [1988] S.C.J. No. 76, [1988] 2 S.C.R. 214 (S.C.C.).

⁴⁷ *Id.*, at para. 25.

⁴⁸ *Id.*, at para. 26, citing *Re British Columbia Government Employees' Union*, [1985] B.C.J. No. 1939, 20 D.L.R. (4th) 399, at para. 46 (B.C.C.A.).

⁴⁹ *Christie* (B.C.C.A.), *supra*, note 21, at para. 22.

proceedings before courts and tribunals dealing with rights and obligations.⁵⁰

Referring to the three components of the rule of law it identified in the *Reference re Manitoba Language Rights*⁵¹ and *Reference re Secession of Quebec*,⁵² the Court pointed out that they do not include “general access to legal services”, although the list of three is not exhaustive. In the Court’s view, legal representation is only one way in which litigants may gain “effective” access to the courts or, more broadly, “access to justice”. Significantly, it refers to legal services as “a particular type of access to justice”.⁵³ Yet the Court also refers to the importance of lawyers in the legal system and the constitutional recognition given to the role played by lawyers in some situations, stating that “[a]ccess to legal services is fundamentally important in any free and democratic society”.⁵⁴

In *Christie*, the Supreme Court not only declined to treat the rule of law as a separate grounding for constitutional rights, but also failed to use this unwritten principle as a way of reading the written text. It accepted the limited vision of the rule of law posed by the dissent in the Court of Appeal.⁵⁵ The unwritten principles are not meant to be interpreted in a static manner any more than are the written provisions. While not exactly taking a “frozen rights” approach to the interpretation of the rule of law, the Court points out that “historically” it encompassed only “a limited right that extended only, if at all, to representation in the criminal context”.⁵⁶ The Court has cautioned against a “frozen rights” approach since the earliest of Charter cases⁵⁷ and the Court in *Christie*

⁵⁰ *Christie*, [2007] S.C.J. No. 21, [2007] 1 S.C.R. 873, at para. 27 (S.C.C.).

⁵¹ [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.).

⁵² [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).

⁵³ *Christie*, *supra*, note 50, at para. 10 (emphasis in original).

⁵⁴ *Christie*, *id.*, at paras. 22-23 (S.C.C.).

⁵⁵ *Christie* (B.C.C.A.), *supra*, note 21, at para. 22.

⁵⁶ *Christie*, *supra*, note 50, at para. 26.

⁵⁷ See, e.g., *B.C. Motor Vehicle Act*, *supra*, note 44, at para. 53 and, more recently, with respect to the common law, *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698, at para. 22 (S.C.C.). One might usefully compare *Reference re Public Service Employee Relations Act (Alta.)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.) with *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016 (S.C.C.), or *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573 (S.C.C.) with *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] S.C.J. No. 7, [2002] 1 S.C.R. 156 (S.C.C.) and with *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.) for examples of the Court’s willingness to expand its understanding of a guarantee. The Court has drawn back from its expansive appreciation of the

did acknowledge that the rule of law might support a right to counsel in limited situations, acknowledging, indeed, that *Imperial Tobacco* left open the possibility that the rule of law had more than the three elements,⁵⁸ but it almost precluded applying that approach in *Christie* by the way that it defined Christie's claim.

*Christie*⁵⁹ highlights the difference between the Supreme Court of Canada's aspirational statements about the importance of access to justice, including, moreover, the significance of lawyers in securing access, and its reluctance to play a significant role in securing access when it might be in tension with a limited view of the extent it should impose financial obligations on the legislature. The case does not bode well for further attempts to establish a broad constitutional right to legal representation, particularly since *Christie* is a decision by "the Court" and a full Bench, at that. The lesson of *Christie* is that it will be necessary to develop the jurisprudence and access to the legal system on a case-by-case basis, with the context to which the right to legal representation applies defined narrowly.

2. Private and Public Interests: What Counts?

While *Christie* was about basic access to the legal system for ordinary litigants, the capacity of a party to litigate public interest constitutional challenges arose in *Little Sisters (No. 2)*.⁶⁰ The Little Sisters bookstore wanted advance costs in order to continue its fight against what it considered discriminatory conduct by Canada Customs in not allowing certain books to cross the border, relying on *British Columbia (Minister of Forests) v. Okanagan Indian Band*⁶¹ for its claim. In the view of Bastarache and LeBel JJ., speaking for the majority, the circumstances facing Little Sisters did not meet the stringent test applied in *Okanagan*: "where a court would be participating in an injustice —

unwritten principles evident in *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 (S.C.C.), however, where the unwritten principle of judicial independence served to fill the gap lacking in the written text.

⁵⁸ *Christie*, *supra*, note 50, at para. 21. See *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] S.C.J. No. 50, [2005] 2 S.C.R. 473, at paras. 61-63 (S.C.C.): the actual text of *Imperial Tobacco* is perhaps not as clear as suggested in *Christie*.

⁵⁹ *Christie*, *id.*

⁶⁰ *Little Sisters (No. 2)*, [2007] S.C.J. No. 2, [2007] 1 S.C.R. 38 (S.C.C.).

⁶¹ [2003] S.C.J. No. 76, [2003] 3 S.C.R. 371 (S.C.C.) [hereinafter "*Okanagan Indian Band*"].

against the litigant personally and against the public generally — if it did not order advance costs to allow the litigant to proceed”.⁶²

After the bookstore’s partial victory in *Little Sisters (No. 1)*,⁶³ Customs continued to detain books destined for the bookstore and in *Little Sisters (No. 2)*, the bookstore requested the injunction refused in the first case, as well as “[s]pecial or increased costs”.⁶⁴ In addition to appealing the detention of four books in two separate Customs determinations, Little Sisters argued that *Little Sisters (No. 1)* had not remedied the “systemic problems” in the way Canada Customs approached the determination of whether books entering Canada are obscene; therefore, a broader challenge was required and Little Sisters bookstore was prepared to bring the challenge.⁶⁵

Thus in addition to appealing Customs’ detention of four books (“The Four Books Appeal”), Little Sisters asked for a systemic finding that Customs be prevented from applying the impugned provisions to itself or, indeed, “to anyone”, “until such time as the Court is satisfied that the unconstitutional administration will cease”.⁶⁶ It requested advance costs after the release of *Okanagan*.

In *Okanagan*, members of four Indian Bands engaged in unauthorized logging on Crown land in British Columbia were issued with stop-work orders. The Bands claimed title to the land and maintained that they had a right to log. They also argued that if the matter were to go to trial, they did not have the resources necessary to mount the kind of case required and thus requested advance fees and costs “in any event of the cause”. Speaking for the majority of six judges, Lebel J. accepted that the bands were in poor financial circumstances. Although costs had been traditionally used to indemnify the winning party, Lebel J. noted that “it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice”.⁶⁷ More recently, the

⁶² *Little Sisters (No. 2)*, *supra*, note 60, at para. 5.

⁶³ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120 (S.C.C.) [hereinafter “*Little Sisters (No. 1)*”]. While the majority of the Court found that Canada Customs’ practices in detaining books destined for the bookstore contravened the Charter, it held that the legislative scheme itself was constitutional. The Court refused to grant the injunction requested by *Little Sisters* because there was inadequate evidence to do so.

⁶⁴ *Little Sisters (No. 2)*, *supra*, note 60, at para. 13.

⁶⁵ *Id.*, at para. 16.

⁶⁶ *Id.*, at para. 14.

⁶⁷ *Okanagan Indian Band*, *supra*, note 61, at para. 25.

courts have recognized that the awarding of costs “helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole”, even when parties making constitutional challenges fail.⁶⁸

Although interim or advance costs have been ordered in a wide range of cases, for a court to exercise its discretion to order the costs, the case must meet three criteria: the litigant must be unable to pursue the litigation because of impecuniosity without the costs award; the case must have “sufficient merit to warrant pursuit”; and “there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate”.⁶⁹ A case may be “special” because it is a public interest case⁷⁰ and concerns that awarding costs is effectively prejudging the outcome of a case are “attenuated” if costs would be awarded regardless of whether the litigant was successful.⁷¹ Justice Lebel also identified a number of factors to ensure that costs remain reasonable, that a litigant is not encouraged to engage in additional litigation and that the award does not operate unfairly on other parties.⁷²

Justice Lebel found that all the criteria were met in *Okanagan*. In particular, he found that the claim of title and logging rights

are of profound importance to the people of British Columbia, both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme.⁷³

The dissent in *Okanagan* maintained that the awarding of interim costs should be left to the trial judge, not awarded by appellate courts,

⁶⁸ *Id.*, at paras. 27-29. An example of costs awarded in favour of an unsuccessful litigant is *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 31 (S.C.C.). The Federal Court and Federal Court of Appeal awarded the Crown costs in *Métis National Council of Women v. Canada (Attorney General)*, [2006] F.C.J. No. 280, 2006 FCA 77 (F.C.A.), affg [2005] F.C.J. No. 328, 2005 F.C. 230 (F.C.) when the M.N.C.W. was unsuccessful in challenging their exclusion as an organization from resource development programs directed at Aboriginal communities under ss. 15 and 28 of the Charter. M.N.C.W.'s application for leave to appeal to the Supreme Court of Canada was dismissed with costs: [2006] S.C.C.A. No. 170. The courts viewed M.N.C.W. as raising its own private interest, not the issue of whether the exclusion of female-dominated organizations was discriminatory.

⁶⁹ *Okanagan Indian Band*, *supra*, note 61, at para. 36.

⁷⁰ *Id.*, at para. 38.

⁷¹ *Id.*, at para. 39.

⁷² *Id.*, at para. 41.

⁷³ *Id.*, at para. 46.

and that the majority's decision constituted a significant extension of the principles governing the awarding of discretionary costs.⁷⁴ The dissent also emphasized that in matrimonial cases, where interim costs are often awarded, it is presumed that there will be some distribution of the assets between both parties, not that one party will "lose" in the usual sense.⁷⁵

It is possibly noteworthy that the majority decision in *Little Sisters* (No. 2) is written by both Lebel J., who wrote the majority judgment in *Okanagan*, and Bastarache J., who dissented in *Okanagan*.⁷⁶ The majority of the Supreme Court of Canada in *Little Sisters* (No. 2) concluded that the issues raised there did not rise to the level of public interest warranting interim or advance costs.⁷⁷ For them, *Okanagan* had now become a case in which "[t]he bands had been thrust into complex litigation against the government that they could not pay for, and the case raised issues vital both to their survival and to the government's approach to aboriginal rights."⁷⁸ The majority obviously sees *Little Sisters*' interests as individual and private, interests that do not meet the Court's articulation of the *Okanagan* test of whether "a court would be participating in an injustice — against the litigant personally and against the public generally — if it did not order advance costs to allow the litigant to proceed".⁷⁹

The majority sought to diminish the precedential value of *Okanagan*, by describing the circumstances in that case as "[a]n exceptional convergence of factors": the bands could not afford litigation, especially given their other needs, particularly housing; but if they did not continue to log, they would not be able to build the houses; and it was in the public interest to resolve the way in which land claims would be resolved. Therefore, the Court "held that the public's interest in the litigation justified a structured advance costs order insofar as it was necessary to have the case move forward".⁸⁰ *Okanagan*, the majority in *Little Sisters* (No. 2) maintained, was an "evolutionary step, but not a revolution", in the awarding of interim costs.⁸¹ (Justice Bastarache had not distanced himself in his concurrence with Major J.'s dissenting

⁷⁴ *Id.*, at paras. 54-55 (*per* Major J.).

⁷⁵ *Id.*, at para. 74.

⁷⁶ *Id.*

⁷⁷ *Little Sisters* (No. 2), *supra*, note 60.

⁷⁸ *Id.*, at para. 2.

⁷⁹ *Id.*, at para. 5.

⁸⁰ *Id.*, at para. 33.

⁸¹ *Id.*, at para. 34.

opinion in *Okanagan* with Major J.'s comment that *Okanagan* was a significant change in the interim costs rules).⁸²

The majority cautioned that the awarding of interim or advance costs for public interest cases ("public interest advance costs orders") is "to remain special and, as a result, exceptional" and is to occur only "as a last resort".⁸³ Thus:

[a]n application for advance costs may be entertained only if a litigant establishes that it is impossible to proceed with the trial and await its conclusion, and if the court is in a position to allocate the financial burden of the litigation fairly between the parties.⁸⁴

Litigants seeking advance costs must show that they cannot obtain the required funding through alternative means; if there are other ways of resolving the matter, it is not an injustice to deny the costs for a trial; and the use of the costs must be scrutinized.⁸⁵

The main distinction between *Okanagan* and *Little Sisters (No. 2)* is that the Court concluded that the issues in *Okanagan* are of significant public interest regardless of the outcome because the outcome will identify a method by which land claims can be addressed, while the constitutionality of Customs' practices will be of public interest only if the outcome is that Customs has behaved unconstitutionally.⁸⁶ As with *Christie*, the framing of the case inevitably influences the conclusions reached by the judges. In *Christie*, the contrast in the articulation about what was at stake in the case arose from a comparison between the lower courts and the Supreme Court; in *Little Sisters (No. 2)*, the contrast is found in the differences between the majority and dissenting opinions.⁸⁷

The majority, as well as McLachlin C.J.C., Charron J. concurring, who agreed on the outcome, treated *Little Sisters (No. 2)* only minimally as a continuation of *Little Sisters (No. 1)*. They focused on applying the test more or less to the circumstances underlying *Little Sisters (No. 2)* rather than as significantly informed by *Little Sisters (No. 1)*. This becomes more obvious when these judgments are compared to Binnie J.'s dissent (in which Fish J. concurred) in *Little Sisters (No. 2)*. The

⁸² *Okanagan*, *supra*, note 61, at para. 84: Major J. stated that the majority's extension of interim costs "should be seen as a new rule and not an adaptation of existing law".

⁸³ *Little Sisters (No. 2)*, *supra*, note 60, at para. 36.

⁸⁴ *Id.*, at para. 36.

⁸⁵ *Id.*, at paras. 40-43.

⁸⁶ *Id.*, at paras. 64-65.

⁸⁷ *Christie*, [2007] S.C.J. No. 21, [2007] 1 S.C.R. 873 (S.C.C.). *Little Sisters (No. 2)*, *supra*, note 60.

majority bifurcated the Four Books Appeal and the Systemic Review to make the Four Books Appeal effectively a private business matter for Little Sisters, while finding that there was no supporting evidence for the Systemic Review.

Justice Binnie, in contrast, stated, “This fight is not just about four books. As was the case in *Little Sisters No. 1*, the real fight is about alleged systemic discrimination *exemplified* by the Four Books Appeal.”⁸⁸ This is so, even though he rejected Little Sisters attempt to use the Systemic Review itself as, in effect, a “privately initiated public enquiry” or “a sort of informal class action”.⁸⁹ He continued:

The government is in effect being accused of fighting a war of attrition. Today four books, tomorrow another four books. Litigation follows litigation until the rational businessperson is forced to throw in the towel. This is how civil liberties can be eroded, little by little, yielded in small increments that case by case are not worth the cost of the right. It takes an unbusinesslike litigant like Little Sisters to elbow aside purely financial considerations (to the extent it can) and carry on what it sees as unfinished *Charter* business against the government. Having done so successfully and at its own expense in *Little Sisters No. 1*, it asks the court for an exceptional order of advance costs to make good the victory it thought it had won in *Little Sisters No. 1*. Little Sisters may be right or it may be wrong in its allegations, but its motive can hardly be financial, and its claim to advance costs should not be assessed on that basis.⁹⁰

Justice Binnie considered that *Little Sisters (No. 2)* had reached the required level of “special case” (it was sufficiently special) in large measure because of *Little Sisters (No. 1)*.⁹¹ Justice Binnie also noted that although the majority in *Okanagan* maintained that the trial judge is responsible for determining whether a case is “special enough” to warrant interim costs, in *Little Sisters (No. 2)*, the majority rejected the trial judge’s finding on this point and that “in both cases to reach this Court on the advance costs issue, the trial court has been reversed.”⁹²

⁸⁸ *Little Sisters (No. 2)*, *id.*, at para. 128 (emphasis in original).

⁸⁹ *Id.*, at para. 130.

⁹⁰ *Id.*, at para. 129.

⁹¹ *Id.*, at para. 137. All the criteria for advance costs are therefore met. Justice Binnie also held that it would be appropriate if Little Sisters were successful in obtaining damages, it should repay the advance costs.

⁹² *Id.*, at para. 154.

By characterizing Christie's claim more broadly than Christie himself seemed to intend, the Court was apparently more justified in denying that the rule of law requires that at least some litigants (in addition to those already specified in previous cases) should have access to state-funded counsel.⁹³ By characterizing Little Sisters' claim more narrowly than Little Sisters intended, the majority of the Court were apparently more justified in refusing Little Sisters advanced costs.⁹⁴

3. Official Intermeddler or Civic-Minded Citizen?

We usually see access to justice realized through the extension of rights or increased participation. It is not clear that that is always the case, however. For example, in *Alliance for Marriage and Family v. A. (A.)*,⁹⁵ LeBel J. dismissed the Alliance's attempt to gain party status in order to appeal the decision of the Court of Appeal in a case in which it had been an intervenor.

While not itself a constitutional case, *A. (A.) v. B. (B.)*,⁹⁶ the case in which the Alliance intervened, involved a Charter challenge at the Court of Appeal (since it was raised there first, the Court refused to consider it) and granting status would have left open the prospect of third parties appealing constitutional cases in which the constitutional issues had been raised in private litigation, a common way for these issues to arise. In the original case, B.B. was father to a child of whom C.C. was the mother and A.A., C.C.'s lesbian partner, considered herself and was considered by B.B., C.C. and the child also to be the child's mother. A.A. sought a declaration that she was a parent. The application judge dismissed the application on the basis that the governing legislation⁹⁷ did not contemplate this parenting dynamic, but the Court of Appeal declared A.A. to be the child's parent under its *parens patriae* jurisdiction, declining to deal with the Charter issues because they had not been raised previously.⁹⁸ While public interest plaintiffs may raise constitutional

⁹³ *Christie*, *supra*, note 87.

⁹⁴ *Little Sisters (No. 2)*, *supra*, note 60, at para. 128.

⁹⁵ [2007] S.C.J. No. 40, [2007] 3 S.C.R. 124 (S.C.C.).

⁹⁶ [2007] O.J. No. 2, 83 O.R. (3d) 561 (Ont. C.A.), *rev'd* [2003] O.J. No. 1215, 225 D.L.R. (4th) 371 (Ont. S.C.J.).

⁹⁷ *Children's Law Reform Act*, R.S.O. 1990, c. C.12.

⁹⁸ *A. (A.) v. B. (B.)*, [2003] O.J. No. 1215 (Ont. S.C.J.); *A. (A.) v. B. (B.)*, [2007] O.J. No. 2, 2007 ONCA 2 (Ont. C.A.).

questions that otherwise would not be addressed,⁹⁹ the Court maintained the position that it is inappropriate for a third party to “revive” litigation between private parties:

What the applicant is attempting to do is to substitute itself for the Attorney General in order to bring important legal questions relating to the development and application of the law before this Court. As we have seen, neither the Attorney General nor the immediate parties intend, for reasons of their own, to contest the Court of Appeal’s judgment. The applicant is certainly concerned about the impact of that judgment. Nevertheless, it was merely an intervener in the Court of Appeal, there to defend its view of the development of family law, but it had no specific interest in the outcome of the litigation.¹⁰⁰

It might be argued that justice does not require that the Alliance be allowed to import interests into what is admittedly a private matter with a public component. It was sufficient that its intervenor status allowed it to present policy reasons why the court should refuse A.A.’s request to be declared the child’s parent at the Court of Appeal. Beyond that, the Alliance had no interest in the case that warranted overriding the parties’ decision about how to proceed. It may be significant, however, that the Alliance had not shown that it satisfied the requirements for public interest standing, particularly coupled with characterizing the litigation as, in essence, a private matter in which the Alliance had no “specific personal interest in the outcome”.¹⁰¹

4. The Secular Legal System, Equality and Religion: Porous or Solid Borders?

Bruker v. Marcovitz is, from one perspective, simply about when someone may use the legal system to enforce a contract. From another, however, it is a case about how members of minority groups gain access to justice in the mainstream when the group adheres to tenets that are inconsistent with mainstream values.¹⁰²

⁹⁹ *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] S.C.J. No. 5, [1992] 1 S.C.R. 236 (S.C.C.).

¹⁰⁰ *Alliance for Marriage and Family v. A. (A.)*, *supra*, note 95, at para. 9.

¹⁰¹ *Id.*, at paras. 10-12.

¹⁰² *Bruker v. Marcovitz*, [2007] S.C.J. No. 54, 2007 SCC 54 (S.C.C.). Richard Moon analyzes this case in considerably greater detail: (2008) 42 S.C.L.R. (2d) 37.

Bruker v. Marcovitz involved a question of religious freedom under the *Quebec Charter of Human Rights and Freedoms*,¹⁰³ a quasi-constitutional document, and thus gives us a sense of how the matter would be approached had the same matter been raised under the Canadian Charter, as was the case in *Amselem*.¹⁰⁴ In *Amselem*, Jewish owners of condominiums wanted to build *succahs* on their balconies, contrary to the corporation's by-law that the balconies be kept clear. They successfully challenged the by-law under the Quebec Charter on the basis that it infringed their religious freedom.

Speaking for the majority in *Bruker v. Marcovitz*, Abella J. noted that "Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism", but that "[n]ot all differences are compatible with Canada's fundamental values".¹⁰⁵ If access to justice is viewed as access to full participation in and benefit from not only Canada's legal system, but also Canada's commitment to particular norms and values, as mediated by the legal system, then the courts have a major role to play in determining how this objective is manifested. *Bruker v. Marcovitz* is about how the courts enforce Canada's commitment to pluralism: here the issue is the tension between religious beliefs and practices and sex equality. One might also consider it to be a case about whether individuals more appropriately gain access to justice through secular or religious institutions, when the bar to justice is religious.

After her divorce from Jason Marcovitz, Stephanie Bruker wanted to remarry in a religious ceremony, but could not do so because her former husband would not grant her a *get*, an act within his control under Jewish religious law (it would be within the wife's control to refuse the *get*). Without the *get*, she remained his wife and if she did remarry in a civil ceremony, her children would be "illegitimate" under Jewish law. In 1990, the *Divorce Act* was amended to encourage a party to remove a barrier to religious remarriage within the party's control.¹⁰⁶ Failure to do so could result in the court's exercising discretion not to grant the recalcitrant party relief under the *Divorce Act*; an exception provided that if the party refused because of genuine religious or conscientious

¹⁰³ R.S.Q., c. C-12.

¹⁰⁴ *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (S.C.C.) [hereinafter "*Amselem*"].

¹⁰⁵ *Bruker v. Marcovitz*, [2007] S.C.J. No. 54, [2007] 3 S.C.R. 607, at paras. 1-2 (S.C.C.).

¹⁰⁶ R.S.C. 1985, c. 3 (2nd Supp.), s. 21.1(3).

reasons, the court could not exercise its discretion to refuse the party's request for relief.¹⁰⁷

In the settlement of the issues arising out of the end of their marriage, Ms Bruker and Mr. Marcovitz agreed to attend before a rabbinical court to obtain the *get*. For 15 years, Mr. Marcovitz refused to abide by the agreement on the basis that his freedom of religion meant that he did not have to do so. Ms Bruker argued that she had considered the *get* in negotiating the terms of their agreement around the issues arising from the end of their marriage and sought damages for Mr. Marcovitz's failure to provide the *get*.¹⁰⁸ She did not request that the court compel Mr. Marcovitz to provide the *get*. Accordingly, while this case may be about freedom of religion with a subtext of equality, it is also about conforming to a voluntarily made contract.

For Abella J., as long as the contract is valid, its religious element does not make it non-justiciable, the position Deschamps J. (Charron J. concurring) took in her dissent.¹⁰⁹ While the courts have generally (but not always) taken a "hands-off" approach to adjudicating internal church disputes, this has not been the case when the rights of an individual to claim a legal remedy have been met with objections based on religion. The guiding principle is that courts seek to avoid adjudicating religious doctrine.¹¹⁰ In Abella J.'s view, this case did not require consideration of religious doctrine because it was simply about the refusal of one party to abide by a contract into which he voluntarily entered, even though the substance of the contract involved a religious practice.

Underlying Abella J.'s treatment of the issue is her position that the husband translated a religious practice and a moral duty into a legal obligation.¹¹¹ The husband sought to avoid the contract by arguing that its enforcement would be against public order, since it contravened his freedom of religion.¹¹² Justice Deschamps, on the other hand, asserted that "the undertaking to appear before the rabbinical authorities for a

¹⁰⁷ *Bruker v. Marcovitz*, *supra*, note 105, at paras. 7-8. The provision does not apply if the power to remove the barrier lies with religious officials: *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), s. 21.1(6). In *Bruker*, there was no doubt that the husband could provide the *get*.

¹⁰⁸ The facts are taken from Abella J.'s judgment: *id.*, at paras. 23ff.

¹⁰⁹ *Id.*, at para. 41, *per* Abella J., and para. 175, *per* Deschamps J.

¹¹⁰ Justices Abella and Deschamps both review the case law in this area: *id.*, at paras. 42ff, *per* Abella J., and para. 124, *per* Deschamps J.

¹¹¹ *Id.*, at para. 51.

¹¹² The husband characterized the contract as a "religious undertaking", arguing that the secular courts could not enforce a religious undertaking or, in other words, that religious undertakings are not justiciable: *id.*, at para. 119, *per* Deschamps J.

religious divorce, like an undertaking to go regularly to church, to synagogue or to a mosque, is based on a duty of conscience alone". The undertaking is "purely a moral obligation that may not be enforced civilly".¹¹³

In Abella J.'s opinion, Mr. Marcovitz's agreement to provide the *get* was actually consistent with public order and the relationship between equality and religious freedom reflected in the *Divorce Act*.¹¹⁴ Furthermore, his reason for refusing to provide the *get* was not because he had a religious objection to it, but because he "was angry at Ms. Bruker", a crucial finding in the case for the majority.¹¹⁵ More broadly, and less dependent on the existence of the contract, "[t]he refusal of a husband to provide a *get* ... arbitrarily denies his wife access to a remedy she independently has under Canadian law and denies her the ability to remarry and get on with her life in accordance with her religious beliefs."¹¹⁶ It is not insignificant that the husband's refusal to provide the *get* had a major impact on Ms Bruker's life precisely because she chose to conform to *her* religious beliefs that without the *get*, she could not remarry or have legitimate children under Jewish law. Although there are hints in the majority judgment that a refusal to give a *get*, absent an agreement to provide one, would result in damages in the appropriate case, it is far less likely that the court would require a husband to provide a *get* or even appear before a rabbinical court to request one.

In awarding damages to Ms Bruker for the breach of the contract by Mr. Marcovitz, the majority concluded that the claiming of religious grounds by the party seeking to renege on the contract did not override the other party's access to the legal system to enforce the contract. In other words, Ms Bruker was not denied access to justice because Mr.

¹¹³ *Id.*, at para. 175.

¹¹⁴ *Id.*, at para. 63. It should be noted that Mr. Marcovitz withdrew his initial challenge to the constitutionality of s. 21.1 of the *Divorce Act*: *id.*, at para. 34. Justices Abella and Deschamps disagreed about the impact that the *Divorce Act* was to have in the case: see para. 34 for Abella J.'s characterization and para. 105 for Deschamps J.'s.

¹¹⁵ *Id.*, at para. 69. As Abella J. wrote, "There is no doubt that at Jewish law he *could* refuse to give [a *get*], but that is very different from Mr. Marcovitz being prevented by a tenet of his religious beliefs from complying with a legal obligation he voluntarily entered into and of which he took the negotiated benefits" (emphasis in original).

¹¹⁶ *Id.*, at para. 82. Justice Deschamps implicitly cast doubt on whether the reason for not remarrying was Ms Bruker's religious beliefs by pointing at para. 113 to the trial judge's enumeration of several acts by Ms Bruker contrary to Orthodox Judaism. Justice Deschamps also brought Ms Bruker's character into the equation in other ways; see, e.g., para. 109's reference to Ms Bruker's difficult relationship with her daughters.

Marcovitz raised a religious objection to meeting his agreement. Limiting the remedy to damages (the remedy Ms Bruker requested) rather than enforcing the performance of the contract by requiring Mr. Marcovitz to appear before the rabbinical court, meant that the Court was not compelling him to take a “religious step”. It minimized the role religion played in the agreement and in effect characterized the agreement as a promise to take certain action, action which happened to have religious significance.

Justice Deschamps in dissent focused on the religious significance of the promise (it was not merely a promise but a promise of a particular kind) and on the religious consequences of the failure to abide by the promise. Religion is the core of the matter, not a happenstance. It is the core because Ms Bruker’s reasons for wanting the *get* were religious, to enable her to live a religious life. Nothing prevented Ms Bruker marrying in a civil ceremony, but that would not be “remarriage” for her. Similarly, the law makes no distinction between children born within or outside wedlock. For Ms Bruker, however, children of a civil marriage would be illegitimate without the *get*. Although implicit in both opinions, both Abella and Deschamps JJ. avoided making an explicit statement about the equality ramifications of the *get*. Only the man is able to provide the *get* and only the husband can therefore limit the wife’s future by denying it to her. The wife can refuse to accept the *get* and therefore prevent the husband’s remarriage in a religious ceremony but, while this falls within the provisions of the *Divorce Act*, it is not the reason the *Divorce Act* was amended. The *Divorce Act* provisions, in the context of the *get*, are directed at the possibility of an abusive use of the husband’s power over the wife’s future through the *get*.

On its face, the dissent seems to say to Ms Bruker, “bad luck”, you will be denied access to justice because the impact of your husband’s refusal to abide by his agreement — a refusal that in the usual case would allow you access to the legal system to obtain a remedy — arises from religious practice. But this is not what Deschamps J. said that she was saying. On the contrary, preventing Ms Bruker from enforcing the contract was actually a way to maintain the separation of religion and the justice system. Equality could not be advanced by recognizing the damage caused by the religious consequences that would occur if the contract was not enforced; rather, equality would be advanced by treating the religious consequences as outside the system. It was not Ms Bruker’s access to justice that mattered; it was ensuring that the system providing access to justice was not tainted by religious considerations.

Far from condemning the inequality that flowed from the *get*, the dissent reinforced it under the guise of taking an arm's length approach. Justice Deschamps framed the issue as "whether the civil courts can be used not only as a shield to protect freedom of religion, but also as a weapon to sanction a religious undertaking".¹¹⁷ In her view, the majority "sanction[ed] the religious consequences of delaying consent for a *get* signif[ying] that it endorses those consequences even if they are contrary to the hard-won gains (*aquis*) of Canadian society".¹¹⁸ Only when a religious undertaking (such as a religious marriage contract) meets the requirements for a civil contract, should the courts enforce the remedial provisions of the contract; they should not, however, give a remedy for the religious consequences of the failure to abide by the contract. For Deschamps J., this case falls into the latter category, since not being able to remarry or have legitimate children are consequences determined by religion.¹¹⁹

Significantly, Deschamps J. did not accept that the contract entered into by the parties constituted a contract under Quebec law, because it did not have as its object a "juridical act". Here the object was the obtaining of a religious divorce, an object "not capable of legal characterization" or of juridical consequences, since the rabbinical authorities do not play the same role as religious authorities may in marriage: their rulings do not acquire civil status. Accordingly, Deschamps J. concluded that "one of the essential elements of contract formation is missing" and the agreement to attend at the rabbinical court to obtain a religious divorce is "purely a moral obligation that may not be enforced civilly".¹²⁰

Justice Deschamps maintained that the ground of damages is not recognized in Canadian or Quebec law: the religious consequences of the husband's not providing the *get* are not consistent with the civil law which provides that a woman does not require her husband's consent to remarry and that children are treated equally whether born into a marriage or not. Thus to award damages is to sanction the religious law and thus "impose a rule that is inconsistent with the rights the secular courts are otherwise responsible for enforcing"¹²¹ or, phrased even more

¹¹⁷ *Id.*, at para. 101.

¹¹⁸ *Id.*, at para. 103. The "hard-won gains" are freedom of religion and the right to equality.

¹¹⁹ *Id.*, at para. 123.

¹²⁰ *Id.*, at paras. 174, 176. For Deschamps J.'s discussion of the object of the contract and why this contract does not contain an object, see paras. 171ff.

¹²¹ *Id.*, at para. 179.

strongly, “the assessment of damages would require the court to implement a rule of religious law that is not within its jurisdiction and that violates the secular law it is constitutionally responsible for applying”.¹²² Justice Deschamps described as a “clear rule” the principle that “religion is not an autonomous source of law in Canada”¹²³ and that it is crucial that the state be neutral with regard to religion.¹²⁴

For the majority, the issue is far simpler:

The promise by Mr. Marcovitz to remove the religious barriers to remarriage by providing a get was negotiated between two consenting adults, each represented by counsel, as part of a voluntary exchange of commitments intended to have legally enforceable consequences. This puts the obligation appropriately under a judicial microscope.¹²⁵

Yet it is also true that not only did the husband claim that religion lay behind his refusal to abide by the contract (a religious belief that did not prevent his making the contract initially and a position the majority did not accept), but that the wife also maintained that her desire to enforce the contract lay in her religious belief (a claim about which the dissent seems skeptical). Assuming that both parties were stating their positions in good faith, the majority sanctioned one party’s commitment to her religious tenets while disregarding the religious belief of the other, since the damages are premised on the wife’s inability to pursue a “normal” life following divorce, but a normal life under Jewish law. Justice Abella was able to do this in part because she took Ms Bruker’s profession of belief at face value, while questioning Mr. Marcovitz’s, but more significantly, she removed religion from the equation or, at least, she avoided compelling a “religious action”. Ms Bruker then was granted “access to justice”. Justice Deschamps placed religion front and centre, on the other hand, permitting her to treat it outside the secular legal system. As a result, she would have denied Ms Bruker the opportunity to obtain damages for Mr. Marcovitz’s failure to grant her the right she thought she had acquired through her agreement with him.

¹²² *Id.*, at para. 180.

¹²³ *Id.*, at para. 183.

¹²⁴ *Id.*, at para. 184.

¹²⁵ *Id.*, at para. 47.

III. CONCLUSION

In *Christie* and *Little Sisters (No. 2)*, the Court has staked its position in the ongoing problem of the financial difficulties facing litigants. In *Christie*,¹²⁶ the Court preferred the same rule for litigants having difficulty affording a lawyer and corporations: neither may sleep under bridges. The majority in *Little Sisters (No. 2)* recognized that litigants are often in an unequal position, but considered that attempting to devise ways of addressing this problem, of bringing “an alternative and extensive legal aid system into being”, is not their role, since it “would amount to imprudent and inappropriate judicial overreach”.¹²⁷ While it may play a crucial role in maintaining the rule of law and in serving as a vehicle by which people may enforce rights and obtain justice, the Supreme Court views itself as having only a narrowly prescribed role in enhancing access or in reducing unequal access to the system necessary for individuals to achieve those objectives. Moreover, the Court is not willing to be a party to advancing public interest litigation:

The justice system must not become a proxy for the public inquiry process, swamped with actions launched by test plaintiffs and public interest groups. As compelling as access to justice concerns may be, they cannot justify this Court unilaterally authorizing a revolution in how litigation is conceived and conducted.¹²⁸

*Alliance for Marriage and Family v. A. (A.)*¹²⁹ says that “access to justice” does not require giving intervenors with no direct interest in a case the opportunity to force the parties to continue a battle that they choose not to fight. “Access to justice” does mean that “outsiders” cannot prolong a matter, at least in litigation between private parties.

Finally, while *Bruker v. Marcovitz*¹³⁰ appears to engage the Court in a religious dispute in a way inconsistent with its general approach to religious cases, the facts of the case permit the majority to avoid explicitly making a judgment about religious beliefs or enforcing religious tenets. In *Bruker*, both parties share the same religious beliefs, beliefs that may appear inherently contrary to the Charter value of equality. This case would have been far more difficult for the majority,

¹²⁶ [2007] S.C.J. No. 21, [2007] 1 S.C.R. 873 (S.C.C.).

¹²⁷ [2007] S.C.J. No. 2, [2007] 1 S.C.R. 38, at para. 44 (S.C.C.).

¹²⁸ *Id.*, at para. 39.

¹²⁹ [2007] S.C.J. No. 40, [2007] 3 S.C.R. 124 (S.C.C.).

¹³⁰ [2007] S.C.J. No. 54, [2007] 3 S.C.R. 607, at para. 179 (S.C.C.).

and easier for the dissent, had Ms Bruker come to the Court asking that Mr. Marcovitz obtain a *get*. Thus the majority's approach may have less value for future cases that explicitly or implicitly pose a tension between equality and freedom of religion than does the dissent's.

