The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 42 (2008) Article 20

Searching for the Constitutional Core of Access to Justice

Melina Buckley

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/sclr

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

Citation Information

Buckley, Melina. "Searching for the Constitutional Core of Access to Justice." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 42. (2008).
http://digitalcommons.osgoode.yorku.ca/sclr/vol42/iss1/20

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.

Searching for the Constitutional Core of Access to Justice

Melina Buckley[*]

I. Introduction

Access to justice is a large multi-faceted concept with broad policy implications and is also a constitutional commitment central to our legal system. In its largest sense, access to justice encompasses both a procedural component, *i.e.*, the availability of a range of formal and informal avenues to resolve disputes and prevent conflict, and a substantive component, *i.e.*, a just, fair or equitable outcome. From this policy perspective the concept of access to justice defies precise definition but includes a range of programs and initiatives *e.g.*, programs to reduce cost and delay of dispute resolution processes, public legal education, community mediation services, and so on. However, access to justice is also a legal principle that underpins our justice system and has a narrower, restricted definition relating specifically to access to the courts, effective remedies, and legal services. In order to distinguish the legal principle from the broad policy concept, I refer to the former as the constitutional core of access to justice.

In this paper, I argue that the constitutional core of access to justice is susceptible to precise definition by the courts, but that at present the judicial enterprise of refining and giving contemporary meaning to access to justice is obfuscated by debate surrounding the broader policy concept. This obfuscation occurs because the duality of broad policy and narrow legal principle plays into concerns over the respective roles of governments and the courts to ensure access to justice which brings the justiciability of access to justice claims into question. A claim is justiciable when its subject matter is a real and substantial legal controversy that is amenable to judicial determination. Justiciability involves two interrelated issues: (1) the competence and legitimacy of the court to hear the claim; and (2) the sufficiency of the factual basis for

---

[*] Melina Buckley, LL.B., Ph.D. is a lawyer and legal policy consultant who serves as co-counsel to the Canadian Bar Association in its right to civil legal aid litigation.

the claim (the claim cannot be hypothetical, speculative, abstract or moot).[1] Governments clearly have the primary responsibility for ensuring access to justice, but courts too have a role in determining whether barriers to the justice system offend the *Constitution Act, 1982*[2] and to provide responsive legal remedies where constitutional breaches are found. The legal profession also plays a central role in ensuring access to justice, but this obligation is of a different nature given that it is mandated by professional responsibility rather than the Constitution.

Judges have become quite vocal in raising their concerns over access to justice in public forums and these voices have become more urgent in the past few years. It is instructive to examine a few of these judicial comments in light of recent jurisprudence and to consider the underlying views regarding the respective roles and responsibilities of governments, the courts and the legal profession in ensuring access to justice. In early 2007 in the *Little Sisters* case, a majority of the Supreme Court of Canada downplayed the constitutional importance of the principle of access to justice ruling that access to justice concerns are not "paramount" in a court's decision to award advance costs in order to ensure that impecunious litigants with meritorious public interest claims can proceed.[3] A few months later in *Christie*, the Court unanimously rejected, in a relatively cursory manner, a claim that a provincial tax on legal services offended the constitutional principle of access to justice.[4] And yet in August 2007, McLachlin C.J.C. declared that access to justice is a "basic right" for Canadians and called upon governments, lawyers and judges to address this crisis.[5]

In her remarks, she emphasized the access problems experienced by "middle-class Canadians" and noted that "[t]he justice system risks losing the confidence of the public when 'wealthy corporations,' or the poor, who qualify for legal aid, have the means to use the court system" while the middle-class can only do so at an unacceptable cost.[6] While the

---

1 Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough, Ont.: Carswell, 1999).

2 Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Constitution"].

3 *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] S.C.J. No. 2, [2007] 1 S.C.R. 38, 2007 SCC 2, at para. 35 (S.C.C.), *per* Bastarache and Lebel JJ. for the majority [hereinafter "*Little Sisters*"].

4 *British Columbia (Attorney General) v. Christie*, [2007] S.C.J. No. 21, [2007] 1 S.C.R. 873, 2007 SCC 21 (S.C.C.) [hereinafter "*Christie*"].

5 Tracey Tyler, "Access to Justice a 'Basic Right'" *The Toronto Star*, August 12, 2007, online: The Toronto Star <http://www.thestar.com/article/245548>.

6 *Id*.

Chief Justice's remarks are an important and welcome recognition of the enormous difficulties faced by individuals in accessing the justice system, they are problematic in two important respects. First, they overstate the availability of legal aid to poor people and secondly they suggest, especially when read together with the Court's decisions in *Little Sisters* and *Christie*, that the solutions to denials of the "basic right of access to justice" exist solely outside of the courtroom.

A similar juxtaposition can be made of the views expressed by Brenner C.J. of the Supreme Court of British Columbia inside and outside of the courtroom. Chief Justice Brenner has been actively involved in co-chairing a multi-year initiative to improve access to civil justice in the province.[7] Recently, serving in his capacity as a guest editor to *The Vancouver Sun* for a special issue on how to construct a "truly civil society in British Columbia", he wrote about the importance of access to justice and the provincial government's initiatives in this regard. Chief Justice Brenner concluded his contribution with an eloquent plea for "commitment by governments to provide adequate levels of legal aid":

> But while these measures will help, we must not forget the particular challenges faced by the poor and the disadvantaged. These British Columbians face very long odds when trying to identify and solve their problems. Many are simply too ill-equipped to understand, let alone to try to enforce their rights. When their adversary is a government or large organization, obtaining redress can prove virtually impossible.
>
> For these disadvantaged British Columbians we have a duty to provide adequate levels of civil legal aid. Most would agree that this is a moral obligation; the Supreme Court of Canada has ruled that civil legal aid in some circumstances is also a constitutional obligation. Clearly governments must now recognize this and ensure that civil as well as criminal legal aid is available in appropriate cases to the poor and the disadvantaged.[8]

These remarks are evidence of Brenner C.J.'s clear and active commitment to improving access to justice and his recognition of the huge barriers to justice faced by poor persons who are the most

---

[7] See Civil Justice Reform Working Group, *Effective and Affordable Civil Justice — Report of the Civil Justice Reform Working Group to the Civil Justice Review Task Force* (British Columbia: November 2006).

[8] Don Brenner, "Legal Aid Needs Help from Government" *The Vancouver Sun*, April 5, 2008, at C-7.

vulnerable and socially excluded group in Canada. However, this same judge had earlier dismissed, at a very preliminary stage, the Canadian Bar Association's ("CBA") public interest action seeking a declaration that the civil legal aid regime in British Columbia is unconstitutional and that there is a constitutional right to legal aid in civil justice matters affecting the fundamental interests of people living in poverty.[9] He dismissed the action on the basis that the CBA could not be granted public interest standing and that, in any event, the claim did not disclose a reasonable cause of action.[10] The central underlying theme of his reasons for dismissing the case appears to be that governmental acts that have strong policy dimensions "cannot be the subject of public interest standing to bring a Charter claim".[11]

The striking contrast between these public exhortations to governments to act on the one hand and judicial reticence and deference to government in the courtroom on the other, frame the current fate of civil legal aid in Canada. Legal aid schemes are a fundamental component of access to justice initiatives in Anglo-American countries and arguably the most important mechanism to improve access for the most disadvantaged individuals and groups. However, the provision of civil legal aid is extremely limited in most provinces and almost non-existent in others.[12] The dire state of legal aid in Canada led the CBA to begin treating it as an access to justice crisis in 1992 and to take active steps to lobby for increased legal aid funding and effective mechanisms for the delivery of legal aid services. In the intervening years, the state of civil legal aid provision has generally declined and this decline is in large measure attributable to the diminishing contribution from the federal government and the shift in funding mechanisms from a cost-sharing regime to a block transfer.[13] Given the worsening access to

---

9 *Canadian Bar Assn. v. British Columbia*, [2006] B.C.J. No. 2015, [2007] 1 W.W.R. 331; 144 C.R.R. (2d) 291, 2006 BCSC 1342 (B.C.S.C.) [hereinafter "*CBA* case"]. The CBA's statement of claim and other material relating to the case are available on the CBA's website at: <http://www.cba.org/CBA/Advocacy/legalaid/default.aspx>.

10 The Court of Appeal dismissed the appeal, although on the narrower grounds that there was no reasonable cause of action because the pleadings failed to state adequate material facts: *Canadian Bar Assn. v. British Columbia*, [2008] B.C.J. No. 350, 290 D.L.R. (4th) 617, 2008 BCCA 92 (B.C.C.A.).

11 Lorne Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007) 40 U.B.C. L. Rev. 727, at 729.

12 Quebec and Ontario have by far the most comprehensive civil legal aid schemes, but there are still important limitations and inadequacies.

13 The 1996 change from funding under the Canada Assistance Plan pursuant to the *Canada Assistance Plan Act* (R.S.C. 1970, c. C-1) to block fund transfers first under the Canada

justice crisis and federal and provincial governments' lack of response to its public advocacy efforts, the CBA decided that its only recourse was to initiate litigation.[14] To date, the CBA's claim has become wedged in the quagmire of debate over institutional competence and the respective responsibilities of government and courts to ensure access to justice. It is important to continually remind ourselves that it is the fundamental rights of poor persons that are ignored and further trammelled in this war of words and resultant inaction.

In my view, a way forward can be found by disassociating the broad policy concept of access to justice from the narrower legal and constitutional principle. It is only this narrower meaning that gives rise to legal obligations and hence is within the purview of the courts. With this in mind, I set out three approaches to defining the constitutional core of access to justice: (1) access to the courts and the rule of law; (2) access to counsel and the right to a fair trial; and (3) access to justice and the equal benefit and protection of the law. Following this brief and preliminary exposition, I discuss *Canadian Bar Assn. v. British Columbia*[15] as an example of a case that offers the opportunity to search for and further refine the constitutional core of access to justice if it can be untangled from the web of justiciability concerns.

II. ACCESS TO THE COURTS AND THE RULE OF LAW

The rule of law has been recognized by Canadian courts as a fundamental constitutional principle that establishes the foundation for our justice system.[16] The rule of law is ubiquitous and so it may appear amorphous but, like air, its absence or denial has concrete, measurable effects. Our perception of what the rule of law is and of its importance is sharpest when it is absent, in situations where law does not in fact rule.

Health and Social Transfer and now under the Canada Social Transfer pursuant to the *Federal Provincial Fiscal Arrangements Act* (R.S.C. 1985, c. F-8).

[14] Susan McGrath, "CBA Launches Test Case to Challenge Constitutional Right to Civil Legal Aid", online: The Canadian Bar Association <http://www.cba.org/CBA/News/2005_Releases/2005-06-20_remarks.aspx>.

[15] *CBA Case*, *supra*, note 9; appeal denied, *supra*, note 10.

[16] *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121, at 142 (S.C.C.); *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 70 (S.C.C.). The rule of law is expressly acknowledged by the preamble to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Scheudle B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"], and implicitly recognized in the preamble to the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3: see *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, at 750 (S.C.C.).

The Supreme Court of Canada has summarized its jurisprudence on the content of the rule of law[17] as embracing three principles:

(1) The law "is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power".[18]
(2) The requirement for "the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order."[19]
(3) The requirement that the relationship between the state and the individual be regulated by law.[20]

The first approach to defining the constitutional core of access to justice is to focus on the implicit link between access and the rule of law. From this perspective, the emphasis is on access to the courts and to effective remedies. It is only when access is assured that the courts can play their primordial role as guardians of the justice system and the rule of law. The rule of law necessarily requires that every person, regardless of wealth or circumstance, be entitled to justice in a court of law. Part of the substantive enjoyment of every right is that one is able to enforce it through the courts. The right of access to the courts is a long-standing historical tradition in the common law and is enshrined in the *Magna Carta*.[21]

The most robust judicial pronouncement of the inextricable relationship between the rule of law and access to the courts to date was made by Dickson C.J. in *B.C.G.E.U. v. British Columbia (Attorney General)*:

> … Of what value are the rights and freedoms guaranteed by the Charter if a person is delayed or denied 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 illusory, the entire Charter undermined.

---

[17] *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] S.C.J. No. 50, [2005] 2 S.C.R. 473, 2005 SCC 49, at para. 58 (S.C.C.) [hereinafter "*Imperial Tobacco*"].

[18] *Reference re Manitoba Language Rights*, *supra*, note 16, at para. 59.

[19] *Id.*, at para. 60.

[20] *Reference re Secession of Quebec*, *supra*, note 16, at para. 71.

[21] The *Magna Carta* (1215) provides *inter alia*: "To none will we sell, to none will we deny or delay, right or justice."

> There 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. …[22]

While *BCGEU* is often presented as a case purely about physical access to the courts, it should be noted that intangible barriers to accessing justice were also at issue in that case, namely an "obligation of conscience not to breach the picket line".[23] More specifically, Dickson C.J.C. quoted with approval a passage from the Court of Appeal decision referring to "interference from whatever source".[24] Other cases have held that the rule of law protects access to the courts beyond physical access and gives rise to the constitutional obligation to set aside court hearing fees,[25] and to order government to provide for fee waivers for impecunious litigants.[26] Government actions that result in barriers to access to the courts cannot be tolerated because recourse to the courts is a constitutional right and not simply a choice an individual makes in resolving civil disputes:

> Citizens wronged, or believing themselves to have been wronged, or denied, or believing themselves to have been denied rights to which they are entitled, and whether the alleged transgressor is another citizen or the state itself, apart from self help remedies, will see little alternative than to seek to have the judicial component of our Constitution affirm their rights. Self help remedies are unacceptable, and therefore there is the practical compulsion to seek redress in the courts. The respondent's stated position that a litigant makes a choice to go to court and therefore there is no compulsion, fails to recognize the inherent right, and in some cases need, for all of us to seek redress and relief. Although private resolution models have been developed, and provide a valuable forum for resolving certain types of disputes, they cannot provide remedies in cases involving fundamental rights

---

[22] *BCGEU v. British Columbia (Attorney General)*, [1988] S.C.J. No. 76, [1988] 2 S.C.R. 214 at 229-30 (S.C.C.).

[23] *Id.*, at para. 29.

[24] *Id.*, at 230.

[25] *Pleau v. Nova Scotia (Supreme Court, Prothonotary)*, [1998] N.S.J. No. 526, 186 N.S.R. (2d) 1 (N.S.S.C.).

[26] *Pearson v. Canada*, [2000] F.C.J. No. 1444, 195 F.T.R. 31 (F.C.T.D.), affd [2002] F.C.J. No. 1291, 2002 FCA 326 (F.C.A.), leave to appeal refused, [2002] S.C.C.A. No. 459 (S.C.C.); *Polewsky v. Home Hardware Stores Ltd.*, [2003] O.J. No. 2908 (Ont. Div. Ct.), leave to appeal granted, [2004] O.J. No. 954 (Ont. C.A.). In both cases, the courts found a common law as well as a constitutional right to proceed *in forma pauperis*, that is, as an indigent person, without incurring court fees.

> and freedoms. In respect to accessing the courts, there is a practical and real "compulsion".[27]

The Supreme Court of Canada was invited to consider the contemporary meaning and legal requirements of the fundamental guarantee of access to justice as it relates to and supports rule of law in *Christie*.[28] The legal issue was whether the provincial tax on legal services, which had been demonstrated to hinder the access by low-income persons to legal counsel, was unconstitutional in that it violated the principle of access to justice and thereby offended the rule of law. The British Columbia courts had struck down the tax as unconstitutional in certain circumstances. The Chambers judge had limited the effect of her order to relieving the tax burden from low-income Canadians defined in relation to eligibility for certain types of legal aid.[29] The Court of Appeal took a different tack in emphasizing the type of legal service at issue rather than the characteristics of the client in determining where the tax had unconstitutional effects. After a careful review of the jurisprudence and scholarly commentary, Newbury J.A., writing for the majority, settled on the following definition:

> … I propose as a working definition the meaning which in my opinion represents the most basic, or core, aspects of access to justice as a constitutional principle — i.e., 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.[30]

The Court of Appeal's remedy flowed directly from this wording and it struck down the tax on legal services to the extent that they applied to legal services related to the determination and interpretation of legal rights and obligations by courts of law or other independent tribunals.

The Supreme Court of Canada reversed the lower courts concluding that the text of the Constitution, the jurisprudence and the historical understanding of the rule of law did not support such a broad general

---

[27] *Pleau*, *supra*, note 25, at para. 22.

[28] *Supra*, note 4.

[29] *Christie v. British Columbia (Attorney General)*, [2005] B.C.J. No. 217, 250 D.L.R. (4th) 728 (B.C.S.C.), *per* Koeningsberg J.

[30] *Christie v. British Columbia (Attorney General)*, [2005] B.C.J. No. 2745, 262 D.L.R. (4th) 51, at para. 30 (B.C.C.A.).

right to counsel. The Court did not "foreclose the possibility that a right to counsel may be recognized in specific and varied situations" but at the same time, it reiterated that there is no "general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations."[31] The Court's reasons conflate Mr. Christie's claim that the tax was unconstitutional because it hindered access to justice with a claim that the principle of access to justice requires that state-funded counsel be provided in all circumstances. In doing so, the Court transformed the negative claim that the state should not impose a burden on access to counsel, into a more onerous claim for a positive obligation for state-funded access to counsel. The Court summarily dismissed the argument that the right to non-interference with access to counsel, including freedom from state-imposed barriers that hinder or deny access to counsel, has a much broader ambit than the right to state-funded counsel under current Canadian jurisprudence.

In its reasons, the Court failed to engage in a close examination of the actual impact of the tax on poor persons as demonstrated by the evidentiary record. Instead it decried the lack of evidence about how much it would cost to provide legal aid to everyone in all circumstances.[32] This is a phantom concern created by the Court. An analogy that demonstrates the problematic nature of the Court's approach can be made with the *Pleau*[33] and *Polewsky*[34] cases cited above, which deal with the unconstitutionality of hearing fees and lack of waiver provisions for filing fees for impecunious litigants. In these cases, the courts did not take such an all-or-nothing approach; they did not find that all court fees violated the principle of access to justice or that all filing fees had to be waived because some individuals could not pay. Rather, they looked at the impact of these government-imposed barriers to access and provided a tailored remedy. These cases recognize that the impact on the individual whose access is impaired or denied is the same regardless of whether the nature or source of the barrier is physical or economic.

Having created a scenario in which "the logical result would be a constitutionally mandated legal aid scheme for virtually all legal

---

[31] *Christie*, *supra*, note 4, at para. 27.
[32] *Id.*, at para. 14.
[33] *Supra*, note 25.
[34] *Supra*, note 26.

proceedings”,[35] the Court was able to sidestep an examination of the ways in which the right of access to justice flows by necessary implication from the three principles underlying the rule of law as articulated by the Court in *Imperial Tobacco*.[36] The supremacy of the law, an actual order of positive laws preserving and embodying the principle of normative order, and the regulation of the relationship between the state and the individual by these laws can only be assured where there is real access to the courts. No law, not even the written Constitutional text, can be given effect if access to justice is denied.

The abstract right of access to the courts under the rule of law must be grounded in the real experiences of individuals upon whom the burden of this tax fall. The uncontroverted evidence in *Christie* demonstrated the uneven and discriminatory impact of the tax on legal services on low-income persons. The rule of law is particularly important for low-income persons because as a group their underprivileged status makes them particularly vulnerable and most in need of protection from arbitrary power, for the preservation of the normative order, and for protection from the state.[37]

The question facing the Court was whether the tax on legal services operated as a lock on the courtroom door for individuals of modest means. The Supreme Court did not answer the question of whether the tax amounted to a barrier to the courts nor take into account that the disadvantaged situation of low-income persons was exacerbated by the tax on legal services. While leaving open a small window for claims to access to counsel in specified circumstances under the rule of law, the Court suggested that the preferred approach is to bring access to justice claims through right to counsel claims under the Charter. Needless to say, this would not have helped Mr. Christie had he lived to proceed further with his claim given that his claim did not involve, in any shape or form, an application for state-funded counsel.

---

[35] *Christie*, *supra*, note 4, at para. 13.

[36] *Supra*, note 17.

[37] Patricia Hughes, “Recognizing Substantive Equality as a Foundational Constitutional Principle” (1999) 22 Dalhousie L.J. 5, at 33; Janet Mosher, “Poverty Law – A Case Study” in Ontario Legal Aid Review, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services*, vol. 3 (Toronto: Ontario Legal Aid Review, 1997), at 915.

III. Access to Counsel and the Right to a Fair Trial

A second path in the search for the constitutional core for access to justice focuses on access to counsel as it relates to the right to a fair trial. In criminal matters, Canadian courts employed their inherent powers to ensure a fair trial by ordering that it will stay proceedings in a specific case unless the government funds legal representation for the accused long before the entrenchment of the Charter.[38] This traditional approach has been maintained since the adoption of the Charter. Courts continue to find an *ad hoc* right to publicly funded counsel in particular circumstances, now relating it specifically to the protection afforded by the guarantee of the right to life, liberty and security of the person protected by section 7 of the Charter. In each case, a trial judge will review whether or not counsel is required for an individual to have a fair trial.[39] Three main factors are taken into account in making this determination: (1) the seriousness of the charge and its consequences; (2) the complexity of the case; and (3) the capacity of the accused.[40]

The jurisprudence has been developed in the criminal context, but a similar approach was extended to child apprehension proceedings by the Supreme Court of Canada in *G. (J.)*.[41] This jurisprudence has elucidated an important qualitative standard to be incorporated into the constitutional core of access to justice. This constitutional standard is that of "meaningful" and "effective" participation in legal proceedings involved in asserting or defending important legal interests.[42]

IV. Access to Justice and Equal Benefit and Equal Protection of the Law

A third route along which we can seek the constitutional core of access to justice follows from the norm of equality that is inherent in the concept itself — the understood, if not always spoken or acknowledged, prefix of "equal" access to justice. This route is the less-well-travelled one. It brings together the two earlier paths focusing on access to the

---

38 See for example, *R. v. Ewing*, [1974] B.C.J. No. 846, 18 C.C.C. (2d) 356 (B.C.C.A.), and *R. v. White*, [1976] A.J. No. 574, 32 C.C.C. (2d) 478 (Alta. T.D.).

39 *R. v. Rowbotham*, [1988] O.J. No. 271, 41 C.C.C. (3d) 1 (Ont. C.A.).

40 *Id*.

41 *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.)*"].

42 *Id.*, at paras. 73, 80, 81, 83, 84, 85, 89, 119, 120, 121, 122, 123, 125.

courts and access to counsel, but sees these two approaches to access to justice through the prism of equality rather than the construct of the right to a fair trial. At its most basic, the rule of law describes the state of a society where law is supreme, that is, where the highest representative of the Crown as well as the most humble citizen must act in accordance with law as interpreted by the courts. As confirmed by Dicey in his early treatise on English constitutional law, the rule of law ensures and guarantees equality before the law.[43]

The norm of substantive equality is a primary value within and across Canadian society and is closely related to the principle of the rule of law. The primordial quality of this human rights norm was endorsed in ringing tones by Cory J. in *Vriend*: "The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society."[44] These principles are inextricably linked in a constitutional democracy and in the inherent values of the dignity of the human person, the commitment to social justice and equality and the respect for cultural and group identity.[45] Equality rights have been characterized as "the broadest of all guarantees. They apply to and support all other rights guaranteed by the *Charter*."[46]

The primordial status of substantive equality is acknowledged in a number of governmental actions and commitments. The advancement of equality is a national policy in Canada. It is the subject of statutes in every jurisdiction and equality guarantees are a central part of Canada's Constitution. In addition, Canada as a nation, is signatory to a number of international human rights treaties which commit us to the advancement of equality for all residents. The equality guarantees were included in the Charter to satisfy both Canada's own commitment to advancing equality and to meet international obligations.

Canadian courts have not yet considered in-depth the relationship between access to justice and the right to equal benefit and equal protection of the law. However, the parameters of equal access to justice

---

[43] *Roncarelli v. Duplessis*, *supra*, note 16. For a summary of Dicey's rule of law principles see A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: MacMillan & Co., 1959), at 202-203, cited in P. Hogg & C. Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55 U.T.L.J. 715, at note 1.

[44] *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493, at para. 67 (S.C.C.) [hereinafter "*Vriend*"].

[45] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at para. 64 (S.C.C.).

[46] *Law Society of British Columbia v. Andrews*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, at 185 (S.C.C.).

and the related obligations on government is a well-trodden avenue in the international legal arena. Canada's international human rights obligations confirm the primacy of equality, and serve to shed light on the requirements of the principle of access to justice.

Articles 2, 14(1) and 26 of the *International Covenant on Civil and Political Rights* are the key guarantors of equal access to justice in the international human rights framework.[47] Article 14(1) declares that "all persons shall be equal before the courts and tribunals", and establishes a right to a fair hearing. The right to equality before the courts in Article 14(1) is reinforced by Articles 2 and 26. Article 2(1) commits states parties to respect and ensure to all individuals the rights set out in the ICCPR, without distinction. Article 26 provides that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law", and requires that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination".[48] The right to equality before the courts and tribunals under Article 14(1) of the ICCPR is understood to apply not only to criminal matters, but also to litigation concerning rights and obligations of a civil nature. The Human Rights Committee has interpreted the concept of a fair hearing in a civil "suit at law" as requiring a number of conditions including "equality of arms" with the opposing side.[49]

It is a fundamental principle of international human rights law that commitments to rights entail effective access to the courts to seek an effective remedy for rights violations. Moreover, it is clear that the duty to ensure that people do have access to the courts to seek remedies for rights violations, imposes obligations on governments to provide rights adjudication mechanisms that are accessible. Article 2(2) of the ICCPR obligates governments to take the necessary steps to "adopt such legislative or other measures as may be necessary *to give effect to the rights*" contained in the Covenant. Further, through Article 2(3)(a) of the ICCPR, every state party undertakes "to ensure that any person whose

---

[47] G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force for Canada March 23, 1976 ("ICCPR").

[48] "General Comment No. 18" in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*: (UN DOC. HRI/GEN/1/Rev.3 (1997)).

[49] *Morael v. France*, HRC Dec. 207/1986, UN DOC. Supp. No. 40 (A/44/40), at para. 9.3 (1989).

rights or freedoms as herein recognized are violated shall have an effective remedy".[50]

Together Articles 2(2), 14(1) and 26 of the ICCPR require substantively equal access to the courts, and prohibit any government action that may have a deterrent effect on the ability of individuals to pursue a remedy before the courts. Conditions that have the effect of preventing individuals from effectively exercising their rights are considered to violate the ICCPR. For example, the Human Rights Committee has held that a rigid duty under law to award costs to a winning party, without discretion to consider its implications for "access to court" by rights claimants violates Article 14(1) in conjunction with Article 2 of the ICCPR.[51]

It is also understood by other international treaty bodies that the duty of state parties to fulfil the obligation to provide effective remedies for rights violations imposes an obligation on governments to remove economic and other barriers to the effective presentation of a claim. For example, the International Covenant on Economic, Social and Cultural Rights Committee explained in General Comment No. 16 that the duty of state parties to fulfil rights includes an obligation on governments to "take steps to ensure that in practice, men and women enjoy their economic, social and cultural rights on a basis of equality", and that such steps should include establishing "appropriate venues for redress such as courts and tribunals or administrative mechanisms that are *accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalized men and women*" (emphasis added).[52]

Within the rubric of the rule of law today, equal access to justice does not mean Diceyan formal equality, that is, mere recognition of everyone's similar position in the justice system and its equal application to everyone. In addition to the international human rights norms cited above, jurisprudence under section 15 of the Charter and human rights legislation must be considered as part of the interpretive backdrop and for ascertaining the core of access to justice. Canadian courts have been unequivocal in eschewing a "thin and impoverished" narrow formalistic

[50] (1948), at Articles 8, 10 ("UDHR"); ICCPR, Articles 2(2), (3); *Universal Declaration of Human Rights*, G.A. Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, Doc. A/810.

[51] *Äärelä and Näkkäläjärvi v. Finland*, Communication No. 779/1997, 24 October 2001, U.N. Doc. CCPR/C/73/D/779/1997, at para 7.2.

[52] Committee on Economic, Social and Cultural Rights ("CESCR"), "General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of all Economic, and Social and Cultutal Rights" (2005), at para. 21.

interpretation of the equality rights both in constitutional and quasi-constitutional law. Rather it has unhesitatingly embraced a rich, purposive, substantive guarantee of equality, which encompasses the duty to promote a more equal society and an obligation to take into account the possible impact of measures on "already disadvantaged classes of persons".[53]

The constitutional core of access to justice hinges on a robust understanding of the right to equal benefit and equal protection of law. These legal norms are well developed under international human rights law and include the proposition that meaningful access to the courts is, in many circumstances, contingent upon legal representation. The mere right to appear in court — that is, a right to self-representation — is in many cases a meaningless right given the complexity of modern law. In many, if not most, circumstances, individuals require legal assistance in order to participate meaningfully in legal proceedings.[54] Even in cases where the state is not a party, power disparities between parties, left unaddressed, can infringe the right to equal benefit of the law.

The law defines the rights and obligations of individuals and governments. The justice system provides the procedures and decision making authority by which disputes, including disputes with governments, can be resolved. It is axiomatic that the substantive content of the law, the rights and obligations, are hollow unless a means is available to ensure that these rights can be exercised equally by all those who they are intended to protect:

> The law, through its promise of equality before it to all those subject to it, suggests that the benefits it delivers are equally open to all subjects. To the extent that any subject is unable to discover his or her entitlements because of an inability to state adequately the case for entitlement, a silent political choice is made which deems that person unworthy of the benefit. The choice has to remain silent because to

[53] *Ontario (Human Rights Commission) v. Simpsons-Sears*, [1985] S.C.J. No. 74, [1985] 2 S.C.R. 536 (S.C.C.); *Law Society of British Columbia v. Andrews*, *supra*, note 45; *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.); *Vriend*, *supra*, note 44; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] S.C.J. No. 46, [1999] 3 S.C.R. 3 (S.C.C.) [hereinafter "*BCGSEU*"]; *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.).

[54] Several United States decisions recognize this point. For example, the United States Court of Appeal in *Davis v. Page*, 618 F.2d 374, at 385 (5th Cir. 1980) stated: "We realize that it cannot be said there is meaningful access to the judicial process until all serious litigants are represented by counsel." Both the majority and minority reasons in *G. (J.), supra*, note 41, also used the terminology of "meaningful" and "effective" participation in legal proceedings (*id.*, at para. 83, *per* Lamer C.J.C.; para. 125, *per* L'Heureux-Dubé J.).

> bring it into the open—to make it public—is to make it starkly clear that the promise of equality is empty.[55]

Thus, while the positive obligation on governments to provide legal assistance and representation in some circumstances is not the only means to ensure access to justice, it appears clear that is one important facet of the constitutional core of this principle.

V. THE CBA TEST CASE

This brief exposition on the three approaches to refining the constitutional core of the access to justice leads us to a point of convergence. While access to justice means more than access to a lawyer, given the pervasiveness and complexity of both substantive and procedural law in contemporary Canadian society, access to a lawyer is a necessary element of access to justice in many circumstances. To date, the courts have found that the situations in which governments have a positive obligation to provide counsel are best ascertained through individual case specific applications. The validity of this approach was reaffirmed by the Supreme Court in *Christie*.[56] However, this case-by-case approach is problematic in a number of respects, notably that it places an unfair legal burden on disadvantaged litigants and immunizes many aspects of government action from constitutional review.

The CBA has initiated litigation[57] on the issue of the right to civil legal aid that attempts to overcome the problems inherent in the individual right to counsel paradigm, and to further delineate the contours of the constitutional core of access to justice.[58] The CBA claims that British Columbia, Canada and the Legal Services Society are in violation of the Constitution through the operation of the government legal aid scheme, which systematically denies access to justice, and systemically discriminates against poor persons who are unable to access legal representation in matters affecting their fundamental interests. The claim sets out the ways in which the scheme infringes constitutional rights by excluding coverage for family law, poverty law, immigration

---

55 David Dyzenhaus, "Normative Justifications for the Provision of Legal Aid" in John D. McCamus, M.J. Trebilcock, L.Newton *et al.*, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (Toronto: Queen's Printer, 1997).

56 [2007] S.C.J. No. 21, [2007] 1 S.C.R. 873, 2007 SCC 21 (S.C.C.).

57 *Canadian Bar Assn. v. British Columbia*, [2006] B.C.J. No. 2015, [2007] 1 W.W.R. 331, 144 C.R.R. (2d) 291, 2006 BCSC 1342 (B.C.S.C.).

58 Online at: CBA <http://www.cba.org/CBA/Advocacy/legalaid/default.aspx>.

and refugee law, and prison law matters and/or severely restricting legal assistance in these areas. It sets out the harms experienced by poor persons as a result of the exclusions and restrictions in the government scheme. In particular, the claim alleges that the civil legal aid regime in B.C. is inconsistent with the Canadian Constitution because it violates the rights guaranteed by sections 7, 15 and 28 of the Charter, section 36 of the *Constitution Act, 1982*, and unwritten constitutional principles (the rule of law, the norm of constitutional equality and the independence of the judiciary), as informed by Canada's obligations under international human rights law.

We refer to the CBA case as a "systemic case" because it alleges constitutional infringements and harms that are experienced by a group of individuals that result from systemic defects in the regime, rather than from improper individual decisions or actions. The action is pled on the basis of material facts of these systemic breaches. At trial, proof of these systemic facts would be brought through evidence of individuals who have experienced denials of access to justice attributable to the legal aid regime to illustrate the constitutional frailties in the legal aid scheme, as well as evidence of the patterns of denials and their consequences for poor people as a group. This can be distinguished from the more "typical" constitutional action in which a claim is framed by the individual fact pattern of a litigant or litigants. A successful individual right to counsel application gives rise to an individual remedy of the appointment of government funded counsel. However, if the CBA case is successful in establishing its claims, it would result in systemic remedies, that is declarations of unconstitutionality and ancillary relief that would oblige governments to ensure that the legal aid scheme in B.C. fully complies with the Canadian Constitution.

To date, this action has foundered because of concerns about the justiciability of the novel systemic claim pleaded by the CBA. In this final section, I set out the rationale for the CBA case and the fate of the case to date.

1. The Rationale for a Systemic Claim

In the introduction, I alluded to the wholesale inadequacies of civil legal aid and the harms experienced by poor people who are unable to secure meaningful and effective access to the justice system. As a result of the failure of government actions, poor people are left to deal without assistance with complex legal procedures that affect their vital interests.

Many suffer devastating consequences including heightened risks to physical and emotional security, to the ability to maintain relationships with their children, and to the ability to access an adequate standard of living.

The absence or inadequacy of legal aid affects poor people as a group as well as other groupings over-represented within this social class, *i.e.*, Aboriginal persons, persons with disabilities, the young, the aged, women (particularly women who are single mothers with children under the age of 18), and persons belonging to particular racial groups. Research in Canada and other countries has demonstrated that there is an important connection between social exclusion, poor health and "justiciable problems"[59] and that this is a dynamic process whereby unsolved legal problems can serve to further marginalize and exclude vulnerable individuals and groups.[60] An English report concluded that the lack of access to legal assistance is a factor in bringing about or maintaining social exclusion:

> A lack of access to reliable legal advice can be a contributing factor in creating and maintaining social exclusion. Poor access to advice has meant that many people have suffered because they have been unable to enforce their legal rights.[61]

Similar findings were made on a global scale by the United Nations Development Program's Commission on Legal Empowerment of the Poor in its recent report entitled *Making the Law Work for Everyone Volume I.*[62]

The dimensions of this national problem give rise to serious legal issues about access to justice. The failures of governments to adequately respond to this crisis create an imperative for novel legal strategies. Although right to counsel cases play an important role in ensuring that an individual's right to legal assistance is enforced in some circumstances, these cases are incapable of addressing the constitutionality of a

---

[59] Here the term "justiciable problem" is used to denote a problem with a legal aspect and a potential legal solution, but one that may be resolved, possibly more appropriately, by other means.

[60] For an excellent overview of this research and a presentation of preliminary Canadian data see Ab Currie, "Civil Justice Problems and the Disability and Health Status of Canadians" in N.J. Balmer, A. Buck, P. Pleasence, eds., *Transforming Lives: Law and Social Process* (UK: Legal Services Commission, 2007).

[61] Lord Chancellor's Department and Law Centres Federation, *Legal Advice and Services: A Pathway Out of Social Exclusion* (London: Lord Chancellor's Department, 2001), at 11.

[62] The report is available online at: Commission on Legal Empowerment of the Poor <http://www.undp.org/legalempowerment/report/index.html>.

government's actions and failures to act and leave the legal aid schemes *qua* governmental scheme immune from constitutional review by the courts.

The individual right to publicly funded counsel approach was developed in the criminal law context. It does not provide a suitable means of determining the parameters of the constitutional right to civil legal aid. In particular, the following limitations are inherent in the individual right to counsel approach in the non-criminal law context:

- it is exceedingly difficult for an individual to make a claim for state-funded counsel where the state is not a party to the proceeding, as this will generally require initiating a separate action;
- it is similarly difficult for an individual to make a claim for state-funded counsel in an administrative hearing as this would also require initiating a separate action;
- this approach is an uneconomical use of judicial resources because an individual case is limited to the specific circumstances and results only in an individual remedy and not a policy change, therefore the same issue is likely to be re-litigated over and over again;
- it is a fundamentally unfair approach because unrepresented individuals are placed in a position where they must make complex legal arguments;
- this approach results in a complete lack of protection afforded to "invisible claimants", *i.e.*, those individuals who abandon their legal claims and the assertion of constitutional rights because the justice system is simply too daunting without legal assistance which they cannot afford; and
- the individual right to counsel cases are generally founded exclusively on a violation of section 7 of the Charter, but there are strong arguments to be made under other constitutional provisions. These novel causes of action are beyond the capacity of the individual litigant in part because they require evidence that is beyond the knowledge of an individual litigant. Whereas in the criminal context where the jurisprudence is mature, advocacy groups can provide self-represented litigants with a template to make a "Rowbotham Application" for state-funded counsel. Such a straightforward approach is currently not available in civil matters because of the novelty of potential claims in for example, family law or poverty law matters.

Even in the criminal legal aid context, the courts have noted that individual right to counsel cases do not challenge the constitutionality of the legal aid system but only whether the individual's Charter right was violated.[63] Different legal considerations apply to determining whether counsel must be appointed to represent a person in a particular case than would apply to a determination of whether a government program is unconstitutional. In a right to counsel application, the focus is necessarily on the problems of the individual, not the system. The onus is on the claimant to prove his or her own lack of capacity in the specific circumstances of his or her case rather than to prove that omissions in the legal aid system are unconstitutional.

Furthermore, individual right to counsel cases are often not resolved in a timely fashion. This further contributes to immunizing governmental action and inaction from constitutional review. For example, in *G. (J.)*,[64] the trial judge did not make her decision on the right to counsel motion until a year after the hearing on the merits of the underlying case for which counsel was sought. For this reason, the Supreme Court of Canada characterized the issues related to the right to counsel in civil matters as "evasive of review" and noted that "the moving party is no better off than he or she would have been had the motion not been brought to begin with".[65] This was the primary reason that the Court decided the constitutional issues raised in that case despite the fact that they were moot.[66] Additionally, the governments can avoid constitutional review of the operation of civil legal aid systems by settling with individual claimants thereby rendering the right to counsel applications moot. This settlement strategy was employed in British Columbia and was one of the contributing factors to the CBA's decision to proceed with a systemic claim.[67]

Another important distinction is that while right to counsel cases are brought within the purview of section 7, the allegation of systemic discrimination is central to the CBA's case. An analysis of systemic discrimination requires a perspective, supported by evidence, that is

---

[63] *Québec (Procureur général) c. C. (R.)*, [2003] J.Q. no. 7541, [2003] R.J.Q. 2027, at paras. 82 and 113 (Que. C.A.).

[64] *Supra*, note 41.

[65] *Id.*, at para. 46.

[66] *Id.*, at para. 84, *per* Lamer C.J.C.

[67] The CBA relies on evidence filed by the British Columbia Public Interest Advocacy Centre's experience in trying to bring a test case on the right to counsel in civil welfare fraud proceedings in its attempts to resist the motions to strike its claim.

beyond the specific circumstance of the single perpetrator and the single victim. Systemic discrimination is concerned with the cumulative negative effect of government conduct on individuals or groups and requires systemic remedies.[68] Individual right to counsel cases are analogous to the limited approach to accommodation in human rights cases that has been rejected by the Supreme Court of Canada in favour of a systemic approach that extends to scrutiny of the system, policy or program as a whole.[69] Courts should be particularly concerned about shielding systemic discrimination from judicial scrutiny.[70] A sole focus on individual right to counsel cases will leave the web of exclusions and restrictions in legal aid schemes beyond the reach of the Constitution.

The mismatch between a case-by-case approach limited to particular circumstances and systemic problems was addressed in *Chaoulli v. Quebec (Attorney General)*,[71] wherein public interest standing was granted to permit a systemic challenge to proceed. In *Chaoulli*, the trial judge found that neither of the public interest litigants had been directly affected by the waiting lists at issue or by delays in receiving treatment. Instead, they were asserting that they and their families would have better and more timely access to medical services but for a legislative prohibition on private medical insurance. The evidence was presented in a systemic form: doctors testified about the extent of waiting lists and expert witnesses expressed opinions on the effect private insurance would have on the public health system. The trial judge found no actual breaches of section 7 on the evidence before her, but potential and imminent breaches (which she held were saved by section 1).[72] At the Supreme Court, the fullest account of the systemic nature of *Chaoulli* and the distinction between an individual constitutional challenge and a systemic challenge is provided by Binnie J. in his consideration of the issue of standing (dissenting on the merits but not on this issue):

> … the appellants advance the broad claim that the Quebec health plan is unconstitutional for *systemic* reasons. They do not limit themselves to the circumstances of any particular patient. *Their argument is not limited to a case-by-case consideration.* They make the generic

---

[68] *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] S.C.J. No. 42, [1987] 1 S.C.R. 1114, at 1138-39 (S.C.C.), *per* Dickson C.J.C. for the Court.

[69] *BCGSEU*, *supra*, note 53.

[70] *Id.*, *per* McLachlin J., as she then was, for the Court, at para. 42.

[71] [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C) [hereinafter "*Chaoulli*"].

[72] *Chaoulli c. Québec (Procureure générale)*, [2000] J.Q. no. 479, [2000] R.J.Q. 786, at paras. 19-23, 38 (Que. C.S.).

> argument that Quebec's chronic waiting lists destroy Quebec's legislative authority to draw the line against private health insurance. *From a practical point of view, while individual patients could be expected to bring their own cases to court if they wished to do so, it would be unreasonable to expect a seriously ailing person to bring a systemic challenge to the whole health plan, as was done here.* The material, physical and emotional resources of individuals who are ill, and quite possibly dying, are likely to be focussed on their own circumstances. In this sense, there is no other class of persons that is more directly affected and that could be expected to undertake the lengthy and no doubt costly systemic challenge to single-tier medicine. Consequently, we agree that the appellants in this case were rightly granted public interest standing. However, the corollary to this ruling is that failure by the appellants in their systemic challenge would not foreclose constitutional relief to an individual based on, and limited to, his or her particular circumstances.[73] (emphasis added)

The CBA has argued that its action is analogous to, and consistent with this holding. Like in *Chaoulli*, the rationale for the systemic claim is also based on a recognition of the fact that many poor people who require legal aid are vulnerable and are living in marginal and constrained circumstances that give rise to significant barriers to their participation in litigation. In its claim, the CBA relies on evidence concerning the vulnerabilities of poor people, including that:

- many are reliant on social assistance or disability benefits, and are constantly struggling to meet the basic needs of themselves and their children;
- in addition to being poor, they are disproportionately members of other groups that suffer discrimination, including single mothers, people with disabilities, and members of racial minorities, which affects their access to employment and basic services such as housing;
- for many, comprehension of legal problems is hampered by low levels of education, illiteracy, mental disability, or the fact that English is not their first language;
- they suffer from high levels of stress and poor health;
- they have very little influence in the democratic process;
- social assistance recipients are afraid to become involved in legal disputes and litigation with the government, either as defendants or

---

[73] *Chaoulli*, *supra*, note 71, at para. 189.

plaintiffs (or petitioners or respondents), for fear that it will jeopardize their benefits and their relationships with government staff who are the gatekeepers of those benefits; and

- social assistance recipients who are single mothers are afraid to become involved in legal disputes and litigation with the government, either as defendants or plaintiffs (or petitioners or respondents), for fear that existing arrangements for custody, access, and maintenance of children will be disturbed and that their children will be exposed to the risk of apprehension. In some cases, there is a fear of generating animosity from a former spouse.[74]

In a perverse way, the Court's *obiter* comments in *Christie* about the inadequacy of the evidentiary record provide further support for the systemic case.[75] Mr. Christie had brought evidence about the impact of the tax on provincial legal services on his clients and his own practice and the lower courts accepted this evidence but the Supreme Court opined that much more would be needed to prove that the tax on legal services was unconstitutional. Mr. Christie was in a position of relative advantage over a person of modest means who requires legal assistance. It is difficult to imagine how an individual poor person could have the resources, willingness and ability to bring sufficient evidence about the deficiencies in a legal aid scheme and their impact. Concerns about ensuring the adequacy of an evidentiary record in constitutional cases would appear to lend support to the CBA's public interest test case given that it is better placed to marshall the necessary proof of constitutional violations.

2. The Fate of the Systemic Case

At present, the CBA case stands dismissed. The CBA is in the process of considering its options but remains committed to a litigation strategy to broaden judicial recognition of the constitutional right to civil legal aid.[76] I am too close to this matter to provide a detailed analysis of the specific reasons for dismissing the case. However, at this juncture it is appropriate to step back and review the decisions of both the

---

[74] See CBA Statement of Claim, *supra*, note 58, at paras. 13-20.

[75] *Christie*, *supra*, note 56, at para. 28.

[76] After this paper was completed, the CBA sought and was denied leave to appeal to the Supreme Court of Canada in this matter: [2008] S.C.C.A. No. 185 (S.C.C.).

Chambers judge and the Court of Appeal in the larger context of the debate over the justiciability of access to justice issues.

The interrelated issues of public interest standing, the systemic nature of the claim, and whether the CBA is required to plead material facts relating to individual circumstances together led to the dismissal of the case. These issues can be seen as reflecting one big knot of judicial concern about whether the CBA's claim is a real and substantial legal controversy that is amenable to judicial determination. These concerns are somewhat difficult to understand in the context of the robust Canadian jurisprudence on justiciability in constitutional cases.

The Supreme Court of Canada has held that it is the role and responsibility of the courts to determine objectively and impartially whether governmental choices fall within the limiting framework of the Constitution. In constitutional cases, the role of the court extends beyond its traditional function of resolving disputes between private parties, to the regulation of government behaviour.[77] This function recognizes that all citizens have an interest in ensuring that governments behave in a constitutional manner, and that is there is a "fundamental right of the public to government in accordance with the law".[78] These same principles supply the rationale for the granting of public interest standing in constitutional cases.

A court cannot decline jurisdiction over a matter merely because it believed the matter better resolved through the political process.[79] The court is the "constitutionally mandated referee" and if the courts deferred to government on matters of policy in the context of constitutional challenges it would render Charter rights and protections meaningless and without a remedy.[80] The fact that a claim may have some political content does not render it injusticiable. The legislatures and the courts have independent obligations to ensure that legislation and government action conforms to the Constitution. In *Chaoulli*, McLachlin C.J.C. wrote that:

---

[77] *Operation Dismantle v. Canada*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441 (S.C.C.) [hereinafter "*Operation Dismantle*"]; *Newfoundland (Treasury Board) v. NAPE*, [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381 (S.C.C.) [hereinafter "*NAPE*"]; *Chaoulli*, *supra*, note 71; *Vriend*, *supra*, note 44; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.).

[78] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] S.C.J. No. 5, [1992] 1 S.C.R. 236, at para. 31 (S.C.C.).

[79] *Operation Dismantle*, *supra*, note 77, at para. 38, *per* Dickson C.J.C., at para. 64, *per* Wilson J.

[80] *NAPE*, *supra*, note 77, at paras. 105, 111.

> While the decision about the type of health care system Quebec should adopt falls to the Legislature of that province, the resulting legislation, like all laws, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*. The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it. …[81]

Similarly, the CBA does not seek to not tell the government defendants what type of legal aid regime it must create, rather it seeks constitutional review of specified aspects of the existing governmental scheme in British Columbia and a declaration of unconstitutionality. The Statement of Claim contains allegations of the actual deleterious effects of the current civil legal aid regime in this province. There is nothing hypothetical, speculative or abstract about the facts upon which this case is founded that would render it injusticiable. The claim is not that the government scheme *might* lead to a violation of constitutional rights, but that it *is* in violation of the Constitution because it systemically discriminates against poor people. Refining the parameters of the constitutional right to legal assistance and representation is not a task that falls outside the institutional competence of the courts. Even prior to the adoption of the Charter, courts asserted their inherent jurisdiction to order state-funded counsel in some cases. While the CBA's claim seeks constitutional review from a broader, systemic perspective, the subject matter is one which courts are eminently qualified to consider.

Despite the fact that the CBA's claim can be fully squared within existing precedent on justiciability, there are clear indications of judicial nervousness about the breadth of the implications of addressing access to justice issues. The Supreme Court of Canada's decisions in *Little Sisters* and *Christie*[82] are rife with judicial apprehension about the perception that the courts would be seen to be constitutionally mandating a "parallel system of legal aid".[83] In its claim, the CBA is not asking the Court to "bring an alternative and extensive legal aid system into being".[84] British Columbia and Canada brought the system into being several decades ago. The CBA is asking the Court to do what it alone is constitutionally

---

[81] *Chaoulli*, *supra*, note 71, at para. 107.

[82] *Christie*, *supra*, note 56.

[83] *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue*, [2007] S.C.J. No. 2, [2007] 1 S.C.R. 38, 2007 SCC 2, at para. 5 (S.C.C.).

[84] *Id.*, at para. 44.

empowered to do, to review the existing scheme in British Columbia for constitutional compliance. This is in no way an "imprudent and inappropriate judicial overreach".[85] An eventual decision on the constitutionality of the scheme and appropriate remedy would leave the governments the needed margin of manoeuvre to fulfil their responsibilities to devise efficient and effective schemes within the clarified constitutional parameters.

In *G. (J.)*,[86] the Supreme Court confirmed that government has a wide latitude in selecting the means to implement constitutional obligations. However, the Court also clearly held that where the government has adopted a specific policy of not providing legal aid in situations where it is required by the Constitution, the government will be found to be in violation of the Constitution. The CBA's case is fully consistent with this approach. The CBA claims that the effect of the defendant's actions and failures to act is that legal aid is not available in situations in which it is required by the Constitution. The CBA does not argue for a specific delivery system for legal aid in B.C. It is searching to define one aspect of the constitutional core of access to justice, that is a type of minimum constitutional standard for the provision of civil legal aid.

As Professor Sossin has pointed out: "There is a certain uncomfortable irony in a case denying the right to lawyers to argue for better access to justice".[87] However, irony may not be a strong enough term to describe the status quo. Statistics that have been released since the CBA launched its case in June 2005, reveal that the situation of poor people in need of civil legal assistance has steadily deteriorated. Despite the relative strength of the provincial economy, B.C. is now number 1 in poverty in Canada[88] and is near the bottom of provinces in the provision of civil legal aid when measured on a per capita basis.[89] Dismissing the serious issues raised in this case without a trial has the effect of immunizing the alleged constitutional deficiencies of the civil legal aid system in this province from judicial review thereby perpetuating the disadvantage and

---

[85] *Id.*

[86] [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.).

[87] Lorne Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007) 40 U.B.C. L. Rev. 727, at 728.

[88] "Percentage of Canadians, Children, and Individuals in Female Lone-Parent Families Living in Poverty by Province, 2004" in *Persons in Low Income Before Taxation, CANSIM Tables* (Statistics Canada, 2006).

[89] *Legal Aid in Canada: Resource and Caseload Statistics 2006/2007* (Ottawa: Statistics Canada, February 2008), online: Statistics Canada <http://dsp-psd.pwgsc.gc.ca/collection_2008/statcan/85F0015X/85F0015XIE2007000.pdf>.

social exclusion experienced by poor people. Viewed from this context, it appears that inflated justiciability concerns have led not merely to an ironic outcome, but to an unjust one.