THE CHARTER AND THE RIGHT TO LEGAL AID

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"In the end the debate over the role of government subsidy of legal aid is in some sense a debate over the role of law and lawyers in modern society. To the extent that courts and the legal process are viewed as capable of performing active law reform and social change roles, proponents of a particular ideology will attempt to use legal aid to advance their political vision." 1

As some commentators have suggested, the Charter of Rights and Freedoms has created the potential for a new role for the courts in Canada 2 a role which may involve "law reform and social change" in the context of dispute resolution. That this new role presents challenges for judges and lawyers seems unquestioned. In addition, however, it creates new problems for litigants, particularly those who are poor and whose financial resources are insufficient to pay for legal representation in the process of law reform and social change in the courtroom. If important ("political") decisions affecting Canadians are to be made in courtrooms, is it appropriate that only Canadians who can afford to pay for legal representation should be able to participate, and that the poor should be summarily excluded? Or does the Charter offer poor Canadians access to the courts and the process of "law reform and social change" through a right to legal aid?

Twenty years ago, the Report of the Joint Committee 3 in Ontario

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asserted that

"... legal aid should form part of the administration of justice in its broadest sense. It is no longer a charity but a right." ⁴

The Committee recommended the establishment of a province-wide and comprehensive legal aid program funded by government. ⁵ However, the legislation subsequently enacted, both in Ontario ⁶ and then in most other Canadian provinces, ⁷ created only limited rights to legal aid; and most of the legal aid statutes were designed so as to provide legal aid only on the basis of stated eligibility criteria. ⁸ By 1983, in the face of an economic recession and governmental restraint, the Social Planning Council of Metro Toronto concluded that the Ontario government had "shied away from [its] commitment - substantially eroding access to legal aid."⁹

The issue is whether the Charter can be used to promote access to legal aid in Canada, and in particular whether it has potential to extend the scope of legal aid services for low income clients beyond the "coverage" now provided under legal aid legislation - more services, more types of services, and more potential legal aid clients. The purpose of this analysis is to sketch the outline of two approaches to an expanded scope for legal aid services based on Charter analysis. One approach focuses on Charter sections which have been in effect since April 17, 1982: sections 7, 10(b), and 11(d). The other approach is based on section 15, which came into effect on April 17, 1985. In the former case, there are some cases already decided which have examined the Charter's provisions and interpreted them; by contrast, the analysis of section 15 is

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4. Id., at 97.
5. Id., at 97-98.
7. See Legal Aid Services in Canada 1979/80 (Justice Information Report prepared by the National Legal Aid Research Centre, Ottawa: 1981); and Legal Aid 1981 (Canadian Centre for Justice Statistics, Statistics Canada, Minister of Supply and Services Canada: 1981).
8. For example, see Ontario's Legal Aid Act, supra note 6, at ss.12-15.
necessarily more speculative, although some assistance can be obtained from existing Charter analysis, cases under the Canadian Bill of Rights, the American experience, and protection offered by international legal conventions. As will be apparent, the approach to section 15 is based on an understanding of the Charter as a radical departure in the Canadian legal system, offering more significant protection for entrenched rights and freedoms, including that of access to justice through legal aid services.

The Sections Already in Force in 1982

a) Sections 7 and 11(d)

These sections (sections 7, 10(b), and 11(d)) are all included as "legal rights" in the Charter. Section 7 guarantees the right to "life, liberty and security of the person", and the right not to be deprived thereof "except in accordance with the principles of fundamental justice". The issue is whether, in claims which involve "life, liberty and security of the person", it is inherent in the principles of fundamental justice that a person should have the benefit of legal counsel, even if the person cannot afford to pay a lawyer. Similarly, section 11(d) provides that a person charged with an offence has a right "to be presumed innocent until proven guilty according to law in a fair and public hearing" by an independent tribunal; the section requires a "fair trial". The issue is whether, in cases where an accused is charged with an offence, it is necessary to ensure the advice and representation of legal counsel, even where the accused cannot afford to pay, to meet the standard of a "fair trial".

These two sections were considered by Litsky, J. in R. v. Powell and Powell¹⁰ in 1984. In that case, Mr. and Mrs. Powell were charged with two counts of truancy in relation to their children, contrary to section 180(1) of the School Act¹¹ of Alberta. As the judge noted, the proceedings had been adjourned a number of times in order to permit the indigent accused to obtain counsel. Although the accused had expressed to the Court a wish to be represented by counsel, they had been refused legal aid by the Legal Aid Society of Alberta;¹² they were represented at the motion before Litsky, J. by a lawyer who acted for them gratuitously.

¹². According to Litsky, J. the reasons for the refusal were "not evident". Assuming that the accused were qualified on financial criteria, it is quite possible that the refusal was due
In interpreting section 7, Litsky, J. referred to *Duke v. the Queen* (a pre-Charter case) and *R. v. Potma* (a 1983 decision), both of which discussed the notion of "fundamental justice". In the latter case, Robins, J.A. stated:

"The principles or standards of fairness essential to the attainment of fundamental justice are in no sense static, and will continue as they have in the past to evolve and develop in response to society's changing perception of what is arbitrary, unfair or unjust."\(^\text{15}\)

Notwithstanding his reliance on this passage as support for an evolving idea of fundamental justice, Litsky, J. also expressed reservations about the temptation to make "snap-analogies with the American Bill of Rights" and declared instead that "...we should evolve our Charter at our own pace with our own processes in terms of our own value systems."\(^\text{16}\) Thus, instead of relying on the American decision in *Gideon v. Wainwright*,\(^\text{17}\) Litsky, J. looked to earlier Canadian decisions in interpreting section 11(d). In *R. v. MacKay*,\(^\text{18}\) Sinclair, C.J.Q.B., had reviewed section 11(d) in the context of a claim to right to counsel, and stated:

"It will be observed that section 11 of the Charter deals with the legal rights of a person charged with an offence. Nowhere in this section does it say such a person has the right to have counsel paid for at public expense."\(^\text{19}\)

\(^{12}\) to the fact that a truancy charge might not be within the category of cases for which legal aid "coverage" would usually be provided. Note that the cost-sharing agreements between a province and the federal government generally specify that legal aid must be provided to indigent accused only for indictable offences and other serious matters. See *Legal Aid 1981*, supra note 7, at 17.


\(^{14}\) (1983), 18 M.V.R. 133 (Ont. C.A.).

\(^{15}\) Id., at 143.

\(^{16}\) *Supra* note 10, Reasons for Decision, p.3.

\(^{17}\) 372 U.S. 335 (1963).

\(^{18}\) *Re MacKay and the Queen and Legal Aid Society of Alberta* (February 15, 1983).

\(^{19}\) *Ibid.*
However, Litsky, J. primarily relied on a pre-Charter decision to establish the appropriate criteria to be used by a judge in deciding whether to grant a request for legal counsel on the part of an accused. In Re White and the Queen,20 McDonald, J. had listed six criteria for the exercise of judicial discretion in such cases, including:

1. The financial circumstances of the accused;
2. The availability of a legal aid certificate;
3. The educational level of the accused;
4. The complexity of the case "in the sense of raising any question of fact or of law as to which an accused is likely to be at a significant disadvantage if he is unrepresented by counsel";
5. The difficulty of marshalling evidence; and
6. The likelihood of imprisonment on conviction.21

In the course of applying the criteria to this case, Litsky, J. concluded that legal counsel should be appointed to assist Mr. and Mrs. Powell, particularly in light of the likely defence to the charge – a claim to the protection of section 2(2) of the Charter, the freedom of conscience and religion.

"Such a defence will invariably involve a judicial evaluation of religious dogma which will result in emotional commentary on the part of the accused... The Court surely cannot expect lay people to become legal pundits navigating this case with provocative points of fact and law into unsettled seas of constitutional issue. Matters such as adducing evidence, presentation of argument, cross-examination on evidentiary points all constitute complex procedural processes not within the professional purview of the Powells...I therefore respectfully suggest that appointment of counsel is even more important in Charter arguments."22

In the opinion of Litsky, J., moreover, the complexity of the case introduced by the Charter analysis outweighed the fact that a conviction under the School Act would result in a fine only and not imprisonment. In the result, Litsky, J. directed the appointment

21. Id., at 306.
22. Supra note 10, Reasons for Decision, p.7.
of counsel.  

What is significant about the accused's success in having counsel appointed, however, is that the reasoning relies mainly on a case involving the inherent power of a court to appoint counsel, Re White and the Queen, rather than on an interpretation of a right to counsel under sections 7 and 11(d) of the Charter. In this respect, it seems that these Charter sections provide no greater right to counsel than did the Bill of Rights. Clearly, the direction to appoint counsel in Powell did not recognize any general right to counsel. Ironically, it is the fact that the accused intended to make Charter arguments by way of their defence which, using the criteria of Re White and the Queen, resulted in the positive decision to grant counsel to them.

The conclusion that sections 7 and 11(d) add no new rights was also evident in Howard v. Stony Mountain Institution. The applicant, an inmate of Stoney Mountain, sought an order prohibiting a disciplinary hearing under s.39 of the Penitentiary Service Regulations in the absence of legal counsel. The court concluded that inmate disciplinary proceedings were administrative in nature (and not judicial) and that they could be interfered with only in limited types of cases. The court noted that there is no right to counsel at common law, and that there is authority establishing that there is no right to counsel in such disciplinary proceedings unless the refusal to grant counsel would breach the principles of fairness and fundamental justice. However, the court concluded, after an analysis of sections 7 and 11(d), that these sections do not create any new principles of law. Further, as the disciplinary hearing was an administrative rather than a judicial proceeding, there was no "offence" within the meaning of section 11. As a result, the court held that the inmate was properly denied the right to counsel in the disciplinary proceedings, and the motion for an order of prohibition was dismissed. In this case also, therefore, the court relied on pre-existing law as the basis for interpreting sections 7 and 11(d) and for the conclusion that these sections do not create a right to counsel.


b) **Section 10(b)**

By comparison with these sections, section 10 of the Charter focuses more specifically on the right to counsel, guaranteeing that "on arrest or detention", everyone has a right "to retain and instruct counsel without delay and to be informed of that right". The issue is whether section 10(b) creates a right to legal aid. According to the Hon. Jean Chretien, then Minister of Justice, at the time of the Joint Committee hearings on the Charter, the section had no such effect. The interchange was as follows:

"Mr. Robinson: ... I am sure you would recognize that without adequate funds that this right is a hollow right. Do you envisage this possibly being interpreted by the courts as including the right to legal aid in the case of serious offences, or would that have to be spelled out explicitly?"

"Mr. Chretien: No. You have the right to retain and instruct counsel. That is the right he has. How to retain and compensate the counsel is to be decided by the person involved and his lawyer and there are some programs that are shared costs where, for certain categories of citizens, because he cannot afford it, he receives legal aid from the provincial administration.

So the question of compensation, the legal adviser is not a matter of right. It is a question of a private citizen dealing with society with his own problem. Legal aid is a social measure that exists in Canada and is available under the criteria that are established by the Attorney-Generals of the provinces."27

The former Justice Minister's comments are not, of course, determinative of the issue; they merely confirm the expected interpretation of section 10(b) on the part of the federal government at the time the Charter was being negotiated. At the same time, it is evident that different wording was adopted for section 10(b) by contrast with section 14; the latter section of the Charter guarantees the "right to the assistance of an interpreter

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for a party or witness who does not speak the language of the proceedings or who is deaf*. According to at least one commentator, the wording of section 14 requires that:

"The interpreter should probably be paid for out of public funds, at least for a party or witness who cannot afford to pay the cost himself (compare the right to retain and instruct counsel in s. 10(b))." 28

On the other hand, section 10(b) may be used as a basis for a right to legal aid, at least in the context of a person who is arrested or detained. The right in section 10(b) is stated affirmatively, 29 by contrast with section 2(c)(ii) of the Canadian Bill of Rights which states only that no law of Canada should be construed or applied "so as to deprive a person who has been arrested or detained of the right to retain and instruct counsel without delay." In Re Ewing and Kearney and the Queen, 30 the court held that the wording of the Bill of Rights did not create a right to legal counsel at public expense. In that case, the two accused (both aged 18) were charged with possession of narcotics. They had no money to hire counsel but were refused legal aid on the ground that their convictions would not likely result in imprisonment or loss of livelihood. At trial, a motion for prohibition was argued on their behalf and denied. In the appeal to the British Columbia Court of Appeal, three judges held that the appeal should be dismissed and two judges dissented. As Seaton, J.A., for the majority, declared:

"The essential difficulty in the appellants' position is that these provisions of the Bill of Rights prevent a law being construed so as to deprive the accused of the right to counsel, but do not provide that a law shall be construed so as to bestow the right to counsel." 31

Quoting R. v. Burnshine 32 in the Supreme Court of Canada, Seaton, J.A. declared that section 2 of the Bill of Rights "did not create new rights. Its purpose was to prevent infringement of existing rights". 33 If the purpose of the Bill of Rights was only to declare existing rights, however, it may be arguable that section 10(b)

29. Id. at 35.
31. Ibid.
provides a more extensive guarantee of the right to counsel, including the right to legal aid for those without the means to purchase legal services. The more affirmative wording of the right in section 10(b) of the Charter is consistent with such an interpretation.\textsuperscript{34}

This conclusion would also be consistent with some of the American cases\textsuperscript{35} referred to in Ewing and with the International Covenant on Civil and Political Rights which provides for a right to legal assistance "without payment" by a person charged "if he does not have sufficient means to pay for it".\textsuperscript{36} It is also consistent with the reasoning of the two dissenting judges in the British Columbia Court of Appeal who relied on the need for counsel in order to ensure that an accused has a fair trial.\textsuperscript{37} As Farris, CJBC stated:

"Simply stated, it is my opinion that:

(1) An accused person is entitled to a fair trial
(2) He cannot be assured of a fair trial without the assistance of counsel.
(3) If, owing to the lack of funds, he cannot obtain counsel, the State has an obligation to provide one."\textsuperscript{38}

This statement clearly links the need for counsel to the objective of a fair trial, and it is at least arguable that section 10(b) could be read in conjunction with section 11(d) to reach a conclusion similar to that of the dissenting judges in Ewing. Certainly, there appears to be nothing in the Charter to prevent such a conclusion from being drawn as a result of reading the two sections together in this way.

\textsuperscript{34} Hogg, supra note 28, at 35.


\textsuperscript{36} Covenant, article 14(3)(d).

\textsuperscript{37} Farris, C.J.B.C., dissenting, relied on cases in which a new trial was ordered because the accused had been unrepresented at trial, calling into question whether the trial had been a fair one: R. v. Johnson (1973), 11 C.C.C. (2d) 101, 21 C.R.N.S. 375, [1973] 3 W.W.R. 513; R. v. Butler (1973), 11 C.C.C. (2d) 381; Vescio v. The King [1949], 92 C.C.C. 161; (1949) 1 D.L.R. 720; [1949] S.C.R. 139.

\textsuperscript{38} Supra, note 30 at 623.
Further support for such an interpretation can also be drawn from the majority decision and its focus on the negative wording of the right to counsel provision in the Bill of Rights. The affirmative wording of the Charter provision, in contrast to that of the Bill of Rights, seems quite consistent with the idea that counsel may be necessary to achieve the Charter guarantee of a fair trial under section 11(d). These differences may be significant enough to distinguish the result in Ewing.

However, even if these arguments were successful, it is important to note that the guarantee of a right to counsel in section 10(b) is limited to persons who are arrested or detained; it is thus available essentially in matters of criminal law, and seems designed for the purpose of providing legal representation in those circumstances—and not for other types of cases or to provide other kinds of legal services such as advice or information. On this basis, the guarantee of section 10(b) may extend legal aid services in Canada only very little beyond the provisions of legal aid legislation (which already usually provides for legal aid to clients charged with indictable offences); it is possible, of course, that a right to counsel guarantee would extend legal aid services to some persons charged with only summary conviction offences and to whom legal aid may now be routinely denied. However, the section 10(b) right to counsel cannot provide a basis for broadly-based legal aid services as of right.

Section 15: The Equality Guarantee and Access to Justice

Section 15 of the Charter offers a new departure in Canadian political life. This section offers the protection of equality "before and under the law" as well as "equal protection and equal benefit of the law"; moreover, the protection is offered "without discrimination", and in particular, without discrimination based on listed grounds such as race and sex.


40. Russell, supra note 2, at 26 states his concern about the potential for change to be created by section 15:

"I would be much happier about section 15 if its adoption as part of the law of our constitution had followed a widespread public and parliamentary discussion about the principles and practice of
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The issue here is whether the equality guarantees in section 15 mean that all citizens must be provided with legal counsel, if necessary at public expense, in order to meet the commitment of "equality before and under the law" and more particularly, the law's "equal protection and equal benefit". This issue requires an examination of the meaning of the guarantee of section 15.

The interpretation of section 15 depends on underlying assumptions about its intended purpose — was it intended to codify existing rights or was it intended to effect some (substantial?) societal change? As the only section of the Charter not proclaimed in force in 1982 and the only section subjected to a three-year delay to permit governments to review legislation so as to bring it into conformity, it seems very clear that section 15 was expected to effect some changes in legislation. Assuming that section 15 was intended to effect legal and societal changes in Canada, however, it is still necessary to determine the scope of the equality guarantee. In this task, it seems useful to consider the American

equality. But that is not the case... The public and legislative discussions concerning it provide little guidance to our judges as to how far or how fast it is desirable to eliminate all forms of discrimination in Canadian society. Leaving these matters to our judges may have the unfortunate consequence of relieving ourselves as citizens from the responsibility of reasoning together about acceptable answers to these questions of social justice...

41. The full list set out in section 15 includes "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".


jurisprudence, the Bill of Rights and international legal protections, always bearing in mind that section 15 represents a unique departure in Canadian law.

a) The American Jurisprudence

The "equal protection" analysis of the 14th amendment offers some useful approaches to interpreting section 15 of the Charter. The U.S. cases must be understood in the context of a debate about whether the equal protection guarantee provided a substantive guarantee or merely a procedural one. The idea that it was a substantive guarantee seems to have begun in 1956 in Griffin v. Illinois,44 a case which required that the states provide transcripts of trial free-of-charge to indigent criminal appellants. This case was followed, especially during the years of the Warren Court, by others such as Sniadach v. Family Finance Corp.45 which declared unconstitutional a wage garnishment scheme by ex parte order (because of its effect on indigent citizens); Fuentes v. Shevin46 which declared unconstitutional the summary procedures for repossession of goods; Goldberg v. Kelly47 which declared unconstitutional the termination of welfare benefits without a hearing; and Boddie v. Connecticut48 which declared that it was a violation of due process (the 5th amendment) for welfare recipients to be excluded from the court process because they could not afford the $60,000 filing fees.49 All of these cases, although somewhat procedural in their focus, created substantive protection for the poor. By the end of the 1970's it seemed likely that the U.S. Supreme Court would enunciate a:

"...formal recognition of the principle that economic

44. 351 U.S. 12 (1956).
subsistence benefits [were] a fundamental right and that poverty as a classification [was] legally suspect, thus making the denial of benefits a matter of 'strict scrutiny'.

The development of the idea of substantive protection for economic equality was, however, subsequently curtailed in decisions such as James v. Valtierra\(^{51}\) and San Antonio Independent School District v. Rodriguez.\(^{52}\) In these and other cases,\(^{53}\) the U.S. Supreme Court effectively restricted the idea of equal protection as a guarantee of substantive rights for the poor.

On the other hand, the American cases have consistently upheld a right of access to legal counsel, a procedural guarantee of equal protection. In an early case, Powell v. Alabama,\(^{54}\) the U.S. Supreme Court reviewed the history of the right to counsel, noting that such a right had existed at common law in England for petty crime. On the facts, the court held that the right to have counsel appointed was the logical corollary of the constitutional right to be heard.\(^{55}\)


51. 402 U.S. 137 (1971). The statute under review required that a majority of voters at a community election approve a low-rent housing project for the area before it could be built; a challenge to the statute's validity by a group of low-income residents (eligible for the housing) was dismissed.

52. 411 U.S. 1 (1973). The court found an education statute constitutional even though it resulted in very unequal funding for schools in rich, by comparison with poor, neighbourhoods. See also Village of Arlington Heights v. Metropolitan Housing Development Corporation 97 U.S. 555 (1977).


54. 287 U.S. 45 (1932).

55. Id., at 71.
"In a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defence because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law."56

More recently, in Gideon v. Wainwright57 in 1963, the court reconsidered Powell v. Alabama and the role of the federal constitutional right to counsel (the 6th amendment) in state courts. In Gideon, the court concluded that the capital/non-capital distinction relating to the right to counsel was not appropriate, and that the 14th amendment required due process for the deprivation of liberty as for the deprivation of life.58 Still later, in Argersinger v. Hamlin59 in 1972, the constitutional right to counsel was extended further to "petty offences". In reviewing the scope of the 6th amendment, Douglas, J. stated:

"...there is nothing in the language of the Amendment, its history, or in the decisions of this Court, to indicate that it was intended to embody a retraction of the right in petty offences wherein the common law previously did require that counsel be provided."60

Moreover, in the judgments of both Douglas, J. and Brennan, J., there is a reference to the need for counsel in order to ensure a fair trial, even in a case involving only a "petty offence". In Argersinger, the offence was punishable by imprisonment for up to six months, a $1,000 fine, or both.

56. Ibid.
58. The court's analysis focussed especially on Betts v. Brady 316 U.S. 455 (1942), an earlier decision but similar on its facts to Gideon; the result of the decision in Gideon was to overturn Betts v. Brady. See also Kinsella v. United States 361 U.S. 234 (1960); Grosjean v. American Press Co. 297 U.S. 233 (1936); Johnson v. Zerbst 304 U.S. 458 (1938); Avery v. Alabama 308 U.S. 444 (1940); and Smith v. O'Grady 312 U.S. 329 (1941).
60. Argersinger, id., at 30.
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These cases demonstrate a continuing commitment to the right to counsel, and an increasing scope for its application in recent cases. The scope of the right has been extended to some extent to civil cases as well. In Lassiter v. Dept. of Social Services, the court considered the question of a right of counsel in a case where the termination of parental status was at stake. The court listed three factors to be weighed to determine the right to counsel issue: the private interest at stake, the government interest in the matter, and the risk that the proceedings would lead to an erroneous decision. On the facts of Lassiter, the right to counsel was denied, but the need for a careful assessment of the facts in each case was emphasized. The practical reality of scarce legal aid funding was also addressed in Wolff v. Ruddy. In that case the court considered whether the right to counsel could be denied because of a lack of funding. Recognizing that the court has no control over the "public purse", the court nonetheless concluded that if no funding is available and a public defender requires some funds to be able to proceed, the accused would be entitled to be discharged rather than being prosecuted without the benefit of a right to counsel.

These cases demonstrate clearly the extent to which the right to counsel has been provided in equal protection analysis in the U.S. While it appears that the equal protection analysis has sometimes been linked to the 6th amendment (the right to counsel) in the reasoning of the American courts, there is, of course, nothing to prevent a Canadian court from creating a similar link between section 15 (equal protection) and sections 10(b) (right to counsel) and 11(d) (fair trial) to provide a guarantee of legal counsel, at least in cases where an accused is "arrested or detained" pursuant to section 10(b). A similar link between section 15's equal protection and the protection for liberty in section 7 would further support a right to counsel, perhaps in civil as well as criminal cases. This latter position must surely be enhanced as well by the phrase "equal benefit of the law" in the Canadian Charter, a phrase

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62. 617 S.W. (2d) 64 (1981). See also Dickens (1982), 50 U.M.K.C.L. Rev. 207, in which the author also examines the issue as to whether a private solicitor, appointed by the court to act gratuitously, has suffered a deprivation of property without due process. See also Berger, supra note 1.
which does not appear in the American constitution, but which arguably requires the intervention of legal assistance to meet such a goal. It is difficult to imagine how a litigant can be assured of the equal benefit of the law in the absence of even minimal procedural protection such as the right to counsel. On this basis, the American cases appear to offer some useful approaches for the analysis of section 15. However, it is arguable that the Charter's guarantees extend farther, at least in terms of the right to counsel, than the scope of the American equal protection analysis evident to date. Thus while the cases from U.S. courts may be helpful in arguments about the right to legal aid, it is important to avoid introducing into the analysis of section 15 of the Charter any unnecessary or inappropriate restrictions on its equality guarantee.

b) The Canadian Bill of Rights

The Canadian Bill of Rights provides in s. 1(b) that "there have existed and shall continue to exist in Canada" listed human rights and freedoms, namely, "the right of the individual to equality before the law and the protection of the law". The meaning of these words has been considered by courts on a number of occasions. Essentially, the meaning ascribed to the words "equality before the law" has been a narrow one:

"...it] carries the meaning of equal subjection of all classes to the ordinary law of the land as administered by the ordinary Courts, and in my opinion the phrase "equality before the law" as employed in s. 1(b) of the Bill of Rights is to be treated as meaning equality in the administration or application of the law by the law enforcement authorities and the ordinary Courts of the land." 64

The courts have not often considered the meaning of the phrase "protection of the law", although an obiter opinion was expressed in R. v. Mackay65 that the phrase should carry a meaning of "equal protection".


64. A.G. of Canada v. Lavell, supra, note 63 at 495.

65. Supra, note 63 at 370-371.

66. See also Curr v. The Queen, supra note 63, cited in Mackay.
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In light of the restrictive interpretation of the phrase "equality before the law", the argument that the phrase "equal under the law" is an effort to expand the scope of its protection is a compelling one; it has been suggested that the concept of equality under the law:

"...was intended to ensure that judicial review extended to the content of the law, and not just to the manner in which the law is administered". 67

It is arguable, therefore, that the additional phrase might lend credibility to an argument that the equality guarantee requires access to legal aid for low-income clients.

Similarly, the phrase "equal protection" adds a new dimension by comparison with the wording of the Bill of Rights. And, finally, the Charter adds the words "equal benefit", which nowhere appeared in the Bill of Rights and which have no equivalent in the U.S. Constitution. On this basis, it seems that the inevitable conclusion must be drawn that a significant expansion of the scope of equality rights was intended.

This conclusion is significant in the context of the Ewing case,68 referred to in connection with section 10(b). In that decision, Seaton, J.A. (for the majority) denied that section 1(b) of the Bill of Rights created new rights. He quoted from the opinion of Martland, J. in R. v. Burnshine:

"I am not prepared to accept the respondent's submission as to the meaning of the phrase 'equality before the law' in s. 1(b) of the Canadian Bill of Rights. Section 1 of the Bill declared that six defined human rights and freedoms 'have existed' and that they should 'continue to exist'. All of them had existed and were protected under the common law. The Bill did not purport to define new rights and freedoms."69

On this basis, Seaton, J.A. concluded that the appellants' contention "that to be unrepresented would constitute discrimination by reason of impecuniosity" was unpersuasive since it involved creating a new right. If, however, the new phrases added to section 15 of the Charter have significance, it is arguable

67. Gold, supra note 42 at 136.
68. Supra note 30.
69. Id., at 628.
that the position taken by Seaton, J.A. in Ewing will need to be reassessed. Both the additions to the wording and the three-year delay in proclaiming section 15 bespeak an intention to add to equality rights under the Charter. On this basis, the limited scope of s. 1(b) of the Canadian Bill of Rights, as determined in the cases interpreting it, should not be used to confine the interpretation of section 15 in terms of a right to legal aid.

c) International Legal Protections

Canada became a party to the International Covenant on Civil and Political Rights and its Optional Protocol in 1976. A number of provisions of the Covenant bear similarity to the wording of sections of the Charter, including provisions on equality and on the right to counsel. Article 14(3) of the Covenant provides a right to legal assistance in any case where the interests of justice so require, and without payment by the person charged "if he does not have sufficient means to pay for it". While this section appears to be confined to persons "charged", it nonetheless might create a right to legal aid in a wider range of situations than those presently covered in Canada. Failure to comply with Covenant guarantees means that Canada is in breach of its international obligations.

There is a similar provision in Article 6.1 of the European Convention on Human Rights which reads in part:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Although the Convention does not guarantee any right to free legal aid as such, the Airey Case of 1979 decided that article 6:


71. For example, see Sandra Lovelace v. Canada, Communication No. R 6/24, CCPR/D/DR (XIII) (July 31, 1981), in which Canada was found in violation of Article 27 of the Covenant in relation to s.12(1)(b) of the Indian Act providing that an Indian woman would lose her status on marriage to a non-Indian.

"...may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court either because legal representation is rendered compulsory... or by reason of the complexity of the procedure or of the case."  

In Airey, legal assistance was ordered on behalf of a woman applying for a legal separation in Ireland, where such a degree can be obtained only from the high court. The procedure was admitted to be complex, and there was no legal aid in Ireland at the time. Although the European Convention is not binding on Canada, the decisions of the European Court may nonetheless be useful reference points for analyzing the meaning of the Charter's provisions. As has been suggested,

"[A] judicious use of international human rights law, in combination with comparative analysis of the jurisprudence of other culturally similar countries, can help to supplement and confirm domestic sources of inspiration that may range from pre-existing case law to basic concepts of political philosophy. The result will be not only to ensure that Canada complies with its international obligations, but also to improve the quality of the interpretation of the Charter by our courts."  

d) Conclusions About Equality

This analysis has tried to demonstrate that the language of section 15 exceeds the scope of the 14th amendment and equal protection analysis in the U.S., as well as the jurisprudence in Canada under the Canadian Bill of Rights. It has also briefly examined the international protections as a way of comparing the nature of the Charter's guarantees. All of this analysis reinforces a conception of section 15 as a purposive and significant development in the Canadian legal system, as was suggested at the beginning of this examination of section 15. Moreover, the idea that right to legal aid is inherent in the section 15 equality guarantee is consistent with the philosophical notion of equality before and under the law and its equal protection and benefit:

73. Id., at 15-16.


75. Claydon, supra note 70 at 302.
"The justification for access rights [rights to legal aid] derives from an analysis of the role of courts and the legal system in society. In the modern state, the legal system provides a 'general normative code' performing integrative functions in the social system by use of formal dispute resolution mechanisms. As members of society, individuals are entitled to effective access to the law. Legal aid is a means of providing such access to those who cannot otherwise afford it."\(^{76}\)

**A Note on the Scope of Section 1**

If these principles are used to determine that the equality section (or other sections of the Charter) create a right to legal aid, it is likely that provincial legal aid legislation, which restricts entitlement to legal aid services, will be held to violate the rights and freedoms guaranteed. However, to be rendered void, it will be necessary not only to have a violation of a Charter guarantee but also to demonstrate that the guarantee is not limited by section 1. This means that a provincial statute which limits legal aid services may nonetheless be valid if its limits constitute "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Cases which have interpreted section 1\(^{77}\) have held that it creates an affirmative obligation on government to clearly demonstrate why the law is a reasonable limit even though it violates a right or freedom guaranteed by the Charter.\(^{78}\) It is possible that the interpretation of section 1 will also be assisted by American and international jurisprudence.\(^{79}\) However, it seems at least arguable that section 1 will not operate so as to limit the right to legal aid created by the equality guarantee.\(^{80}\)

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80. The "administrative convenience" test in the United States may be less applicable in Canada because of the wording of section 1 of the Charter and its interpretation to date. See *Argersinger, supra* note 59 and section 1 cases, *supra* note 77 and note 78.
Conclusion

This overview of approaches to analyzing Charter rights and freedoms to assess the support they offer for a right to legal aid has suggested potential arguments favouring the existence of such a right either under the sections proclaimed in force in April 1982, or pursuant to section 15, effective from April 17, 1985. In addition, it is important not to overlook the possibility of linking the equality guarantee in section 15 to other rights and freedoms such as the right to counsel in section 10(b). In either case, of course, the analysis is subject to section 1. And overall, the analysis depends on an underlying assumption that the Charter, especially section 15, is intended to effect legal change in Canada. In this context, the existence of a right to legal aid seems quite consistent. As one commentator has explained:

"Only through recourse to state-approved adjudication can citizens ensure themselves of the full protection of the law. Because individuals living in our society must exchange recourse to self help for police and judicial protection, they should be provided the opportunity to use the courts effectively to resolve disputes... The rules of law governing the modern state are so complex that lawyers are required to interpret legal rules for indigents to determine if a valid claim exists and to aid them in navigating the shoals of the legal system."[8]

To do so effectively, the poor must have a right to legal aid. The Charter promises much; the challenge is to keep the promise.

81. Berger, supra note 1 at 288.