The Right to Access Justice

Articles

Mary Jane Mossman, "The *Charter* and Access to Justice in Canada" in David Schneiderman & Kate Sutherland, *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press Incorporated, 1997) at 271.

Summary: This article explores whether or not the *Charter* has increased access to justice. It concludes that the *Charter* has not greatly expanded any right to access justice in the traditional sense (for example, it has not developed a right to legal counsel). However, it may have indirectly increased access to justice by increasing awareness and expectations about equality, diversity, and disadvantage within and outside the legal profession. More members of the public and lawyers are aware of the equality issues behind barriers to justice, and as a result, expect more from the justice system.

- To determine if the *Charter* has increased access to justice, we have to confront the interaction of law and social change. Law is both a tool facilitating change, and an obstacle to change.
- Access to significant justice reform has not occurred under the *Charter*. It has, however, changed many Canadians' expectations about their legal equality rights, thereby encouraging disadvantaged individuals to use the *Charter* to challenge long-standing practices of discrimination. In this way, the *Charter* has acted as a catalyst for social justice goals.
- This article looks at
    1. The delivery of Legal Aid services in relation to the *Charter*, and
    2. The impact of the *Charter* on the demography and processes of the legal profession.
- Pre-*Charter* and Legal Aid:
    - Legal Aid was focused on bolstering the position of the weak (tenants, consumers, employees etc).
    - As the Legal Aid system developed, funding sources changed. Legal Aid funding was focused on individual criminal matters rather than funding for more systemic issues. This reduced Legal Aid's ability to effect social change. Legal Aid was established, but it was not recognized as a right.
- The *Charter*'s influence on Access to Justice and Legal Aid
    - The *Charter* did not expand the existence of Legal Aid into a right. It reinforced narrow, traditional rights and notions of justice. The wording of the *Charter* focused on individual rights (as opposed to systemic/broad issues). It also focused on criminal rights instead of civil rights.
    - Individual *Charter* provisions do not guarantee a right to Legal Aid. While a s. 15 claim may be possible (on grounds of poverty, gender) the existing case law suggests this is unlikely.
- The *Charter*'s Influence on the Culture of the Legal Profession
    - In the legal profession, academics and task forces have been more willing to address broad equality issues.
    - Post *Charter*, law commissions have tried to tackle equality issues. In addition, in the post *Charter*-era, law schools, provincial law societies and the CBA have significantly engaged with equality issues.

        - On this basis, it is arguable the *Charter* has significantly impacted the legal profession through education and legal practice. This suggests that *Charter* equality guarantees have been more effective in making change in the legal profession than in the case of Legal Aid.
    - The traditional focus on individual representation has created a barrier to extend *Charter* equality guarantees to create a right to Legal Aid for those other than accused criminals. In addition, the reluctance to treat poverty as an analogous ground of s. 15 discrimination has stifled the utility of the *Charter* in challenging Legal Aid restrictions.

Michelle Flaherty, "Self Represented Litigants: A Sea Change in Adjudication" in Graham Mayeda & Peter Oliver, *Principles and Pragmatism: Essays in Honour of Louise Charron* (Markham: Lexis Nexis Canada Inc, 2014) at 323.

Summary: This article argues that the increased presence of self-represented litigants in the courtroom requires judges to rethink the traditional impartiality model. Specifically, judges ought to adopt a "substantive impartiality" model that is akin to "substantive equality". In the same way that identical treatment does not foster or promote equality, neither does identical treatment create impartiality in the courtroom. The goal for judges is fairness. Fairness may require assistance for SRLs (within bounds) to allow their case to be given a fair opportunity to be heard on its merits. This assistance is appropriate for all procedural issues, and may extend to some substantive legal help as well.

- The wave of self-represented litigants (SRLs) has continued to grow as the cost of litigation increases. This article argues that we must change the way we view adjudication when dealing with SRLs.
- The growth of SRLs has already changed how the justice system is administered to some extent (for example: the role of assistance in drafting documents).Traditionally, SRLs were viewed as choosing to represent themselves, and were not entitled to accommodation on this basis. We now know that self-representation is increasingly not a choice.
- Adjudicators have a traditional approach to impartiality that is one-size-fits-all. The adjudicator acts as an umpire between two parties. This approach arose in the outdated model when generally all litigants were represented by counsel.
    - What is needed now is substantive impartiality → akin to substantive equality
    - Identical treatment is not necessarily appropriate or conducive to equality. Fairness is not necessarily about treating them the same, but about treating everyone fairly.
- True neutrality often requires a form of engagement that may seem inconsistent with traditional expectations. An impassive adjudicative approach does not address the reality that SRL's are representing themselves out of economic need and not choice.
- No level of adjudicative assistance will place an SRL on the same footing as one with a lawyer → substantive impartiality does not equal perfect parity -- but the goal is fairness.
- What type of assistance is appropriate?
    - Procedural: It is appropriate to assist SRLs to understand court procedure and in relaxing some procedural rules. Transmitting procedural information often just explains how a litigant can do what they've already decided to do. This is essential to increasing access to justice.

- Substantive: Is it appropriate for a judge to explain the applicable law and question witnesses?

- There is not always a clear line between substance and procedure. For instance, is relaxing the rules of evidence procedural or substantive?
- The Canadian Judicial Council (CJC) has come out with a statement of principles on the assistance to give to SRLs. This goes beyond merely procedural aspects. It suggests that judges should explain the relevant law and its implications, provide information to help them assert their rights in court, and ensure that procedural and evidentiary rules are not used to hinder an SRL unjustly. Judges can also question witnesses and determine the order of evidence
- There is ambiguity around a judge's ability to help an SRL raise arguments. However, we have seen judges raise statutory defences, limitation period constitutional arguments and requests for adjournments on behalf of SRLs.
- There are limits on what can or should be done: a trial judge should not instruct a litigant on the nuances of an extremely complicated body of knowledge, nor should the trial judge be suggesting theories or weaknesses that ought to be pursued. This is patently unfair and unduly onerous. A judge cannot be providing strategic litigation advice
- The article ends by reference to *PIPSC v. Bernard*, which (at the time of reading) had yet to be released. This decision is summarized below.

Patricia Hughes, "Defining Access to Justice: The *Charter* and the Courts (And the Law Commission of Ontario)", (2011) 29 Natl J Const L 119.

Summary: Access to justice is a concept underlying, but not embodied by, the *Charter.* In the same way that *Charter* principles have to inform the development of common law, access to justice should inform the efforts of provincial law societies and commissions. Law reform commissions are not bound to apply the minimum *Charter* standards, nor are they bound to recommend the minimum standards for access to justice. In making reform recommendations, Law Commissions should not feel constrained by the minimum standards of access to justice demanded by the *Charter.* They ought to go beyond those minimum constitutional thresholds when suggesting reforms that will advance access to justice.

- The phrase "Access to Justice" is not found in the *Charter* but it embodies the purpose of the *Charter* and its provisions. It is a concept akin to dignity. It transcends any one particular constitutional rule or norm and finds its expression through *Charter* rights (especially ss. 7 and 15). It is a goal of our system, informed (but not encompassed) by the *Charter*.
- The *Charter* and Law Reform: The *Charter* informs the development of the common law. Therefore, it must be part of the analysis undertaken by research groups and law commissions.
  - The Law Commission of Ontario (LCO)'s role is to make recommendations to increase access to justice. In doing so, it should establish its own standards for access to justice that at least meet (but can go beyond) the *Charter*'s guarantees.
- Access to justice has many meanings: at its narrowest it can encompass a list of "pre-conditions" needed to physically access courts. Others see it as the ability to use the legal system meaningfully (often with the assistance of legal representation). More broadly,

access to justice can be seen as demanding the substantive law to be responsive to the experiences of diverse groups of people.

- What role does the LCO have to play in promoting access to justice?
    - *Charter* claims have only partially increased access to justice
    - The basic issues with access to justice are bigger than litigation. While constitutional litigation on access to justice should not be abandoned, it is important to look at other methods.
    - Agencies external to the court can play a role in advancing access to justice. They can dedicate much more time and effort to advancing access to justice. The LCO cannot make law like a government or a court, but it can do important things. "What [the LCO] can do is look at access to justice issues, sometimes the same issues as those before courts (although it will not address an issue that is actually being litigation), through a broad lens, bringing to bear the views of others."
    - The LCO's efforts to engage different communities in conversations can enhance public awareness and law reform and the capacity of the system.
- The SCC's record on access to justice has not been reassuring. Access to justice can be stymied by the law itself. There are real limits when relying on the courts to answer "big questions".
- Some constitutional questions cannot be left to the courts alone. These questions should also be addressed by agencies with a broader mandate and capacity to address these issues through a more nuanced lens.

Micah B. Rankin, "Access to Justice and the Institutional Limits of Institutional Courts", (2012) 30 Windsor YB Access Just 101.

Summary: Many Canadians are unable to access courts, yet governments are unwilling to address the problem and courts are unwilling to impose constitutional obligations. This paper reviews the access to justice crisis as it impacts judges and courts. It argues that the government's failure to comprehensively address access to justice compromises judicial independence. Ultimately, the paper concludes by arguing that judges have a constitutionally entrenched power to appoint state-funded legal counsel when it is necessary to support judicial independence.

- Access to justice means different things to different people. The author considers access to justice a continuum, with formal conceptions on one side, and substantive conceptions on the other.
- Much of the scholarship on access to justice neglects to consider how these barriers affect judges.
- There has been considerable *Charter* litigation on the right to state funded counsel – these responses have been largely underwhelming. The rule of law has been the only non-*Charter* based constitutional argument advanced for a right to Legal Aid. It was unsuccessfully invoked in the *Christie* decision (see outline below).
- It is unlikely the court will change its course without a new approach to unrepresented litigants. A fresh approach may involve a new perspective – instead of focusing on individual litigants, we ought to focus on the impact of inadequate Legal Aid on courts and judges
- The Concept of Judicial Independence
    - There are many different conceptions of judicial independence, but they essentially seek to set minimal conditions and mechanisms for judges to be able to make decisions without fear of reprisal.

  - The author views judicial independence as a bundle of rules, guarantees and mechanisms: It is instrumental – it is a means to an end and not an end in and of itself. It is relational – it refers to the relationship between the judiciary and other parts of the political scene. It is also relative -- it can vary in different situations.
- Judicial independence has sources in the *Constitution Act, 1867* (ss. 96 – 100) and the *Charter* (11(d)). The *Reference Re Remuneration of Judges*, [1997] 3 SCR 3 expanded on the substance of judicial independence and stated that it preserves essential constitutional values. In *Valente v The Queen*, [1985] 2 SCR 673 three pillars of independence were described: security of tenure, financial security, and administrative independence.
- The author argues that the three values underlying judicial independence can be compromised when litigants are denied access to courts.
  - Judges are dependent on people to initiate proceedings in order to exercise their powers. They depend on litigants to provide them with the evidence and argument they need to render decisions impartially. An inability to access courts undermines this impartiality. Impartiality and independence are inextricably linked: one part of the bundle of "independence" rights and guarantees is the judge's ability to maintain an impartial attitude towards the outcome of a proceeding.
- Impartiality requires many things of judges. Legal rules are also supposed to be impartial. Rules of process must be impartial. It may lose this impartiality if it fails to account for significant differences between the participants.
  - A process that systematically ignores certain litigants is unfair. A judge is not capable of being impartial if forced to give judgment without hearing one party's side of the story. What makes courts of law different from other types of adjudication is that, in court, structures are in place to ensure decisions are reached the disputants are assured they can present their case.
  - The rules of court presume that each side can participate equally in a dispute.
- The author argues that many self-represented litigants are unable to participate meaningfully in the adversarial process, and this can open up space for partiality in proceedings. The rules that require judges to remain passive prevent them from compensating for a self-represented litigant's inability to provide them with the evidence and argument they need to be impartial.
- Some of these problems can be fixed by recognizing that judges have the power and sometimes the duty to appoint state-funded counsel where it is necessary to support their independence. By attaching this duty to the constitution, rather than the *Charter*, the power extends beyond the criminal sphere or merely state action.

Patricia Hughes, "Supreme Court of Canada Constitutional Cases 2007: Defining Access to Justice", (2008) 42 SCLR (2d) 517.

Summary: After defining the author's view of access to justice, this article critically reviews case law that is relevant to meaningful participation in the civil justice system. It examines the aspirational speeches on access to justice made by Supreme Court justices, and compares them to the Court's treatment of access to justice in the cases before it. It critically examines the *Christie* and *Little Sisters (No. 2*) decisions and the Supreme Court's approach to the financial barriers to accessing the legal system. It then reviews *Alliance for Marriage and Family v A (A)* and comments on the Court's unwillingness to protect the justice sought by "outsiders" to the suit (in that case, intervenors). After reviewing two additional decisions, the author concludes that 2007 jurisprudence did not increase access to justice.

- Access to justice is not just about physical and financial access to courts, but substantive access that allows people to enforce their rights. The barriers to justice are not just economic – they are social and psychological.
- Chief Justice McLachlin has given speeches triumphing access to justice. The unanimous court in *Christie*, however, declined their opportunity to alleviate an access to justice issue. Instead, the Court "read down" the *Charter* to hold that the presence of s. 10(b) precludes any other general right to counsel. This narrow view is not in keeping with what we have typically seen in *Charter* litigation. *Christie* narrowed our conception of rule of law to merely a procedural right.
    - The decision "highlights the difference between the Supreme Court of Canada's aspirational statements about the importance of access to justice, and its reluctance to play a significant role in securing access when it might be in tension with a limited view of the extent it should impose financial obligations on the legislature"
- In *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, 2007 SCC 2 (*Little Sisters (No 2)*), the Supreme Court of Canada declined to order interim costs and the action failed to proceed.
- The article provides a summary of the *Little Sisters* litigation and compares it with the *Okanagan* decision (these two cases are summarized more fully below). The majority in *Little Sisters* saw the claimants as fighting an individual private issue – not a matter of public injustice. By contrast, in *Okanagan*, the litigants were thrust into litigation by the province. This was a key difference in the two decisions.
- *Little Sisters* narrowed *Okanagan* as a precedent, by limiting it to an exceptional convergence of factors. The major difference in the decisions is that *Okanagan* was viewed as a matter of public interest, whereas *Little Sisters* would not be of public interest unless it was found that customs was acting unconstitutionally.
- As with *Christie*, the <u>framing</u> of the case was crucial to the determination. It expanded the claim in *Christie*, but narrowed it in *Little Sisters.* Both re-characterizations were fatal to the appeals.

Dana Phillips, "Public Interest Standing, Access to Justice, and Democracy under the *Charter*: *Canada (AG) v. Downtown Eastside Sex Workers United Against Violence*", (2013) 22 Const F 21.

Summary: This is a case comment on *Canada (AG) v. Downtown Eastside Sex Workers United Against Violence (SWUAV)*, 2012 SCC 45 [*SWUAV*]. It examines the new approach to public interest standing articulated by the court, and its potential implications on future public interest litigation. In general, the author applauds the decision, but has suggestions as to how the Supreme Court could have gone further in advancing access to justice through the expansion of public interest standing.

- *SWUAV* asked if a group focused on protecting vulnerable sex workers had standing to challenge the criminalization of prostitution on behalf of prostitutes. It is the first time the Court viewed public interest standing as an access to justice issue.
- Public interest standing tends to arise when litigants want to challenge government action with broad social effects. Therefore, it is very important in *Charter* litigation.
- In order to provide democratic protections, the *Charter* must be accessible to minority groups. This includes an active promotion of access to justice, especially for marginalized groups, and a systemic perspective of *Charter* rights. The expansion of public interest standing promotes both of these ends
- The author moves through the history of public interest standing prior to *SWUAV*. In the 1980's the Supreme Court developed a three-part test for public interest standing in *McNeil*

v Nova Scotia (Board of Censors), [1978] 2 SCR 662*, Borowski v Canada (Minister of Justice)*, [1981] 2 SCR 575 and *Finlay v Canada (Minister of Finance),* [1986] 2 SCR:

1. There is a serious issue as to validity (this includes an implicit assessment of justiciability and the proper role of the courts);
2. The litigant has a genuine interest as to validity; and
3. There is no other reasonable and effective manner for the issue to be brought before the court.

- The third branch of the test became the focus. In *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236, the Court took a narrow view of step three, which was re-asserted in *Canadian Bar Association v. British Columbia,* 2006 BCSC 1342.
- This three part test re-emphasized a narrow view of public interest standing and a preference for private standing. A justiciability question was imported into part one of the test because courts were very concerned about overstepping their boundaries. Part two focused on the preservation of judicial resources to exclude mere "busybodies" (which the author argues is an overblown concern).
- The courts prefer the private interest model because: context grounds a dispute and private litigants that are directly affected are the most motivated, thus ensuring the best advocacy. This preference must be reanalyzed in light of the public nature of *Charter* litigation. The logic for preferring private litigants is not persuasive in *Charter* litigation, which often raises broad, systemic issues (thus demanding a systemic approach).
- Analysis of *SWUAV*:
    - The prospective public interest litigants were a non-profit organization created by former and current sex workers. They sought a declaration that the criminal code bans on (among other things) "bawdy houses" violated ss. 7, 15, 2(b) and 2(d) of the *Charter* because it deprived women of the ability to do their job safely.
    - The SCC granted public interest standing. Justice Cromwell called for a flexible and purposive approach to public interest standing, especially with respect to the third branch of the test.
    - Justice Cromwell reformulated the third stage of the test: rather than asking if there was "no other reasonable and effective means" to bring the action, the test now asks if the current action is a "reasonable and effective means" of raising the issue. A list of factors were given to answer this question, including: the plaintiff's capacity to bring the claim, whether the case is of public interest, whether there are realistic alternative means which would be more efficient, and the potential impact of the proceedings on the rights of others who have a direct interest in the action.
    - This flexible approach transformed the discrete three part test into a purposive balancing of factors. Reversing the barrier of stage three is a significant step forward for public interest standing. This rephrasing shifts public interest standing from the exception to the rule.
    - This decision paves the way for systemic issue *Charter* challenges in the future, and validates the importance of public interest litigation.
    - Some vestiges of the private law paradigm survive *SWUAV*. The Court still insists that private interest litigants ought to take priority in the courtroom.
    - The author provides two suggestions going forward:
        - Eliminate the three-part test all together – it is simpler to focus on underlying rationales (both for and against granting standing)
        - Public interest standing, as it currently exists, permits claims by privileged parties seeking to curtail the rights of disadvantaged groups (see, for example: *Chaoulli v. Quebec (Attorney General)* and *Borowski v Canada*

(Attorney General)). Therefore, any inquiry into public interest standing ought to ask "does the public interest litigant represent a disadvantaged or marginalized group?"

D. Jane Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice", (2011) 44 UBCL Rev 255.

Summary: This article focuses on the role of judges in either facilitating or impeding access to justice through their approach to public interest standing. It criticizes the pre-*SWUAV* public interest standing test as overly simplistic and un-contextualized. The blind preference for individual litigation failed to appreciate the economies offered by public interest standing, and the unfair burden this preference placed on the Canada's most vulnerable and poor. It then provides an overview of developments in the test for public interest standing up to release of the article (in 2011).

- Perceptions about barriers to justice often ignore the role judges have within the courtroom. This is particularly evident in analyzing the judicial approach to public interest standing.
- Three concerns animate the debate public interest litigation and ensure the "right" litigant brings the "right" issues before the court:
  - Assuring the economical use of scarce judicial resources;
  - Ensuring an adequate factual context exists for the resolution of the legal issues raised; and
  - Taking into account the "proper role of the court" by, among other things, foreclosing on judicial review of purely political questions as opposed to legal ones.
- Historically, only the Attorney General had standing to bring public interest litigation. This strict approach was expanded by four supreme Court of Canada decisions (*Thorson v. Attorney General of Canada*, [1975] SCR 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 SCR 265; *Canada (Minister of Justice v. Borowski*, [1981] 2 SCR 607 and *Finlay v. Canada (Minister of Finance)*, [1986] 2 SCR 607). These cases recognized judicial discretion to allow public interest litigation when a three part test was satisfied:
  1. There is a serious issue of invalidity of legislation or public action;
  2. The plaintiff is directly affected by or has a genuine interest in the validity of the legislation or public action; and
  3. There is no other reasonable and effective manner in which the issue may be brought before the Court.
- Unfortunately, this test was used to (largely) close the gate to public interest standing. *Canadian Council of Churches* stated that courts preferred individual litigants and facts. With regards to the third criteria, the court suggested that the mere existence of directly affected people who could commence litigation was sufficient to bar public interest standing.
- *Canadian Council of Churches* made three unacknowledged policy choices:
  - Stage three of the test stands for the proposition that directly affected individuals are always a better avenue for bringing litigation. This is an unnecessary automatic presumption, especially in the face of systemic problems.
  - Individual litigation is more efficient than public standing litigation. This is a false dichotomy – there are many situations one can envision where public interest litigation would be more efficient than a piecemeal individual litigation approach.
  - The un-contextualized preference for individual litigants places a burden on the most vulnerable and marginalized members of society to advance individual claims to change broad systemic issues. Having private standing does not realistically

ensure that the directly affected individual will have the economic, emotional and social resources to launch constitutional legal challenge.

- "Taken together, the policy and equality outcomes of the *Canadian Council of Churches* approach clearly illustrate the capacity of judicial decision-making to at best ignore and at worst deepen the access to justice crisis by effectively closing law's gate to public interest claims brought on behalf of vulnerable Canadians."
- The *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 decision arguably sought to re-open the gate of public interest standing. The mere possibility that directly affected individuals existed did not act as a bar to public standing litigation.
- After *Chaoulli* articulated a broader approach to public interest standing, some judges hopped on board, while others rejected the invitation.
  - In *Morgentaler v. New Brunswick*, 2009 NBCA 26 New Brunswick Court of Appeal granted Dr. Morgentaler public interest standing. It was not reasonable to expect a woman to assume the role of plaintiff in a court challenge affecting her right to have an abortion. Like *Chaoulli*, this decision highlights the importance of the social, emotional and financial position of the prospective private litigants when discussing stage three of public interest standing.
  - *Canadian Council of Churches* takes an unnecessarily individuated approach to standing, particularly where the individuals directly affected are already socially vulnerable and it is alleged that the impugned provisions systemically collude to exacerbate that vulnerability

Case Law

Christie v British Columbia (Attorney General), 2007 SCC 21

Facts: The British Columbia government imposed a tax on the purchase price of legal services. A lawyer specialized in servicing low-income clients (Mr. Christie) challenged the constitutionality of the tax. He argued that there was a constitutional right to core aspects of access to justice (including access to counsel in some cases), and that the tax made it impossible for some low income clients to retain counsel. He filed affidavits from potential clients to this effect.

Lower Courts: Mr. Christie's argument was accepted by the Chambers judge and the Court of Appeal. They held that there was a fundamental constitutional right to core aspects of access to justice, including the opportunity to obtain legal services from qualified professionals. This right was infringed by the provincial tax.

Supreme Court Holding: The Supreme Court of Canada allowed the appeal, overturned the lower courts, and found in favour of the provincial government.

Reasoning: The Court characterized Mr. Christie's claim as one seeking a right to effective access to courts that could only be obtained by access to counsel. In other words, he was seeking the constitutionalization of a specific type of access to justice. The Court expressed considerable concern as to the scope of what was being sought. It viewed the right to be represented by a lawyer as a broad right which would cover most if not all court and tribunal proceedings involving an individual. This would result in a flood of new actions.

The Court was very alarmed at the considerable financial implications of such an obligation. The public costs associated with a constitutional right to Legal Aid were not known, but they speculated it would be absolutely massive: "[w]hat is being sought is not a small, incremental change in the delivery of legal services. It is a huge change that would alter the legal landscape and impose a not inconsiderable burden on taxpayers" (at para 14).

The Court considered whether the Constitution supported the right Mr. Christie was contending. Two arguments were analyzed and rejected:

1. Access to justice is a fundamental constitutional right that embraces the right to have a lawyer in relation to court and tribunal proceedings (relying on *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214). The Court held that the right to access courts is not absolute. The legislature has the power to pass laws in relation to the administration of justice in the province, which implies the right to impose conditions on how and when people have a right to access the courts. Every limit on access to courts is not automatically unconstitutional.

2. The right to have a lawyer is constitutionally protected, either as an aspect of the rule of law, or a precondition to it. The Court held that general access to legal services is not recognized as part of the rule of law. In some cases, the right to be given a lawyer has been given constitutional status. The present case was seeking to establish a general right to counsel. The law does not state that a broad right to legal counsel is an essential aspect of the rule of law (see ss. 7, 11(d) and 10(b) of the *Charter*).

While there may be a right to counsel in specified circumstances, there is no constitutional right to counsel generally:

> We conclude that the text of the Constitution, the jurisprudence and the historical understanding of the rule of law do not foreclose the possibility that a right to counsel may be recognized in specific and varied situations. But at the same time, they do not support the conclusion that there is a general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations (at para 27).

Ratio: There is no general constitutional right to access legal counsel in civil cases.

Giacomelli Estate v. Canada (Attorney General), 2008 ONCA 346 (CanLII)

Facts: The appellant was a Canadian citizen of Italian origin. During WWII, he was arrested and imprisoned in an internment camp because of his Italian heritage. The Canadian government has since admitted that this was wrongful and arbitrary detention. They have not, however, compensated Italian Canadians for this internment. It was alleged this refusal was discriminatory and contrary to the *Charter.* In the midst of the action, the appellant died. His estate sought an order to continue the action in his stead.

Lower Courts: Ontario SCJ ruled that the action could not be continued because an estate is not permitted to continue *Charter* claims on behalf of a deceased person.

Ontario Court of Appeal Holding: The Appeal was dismissed. A s. 15 *Charter* claim cannot be advanced by an estate on behalf of a deceased, because an estate is not an individual and it has no dignity that may be infringed. The use of the word "individual" in s. 15 is clear and intentional. As such, estates have no standing to continue these claims. While there are two exceptions to the principle (an appeal pending a judgment and when an individual dies after conclusion of argument but before judgment) they did not apply to the current case.

Ratio: A claim for personal relief under the *Charter* does not survive the death of the claimant.

British Columbia (Minister of Forests) v. Okanagan Indian Band, 2003 SCC 71

Facts: Members of four Aboriginal bands (the Bands) filed a notice of constitutional question asserting their right to log on a specific tract of Crown lands. The Minister applied to have the action converted to a trial procedure. The Band opposed the application, because they lacked financial resources proceed via this route. As an alternative, they argued that (if a trial was ordered) they ought to be entitled to advance interim costs. They adduced evidence that it would be impossible for them to fund a full trial procedure if ordered.

Lower Courts: The BC Supreme Court made an order for advanced interim costs, which the provincial government appealed. Originally, the Bands' argument was advanced in conjunction with constitutional arguments regarding rights to access justice and the rule of law. By the time the case reached the Supreme Court of Canada, those arguments had been abandoned.

Supreme Court Ruling: The Supreme Court held that advance interim costs were appropriate in the circumstances. As traditionally conceived, costs exist to indemnify a successful party after litigation. However, indemnity is not the only purpose of costs – it has long been recognized that costs are an instrument of broader policies (for example, the encouragement of settlement and to prevent vexatious litigation). Access to justice and the mitigation of severe inequality between litigants features prominently in any decision to award interim costs. It seeks to minimize the danger that a meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed.

The jurisdiction to award interim costs is limited to exceptional cases and ought to be narrowly applied. Several factors are relevant in making such an order:

1. The party seeking the order must be impecunious to the extent that without an order, they could not proceed with the case;
2. There must be prima case of sufficient merit to warrant pursuit;
3. There must be special circumstances to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of discretion is appropriate.

When arising in the context of public interest litigation, some of the more traditional costs considerations are often superseded by the other valid policy objectives such as access to courts. In these cases, the following factors must be present to justify an interim costs award (para. 40):

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial.
2. The claim to be adjudicated is prima facie meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

Even if present, the ultimate decision still lies within the discretion of the trial judge. If all three present, courts have the narrow jurisdiction to award interim costs.

Ratio: Judges have discretion to make interim cost awards in true public interest litigation where the claimant could not otherwise continue their prima facie valid suit.

Canadian Bar Association v. British Columbia (Attorney General), 2006 BCSC 1342

Facts: The Plaintiff CBA sought a series of declarations regarding the inadequacies of provincial Legal Aid. The CBA alleged that civil Legal Aid in BC was inadequate to such an extent that it infringed the Constitutional guarantees regarding the rule of law, judicial independence and certain provisions of the *Charter* (ss. 7, 15(1) and 28). The CBA did not allege that any particular statute or regulation breached the *Charter*. Before getting into the merits of its case argument, the CBA had to apply for public interest standing. It also faced an application for the claim to be struck for disclosing no reasonable cause of action.

Ruling: Public interest standing should not be granted. Alternatively, the claim should be struck for disclosing no reasonable cause of action.

Reasons: The CBA launched the following arguments regarding the state of civil Legal Aid in British Columbia:

- The unwritten constitutional principle of the rule of law required that every person have equal and meaningful access to justice and that inadequate civil Legal Aid denies such access.
- Inadequate civil Legal Aid undermines the unwritten constitutional principle of judicial independence by drawing judges and tribunals into the fray to assist unrepresented persons, thus compromising the adversarial system.
- Inadequate civil Legal Aid breached s. 7/15 and 28 of the *Charter*

The CBA failed to meet the (then existing) test for public interest standing.

> (1) There is a serious issue as to the invalidity of the legislation: The CBA had not challenged any particular law or piece of legislation or administrative action. Instead, it was a challenge regarding the failure of having a scheme that meets constitutional criteria. It was asking the court to define a constitutionally valid civil Legal Aid scheme. It failed the first requirement for public interest standing.
>
> (2) The plaintiff is affected directly by or has a genuine interest in the validity of the legislation. This court held that this factor was satisfied.
>
> (3) There is no other reasonable and effective manner in which the issue may be brought before the Court. This factor was not satisfied. There were many other directly affected individuals who could launch this case as of right. The CBA would likely be permitted to intervene in these actions. Constitutional litigation is firmly entrenched within our common law system of governance, and this includes a preference for directly affected litigants where possible.

The CBA should not be granted public interest standing.

Alternatively, the action should be struck for failing to disclose a reasonable cause of action. There were two fundamental flaws with the CBA's claim: (i) unwritten constitutional principles do not rise to the level of free-standing rights; and (ii) Charter breaches can only be established in the context of individual breaches. The claims related to specific *Charter* rights lacked adequate particulars.

Canadian Bar Association v. British Columbia (Attorney General),2008 BCCA 92

Facts: Same as those for case above (2006 BCSC 1342)

Ruling: The Court of Appeal focused on whether or not the pleadings disclosed a reasonable cause of action. Finding they did not, the Court of Appeal did not conduct an in-depth analysis of public interest standing.

Reasons: The *Christie* decision ruled out a broad-based systemic claim to greater legal services based on unwritten legal principles. This portion of the pleadings did not disclose a reasonable cause of action.

The *Charter* specific challenges also failed to disclose a reasonable cause of action. Section 7 of the *Charter* creates a right to counsel where life, liberty and security of the person are affected, but this does not mean that every legal proceeding affecting a person's legal rights requires legal counsel.

The right to legal representation only arises where the specific facts of an individual case dictate that result. The pleadings in this matter were devoid of individual particulars. Issues related to s. 7 cannot be decided in the abstract. The same result was required for the other *Charter* claims as well

Morgentaler v. New Brunswick, 2009 NBCA 26

Facts: Dr. Morgentaler sought public interest standing to argue that a provincial law restricting abortions violated women's s. 7 and s. 15 *Charter* rights. The lower court granted the application, and the province of New Brunswick appealed.

Ruling: The province's appeal was dismissed.

Reasons: Dr. Morgentaler satisfied the test for public interest standing. The action raised a serious challenge to the validity of legislation. Preceding cases do not authoritatively settle the issue, as the underlying legislation is different. Dr. Morgentaler's challenge did not duplicate challenges raised in other jurisdictions. Stage 2 of the public interest standing test was conceded. In terms of the last stage of the test, while other women were more directly affected by abortion restrictions, none of the many women who want or have obtained abortions has initiated legal proceedings. This is likely due to two factors: the prohibitive cost of litigation and the "intimate and private nature" of the decision to terminate a pregnancy. In addition, Dr. Morgentaler brings the financial resources and legal expertise that improve the chances that any judicial decision on the merits is fully informed.

Ratio: In determining if there is a more reasonable and effective way to hear the case, the standing test can consider the realistic lived experience of parties who are directly affected by the challenged laws.

Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency) 2007 SCC 2

Facts: Little Sisters Book and Art Emporium (Little Sisters) was a gay and lesbian book store. In 2000, it won a protracted court battle with Canada customs regarding its practice of detaining books destined for Little Sisters as "obscene". A very large proportion of the material detained as "obscene" was gay and lesbian material. After the Court case had ended, Little Sisters nonetheless found that many of its books continued to be detained as "obscene" material. It launched the present litigation to (a) get four detained books released and (b) to pursue a broad inquiry into Customs' practices. Given the prior Court battle, Little Sisters did not have the money to fund the second action. It thus applied for an interim costs order.

Lower Courts: The Chambers judge granted the order, but this was overturned by the Court of appeal. Little Sisters appealed to the Supreme Court of Canada.

Decision: The appeal was dismissed. Little Sisters was not entitled to interim costs.

After winning this court battle, Little Sisters was dismayed to discover that Canada customs was continuing to detain large portions of their materal. They sought interim costs from the government to cover their legal expenses, because they can no longer afford to continue the litigation.

L is a small corporation that operates a bookstore catering to the lesbian and gay community. Book sales represent 30 to 40 percent of its business. L, which still struggles to make a profit, is engaged in litigation to gain the release of four books prohibited by Customs on the basis that they were obscene. Frustrated after years of court battles with Customs over similar issues, L chose to enlarge the scope of the litigation and to pursue a broad inquiry into Customs' practices. When this litigation began, L had already fought a protracted legal battle against Customs, which culminated in this Court's decision in Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 S.C.R. 1120, 2000 SCC 69 (CanLII) ("Little Sisters No. 1"), where it held that Customs' practices at the time infringed ss. 2(b) and 15 of the Canadian Charter of Rights and Freedoms. L now seeks to have Customs bear the financial burden of its fresh complaint. It applied for advance costs to cover the four books appeal as well as a systemic review of Customs' practices. In its appeal, L asks for a reversal of Customs' obscenity determinations and a declaration that Customs has been construing and applying the relevant legislation in an unconstitutional manner. The chambers judge granted an advance costs order for the appeal and the systemic review, concluding that the three requirements of the Okanagan test were satisfied. The Court of Appeal set aside the order.

The Supreme Court formulated a three part test for the awarding of interim costs in British Columbia v. Okanagan Indian Band:

1. The applicant must demonstrate a genuine inability to pay.

2. The case must be prima facie meritorious.

3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

In this case, the SCC fractured over how to apply this test. The majority decided on an extremely high bar for each component of the test, but particularly the last. To satisfy the final criterion the situation must be such that a refusal of interim costs would result in an injustice both to the applicant and to the public at large. They say that such cases will be "rare and exceptional."

The majority refused to allow the costs order because they characterize this case as essentially a private matter concerning the detention of a small amount of material. They characterized the systemic review into why Customs is detaining so much GLBT material as ancillary to the primary purpose of the claim. Further, they concluded that:

[N]ot all Charter litigation is of exceptional public importance, even if it involves allegations of infringements of freedom of expression. What must be proved is that the alleged Charter breach begs to be resolved in the public interest. Where, as here, only one of the possible results on the merits could render the case publicly important, the court should not conclude that the public importance requirement is met. It is in general only when the public importance of a case can be established regardless of the ultimate holding on the merits that a court should consider the public importance requirement satisfied.

I'll let Corey discuss the dissenting opinion next week, but I'll make mention of the Chief Justice and Justice Charron's concurring opinion. It struck a balance between the majority's claim that this case is not of sufficient public importance, and the dissent's adamant assertion that it is. They argued instead

that the third arm of the test should be characterized as "special circumstances making this extraordinary exercise of the court's power appropriate." They concluded that public importance is neither necessary nor sufficient, and while it was certainly present here, it was not special enough to warrant this exercise of judicial power.

As I said above, I support the SCC's decision here, although I believe that the Chief Justice's opinion provides a more coherent rubric for evaluating whether the costs award is justified. But in any event, this case is much larger than the narrow legalistic reasons the majority and the concurring minority gave to support their refusal to provide interim costs. The SCC's decision amounted to a refusal to provide a public service through the structure of the court system.

This was, by all accounts, a case worthy of litigation. It should have been given the chance to be argued on its merits, but that is likely now impossible due to a shortage of funds. But that tragedy occurs to thousands of Canadians every year. It is happening more and more with cuts to legal aid and to the Court Challenges program. I, along with the majority of the legal profession (see the CBA website), was deeply proud of the Court Challenges program, and I was appalled when it was cancelled. It is perhaps the strongest measure of a democracy when its government encourages and supports challenges to the majority by the minority. But even given my support for the program, I don't think it would be appropriate to effectively replace it with a system of judicial orders forcing the government to subsidize public interest litigation.

I am almost never on the "judicial-restraint" side of these types of arguments, but I do think there are some limits to the role of the judiciary in public life. Judges are very smart, and they're usually fair, but they are still unelected, and that imposes some limits. It is a hallowed principle of English political history that the representative legislature alone holds the power to levy taxes and to pass money-bills that create public services from those taxes. Two revolutions were fought over this principle: the Glorious Revolution of 1688 and the American Revolution in 1776. In both cases, the side supporting representative taxation and spending won. It's been the foundation of English, Canadian, and American government ever since. As much as I disagree with the current government's decision regarding the Court Challenges program, it was still theirs to make.

If the SCC had decided Little Sisters otherwise, i.e. to bestow the judiciary with a broad power to effectively fund Charter challenges, they would be replacing a now defunct government service with an identical one under the auspices of judicial discretion. Of course, the courts retain their equitable jurisdiction to award advance costs (this was first recognized in 1742). I think they should continue to

retain it (and so do they, as evidenced by this case and Okanagan), but it should only be used in the most extreme cases.

I think that the SCC struck an appropriate balance here; on the one hand, they did not stray into the outright and inappropriate provision of a government service. On the other hand, they retained the ability to offer interim costs if the situation is so much an affront to our country that it demands to be heard. This is not to say that the government shouldn't subsidize underfunded litigants. They should. But the courts shouldn't.

PIPSC v. Canada (Revenue Agency), 2014 SCC 13

Facts: A self-represented litigant (Ms. Bernard) employed by Canada Revenue Agency (CRA). While most CRA employees were unionized, Ms. Bernard was not, nor did she want her personal information provided to the union. In a prior court action, she successfully stopped her employer from disclosing her personal information to the union. Later, however, the union and CRA became embattled in a dispute about disclosing employee information. Ms. Bernard was not party to the proceeding, nor did she receive notice of it. The Public Service Labour Relations Board (the Board) accepted a voluntary order from CRA as to what employee information it would provide. This included some of Ms. Bernard's personal information. Upon becoming aware of this decision, Ms. Bernard immediately filed a motion for judicial review to the Federal Court of Appeal. She argued (among other things) that her *Charter* s. 2(d) and s. 8 rights had been violated. The Federal Court of Appeal declined to address her *Charter* argument, but remitted the decision back to the Board. The Board also declined to hear her *Charter* argument for procedural and jurisdictional reasons.

Ms. Bernard again brought an application for judicial review to set aside the Board's decision. She argued, among other things, that the Board erred in declining to consider her *Charter* argument. The Federal Court of Appeal held that the Board was correct in declining to hear her *Charter* argument, and again failed to address it.

Supreme Court Ruling: Ms. Bernard's claim was dismissed. The Majority intimated there was no problem with the lower court denying her an opportunity to present her *Charter* claim. It briefly dismissed her *Charter* claim after summarizing why it plainly had no merit.

The dissent, took a different view. Rothstein J. was very critical of the Board and of the Federal Court of Appeal in denying Ms. Bernard the right to present her *Charter* argument. He indicated that, had either the Board or the Court of Appeal bothered to address her issue, the Supreme Court of Canada would not have had to get involved. Ms. Bernard was a self-represented litigant who took every logical step possible to present her argument. It was unacceptable that she was receiving the run-around on procedural and jurisdictional points. This jurisdictional error denied Ms. Bernard procedural fairness insofar as she was deprived of her right to make her Charter submissions and have them considered and ruled upon.

Ultimately, Ms. Bernard's *Charter* argument had no merit.

Victoria (City) v Adams, 2009 BCCA 563 [*Adams*]

Facts: The City of Victoria passed a bylaw that prohibited the erection of overhead protection or temporary shelters overnight parks. Evidence was adduced demonstrating that the city did not have enough beds for the entire homeless population to access shelters. The Respondents (Ms. Adams and 8 other homeless individuals) argued that forcing a homeless person to sleep outside without shelter unjustifiably infringed s. 7 of the *Charter* because it was arbitrary (there was no evidence of a real connection between societal interests advanced and the prohibition) and overbroad (less invasive options would be available to accomplish its societal interests).

Judgment: The bylaw violated s. 7 of the *Charter,* and the violation was not saved by s. 1. The Court of Appeal considered and rejected the City's three primary arguments: justiciability, the boundaries of s. 7 rights, and compliance with the principles of fundamental justice.

The issue was clearly justiciable. Just because a matter engages complex policy decisions and the allocation of scarce resources, it does not immunize that legislation from review. The Chambers judge did not inappropriately intrude into the legislative sphere. "The respondents were not asking the court to adjudicate the wisdom of the policy decision. The question is whether the bylaws violate s. 7 of the *Charter*, in situations where there are insufficient alternative shelter provided in the city" (at para 68).

There was sufficient state action to engage s. 7. While the bylaw did not cause the homeless persons' state of homelessness, it was a direct cause of a s. 7 violation because it impaired the ability of homeless to address their need for adequate shelter.

The Chambers decision did not inappropriately create a positive obligation on the City. The decision merely restricted the City from legislating in a manner that interferes with s. 7 rights of the homeless. The claim was not one seeking property rights. Rather, the case was about a right to be free from a state imposed prohibition on an activity, which prohibition causes significant health risks on one of the City's most vulnerable populations.

The bylaw breached the principles of fundamental justice because it was overbroad: it failed to consider less intrusive means. The bylaw was not arbitrary – it had a broad objective that sought to maintain the environmental, recreational and social benefits of urban parks. Restrictions on use are connected to that objective.
Intervenors argued that the chamber's judge's declaration of invalidity was inappropriate, and that rather, an individual exemption would have been more suitable. The Court of Appeal noted that a s. 24 constitutional exemption was not appropriate because the challenge was made to the law, which is typically addressed through s. 52 declarations of invalidity.

Costs: The Chambers judge awarded the Respondents special costs of the trial on the basis of the public interest litigation principles. This power is part of a judge's inherent jurisdiction and should not be overturned just because the applicants were represented *pro bono* by a large law firm. Policy reasons favor the award of special costs in such cases because it creates incentives for large firms to take on public interest suits *pro bono*: "[T]here is public interest in encouraging experienced counsel to undertake *Charter* litigation of broad concern on a pro bono basis" (para. 177). This case was one of the rare and exceptional circumstances that justified the departure from regular rules regarding costs. Notwithstanding a lack of reprehensible conduct, special costs are awarded as an instrument to encourage **access to justice** (para. 182). This case involved a matter of public importance that transcends the immediate interests of the named parties; the successful

party has no personal interest in the outcome of the litigation that would justify the proceeding economically; as between the parties, the unsuccessful party has a superior capacity to bear the costs of the proceeding; and the successful party has not conducted the litigation in an abusive or vexatious way. The award of special costs was affirmed.