June 17, 2016

The Right of Access to Justice Under the Rule of Law: Guaranteeing an Effective Remedy

Graham Sharp
University of Saskatchewan College of Law

I. INTRODUCTION

Where the law gives an individual the right to a remedy, why must the associated cost so often render it a privilege? As Chief Justice McLachlin writes in the foreword to the Cromwell Report, "the problem of access to justice is not a new one. As long as justice has existed there have been those who have struggled to access it."[1] This is indicated by Clause 40 of The Magna Carta, an 800-year-old document, which states, "To no one will we sell, to no one will we refuse or delay, right or justice."[2]

On what basis can it be said that accessing justice should never come at a price? The *Canadian Charter of Rights and Freedoms*[3] recognises that Canada is founded upon the principle of the rule of law. For the law to rule, however, it must be able to provide a remedy on every occasion in which a right is violated, "for want of right and want of remedy are reciprocal."[4] If the remedy comes by rights, it should not also come at a severe cost to the individual. Where a claimant is incapable of obtaining their just remedy their right was never exercised.

The Chief Justice has called access to justice a "fundamental right […that] affirms the rule of law."[5] Justice is surely the vindication of legal rights, so where this cannot be accessed

---

[1] Action Committee on Access to Justice in Civil and Family Matters. "Access to Civil and Family Justice: A Roadmap for Change." (Ottawa 2013). [Cromwell Report] at 1.
[2] Online: <http://www.constitution.org/eng/magnacar.htm>.
[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].
[4] *Ashby v White* (1703), 92 ER 126 (KB) at 136.
[5] Lucianna Ciccocioppo, "There is no justice without access to justice: Chief Justice Beverley McLachlin." (November, 2011), *University of Toronto Faculty of Law Newsroom*, online: <http://www.law.utoronto.ca/news/there-no-justice-without-access-justice-chief-justice-beverley-mclachlin>.

the law cannot be said to rule. This paper will set out to understand our current right of access, and what is required of the legal system and profession in order to uphold the rule of law.

II. *Re. B.C.G.E.U.* AND THE FUNDAMENTAL RIGHT TO ACCESS THE COURTS

McLachlin is not the first Chief Justice to highlight access to justice as a serious concern. In 1988 Brian Dickson deemed access to justice "one of the most pressing and significant issues confronting the legal system today."[6] A few months later he delivered a landmark decision on the issue in *Re. B.C.G.E.U,*[7] where a union was denied the right to picket outside British Columbia courthouses. To Dickson C.J. the case "involved the *fundamental right of every Canadian citizen* to have *unimpeded access to the courts* and the authority of the courts to protect and defend that constitutional right."[8] Referring to a European Court of Human Rights decision, he upheld "the right of access to the courts as a fundamental and universally recognized principle."[9] Dickson C.J. adopted the BC Supreme Court's phrasing of the issue: "[W]hether it is proper or permissible for anyone, […] to interfere with or impede the absolute right of access all citizens have to the courts of justice."[10] This established the constitutional right of access to the *courts* but not to *justice* itself. It is important to consider the foundations of this fundamental right and whether framing it merely as access to court satisfies its purpose.

Roncarelli v Duplessis[11] established the rule of law as an unwritten constitutional principle, but as Dickson C.J. identified, the very foundation of the Charter is the rule of law.[12] The *Charter* is entrenched in our Constitution and pursuant to s. 52(1) of the *Constitution Act,*

---

[6] Rt. Hon. Brian Dickson, P.C., "Access to Justice (June 8, 1988 address)" (1989) 1:1 Windsor Rev. Legal & Soc. Issues 1 at 1.
[7] 1988 CarwellBC 363 (SCC) [*B.C.G.E.U.*].
[8] *Ibid*. at para 1 [emphasis added].
[9] *Ibid* at para 47.
[10] *Ibid* at para 12.
[11] 1959 CarswellQue 37 (SCC) [*Roncarelli*] at para 44.
[12] *Supra* note 7 at para 30.

1982, is therefore the supreme law of Canada.[13] Thus, violating the rule of law is an infringement of our Constitution, subject to remediation by a court.

The right of access to courts is justified as fundamental "to the preservation and enforcement of every legal right, freedom, and obligation which exists under the rule of law."[14] The rule of law demands the actual preservation of any legal rights it creates. Access to courts is simply the legal system's means to that end. This begs the question of what might be done when mere access is not enough to preserve those rights, or when access is not obtainable as a result of more complex and systemic impediments beyond physical interference.

Access to justice remains the greatest challenge facing our legal system but guaranteeing physical access to the courts may not be sufficient to ensure access to justice. It is vital to consider whether the rule of law requires a right that is more demanding of the legal system. *R. v Domm*[15] revisited the question and mostly reaffirmed *B.C.G.E.U.* Doherty J.A. went slightly further though, asserting that "the law must provide individuals with *meaningful* access to independent courts" capable of granting "appropriate and effective remedies to those individuals whose rights have been violated."[16] With these statements, the Ontario Court of Appeal decision outlines what the rule of law truly demands: citizens must have "meaningful" access to the courts, which can grant "appropriate and effective remedies." Guaranteeing access to the courts is sufficient only if it ensures that citizens will obtain the appropriate remedy for the violation of their rights. This is a crucial distinction, but one that found little traction in the Canadian jurisprudence thereafter.

---

[13] *Ibid*.
[14] *Ibid* at para 15.
[15] 1996 CarswellOnt 4539 (ONCA) [*Domm*].
[16] *Ibid* at para 12 [emphasis added].

In *Pleau v Nova Scotia (Prothonotary, Supreme Court)*[17] the right was re-examined in response to a challenge made against court hearing fees. MacAdam J. cites *R v Big M Drug Mart* for the rule that "both purpose *and effect* are relevant in determining constitutionality."[18] An effects analysis is employed to determine that "fees in amounts that can *reasonably* be afforded by citizens in general…and those qualifying for legal aid…[are] not precluded by the constitutional right to access the courts."[19] This test potentially balances the need for access to justice with concerns over limited resources to pay for it. However, MacAdam J. finds that the test is appropriate only for fees related to services, and since the fee in question places a charge on the "time required to present one's case…its effect is to put a 'price on accessing the courts,' *a price on justice.*"[20] As a result, even a modest hearing fee is deemed unacceptable in *Pleau*. However, fees related to services are acceptable provided they are reasonable.

Though he highlighted the importance of accessing remedies for rights violations, MacAdam J. held that there "is nothing in the *Constitution, Charter* or common law that would preclude the charging of fees in the course of initiating or continuing litigation."[21] There is, however, no consideration of how these fees may *in effect* prevent access. MacAdam J. acknowledges that court appearances, due to their so-called "constitutional nature", may require "different or additional considerations, and therefore a different outcome."[22] This is a distinction without a difference. The rule of law requirement is that citizens be able to access the courts in order to seek the appropriate and effective remedy. It is difficult to appreciate that court fees might violate this principle but impediments to the initiation or continuation of litigation will not.

---

[17] 1998 CarswellNS 543 (NSSC) [*Pleau*].
[18] *Ibid* at para 95 [emphasis added].
[19] *Ibid* at para 95 [emphasis added].
[20] *Ibid* at para 121 [emphasis added].
[21] *Ibid* at para 39.
[22] *Ibid.*

McAdam J. considers fees outside of court to be appropriate because "processes of getting into court are "service driven", yet he acknowledges, "appearance in court also requires 'services.'"[23] Here, he acknowledges the lack of difference in his distinction. According to him, access to justice is "neither a service nor a commodity," so any impediment to this "constitutional right of all citizens…must fail if its effect is to unduly 'impede, impair or delay access to the courts."[24] Thus, *any* cost, in effect preventing access to justice or the vindication of a right, must not stand.

There is still no reason to read this decision as anything but diluted. Despite the case's grand statements, MacAdam J. neglects to acknowledge the possible impropriety of fees for general court-related services. He accepts there are "many financial consequences in launching a civil lawsuit" but only holds that "one of them must not be the time in court."[25] Somehow, the judge's time must be guaranteed without cost but little else. Ultimately, there is no clear guidance as to which fees are acceptable and which would be deemed unconstitutional. MacAdam J. does not clarify how his reasons in *Pleau* support such a finding. He believes that justice must not be a commodity[26] but this does not prevent him from upholding certain fees.

In *Polewsky v Home Hardware Stores Ltd.*[27] the absence of any provision for the waiver or reduction of fees was found to be "a breach of the Rule of Law…a constitutional defect that must be cured."[28] The decision further rooted into Canadian jurisprudence the rule of law as an inviolable principle. However, the court found that the "the right of access is subject to the caveats of merit and proof of indigence."[29] Requiring that a case be meritorious is practical. Any solution to the access to justice problem should avoid a possible increase in litigiousness and

---

[23] *Ibid*.
[24] *Ibid* at para 66.
[25] *Ibid* at para 122.
[26] *Ibid* at para 66.
[27] 2003 CarswellOnt 2755 (Ont. Div. Ct.) [*Polewsky*].
[28] *Ibid* at para 45.
[29] *Ibid* at para 60.

vexatious claims. Proof of indigence, on the other hand, is a novel consideration, and one that ignores the possibility of a claimant forced to make unreasonable sacrifices to access justice.

Mary Eberts is troubled by the "well-known litigation strategy to take advantage" of an adversary "by exhausting [their] resources."[30] Meanwhile, Christian Morey notes that where litigants elect not to pursue their remedies in courts, there must be consideration whether the "decision not to litigate is a genuine choice."[31] He believes that the "[r]ule of law is, and ought to be sensitive to the presence of barriers to civil litigation"[32] including resource imbalance. He cites Dyzenhaus who deems it "'offensive to the principle of equality before the law' if a stronger party can avoid regulation" because the opposing party is "unable to effectively represent themselves."[33] Where a stronger party applies their resources to prevent a weaker party from continuing litigation and accessing their just remedy, the law fails to rule. Requiring proof of indigence dilutes the fundamental right of access to the courts, but also avoids the consideration that the rule of law must guarantee access to the appropriate remedy for a proven rights violation.

The result in *Polewsky* relies too heavily on an analysis of effects, whilst simultaneously narrowing that analysis in scope. By finding that persons must have a "demonstrated inability to pay,"[34] the effects analysis in *Polewsky* ironically disregards actual effects by disenfranchising those litigants with an ability to pay that is subject to unreasonable sacrifices. The Court asserted that unwritten constitutional principles cannot "alter the thrust of [the Constitution's] explicit

---

[30] Mary Eberts, "'Lawyers Feed the Hungry': Access to Justice, the Rule of Law, and the Private Practice of Law" (2013) 76:1 Sask. L. Rev. 115 at 125.
[31] Christian Morey, "A Matter of Integrity: Rule of Law, the *Remuneration Reference*, and Access to Justice" (2016) 49:1 U.B.C. L. Rev. 275 at 328.
[32] *Ibid* at 330.
[33] *Ibid.*
[34] *Supra* note 27 at para 62.

text"[35] and their remedy went no further than "the enactment of statutory provisions that permit persons to proceed *in forma pauperis* in the Small Claims Court."[36] Despite well-meaning language, the judiciary has shown little concern for financial impediments to accessing a remedy. It is enough that accessing the courts is at least financially possible.

III. *CHRISTIE, HRYNIAK,* AND *TRIAL LAWYERS' ASSN*

The constitutional right of access to justice was argued in a novel and expansive manner in *Christie v British Columbia (Attorney General)*.[37] The province imposed a 7% tax on legal fees. It was accepted that "some of Mr. Christie's clients could not obtain *needed* legal services if Mr. Christie did not act for them…[and] if Mr. Christie were to charge them his hourly rate plus the social services tax, they could not pay him."[38] Christie already charged low fees and if he charged any less, he would have been unable to take on most cases, "thus denying those individuals access to justice."[39] The Chambers Judge found that the imposition of the tax *in fact* denied access to justice to some "low income clients."[40] On appeal Newbury J.A. proposed this definition for the constitutional right of access to justice: "'*reasonable* and *effective* access to courts of law and the opportunity to obtain legal services from qualified professionals, that are *related to the determination* and interpretation of legal rights.'"[41] The British Columbia Court of Appeal upheld the decision and found the tax to be unconstitutional, violating the constitutional right of access to justice based on the rule of law.

---

[35] *Ibid* at para 75.
[36] *Ibid* at para 76.
[37] 2007 CarswellBC 1117 (SCC) [*Christie*].
[38] *Ibid* at para 5 [emphasis added].
[39] *Ibid*.
[40] *Ibid.*
[41] *Ibid* at para 7 [emphasis added].

The Supreme Court, ruling *per curiam*, was less generous with the scope of the constitutional right of access. They identified that the argument was for "the constitutionalization of a *particular type of* access to justice — access aided by a lawyer where rights and obligations are at stake before a court or tribunal."[42] The respondent had to show that the constitution mandated this "form or quality of access" and the Supreme Court found that he did not.[43] They were concerned with how expansive such a right would be: "[T]he logical result would be a constitutionally mandated legal aid scheme for virtually all legal proceedings, except where the state could show this is not necessary for effective access to justice."[44] It is puzzling why the Court deems it so inappropriate to guarantee services "necessary for effective access." The right of access exists to uphold the rule of law, but undoubtedly the rule of law is not upheld unless access to justice is effective insofar as it results in a rightful remedy.

The Supreme Court was concerned with the "not inconsiderable burden on taxpayers" that would be imposed by such a ruling.[45] Furthermore, they clarify that "the right affirmed in *B.C.G.E.U.* is not absolute" because the provincial power to administer justice under the Constitution implies the power to "impose at least some conditions on how and when people have a right of access to courts."[46] Thus, *Christie* finds that an implied constitutional power outweighs the constitutional principle of the rule of law. Some situations may require the recognition of a right to counsel, but following *Christie* the rule of law does not support "a general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations."[47] Just like access to courts, though, a right to counsel would simply be a

---

[42] *Ibid* at para 10 [emphasis original].
[43] *Ibid*.
[44] *Ibid* at para 13.
[45] *Ibid* at para 14.
[46] *Ibid* at para 17.
[47] *Ibid* at para 27. In *Canadian Bar Assn. v British Columbia*, 2008 CarswellBC 379 the CBA demanded the BC LegalAid scheme be more expansive. The pleadings were too general, and the requirement that there be individuals

means to an end. What is required is guaranteed access to a rightful remedy, however that may be achieved.

It is accepted that the rule of law is an unwritten constitutional principle that must be upheld. At the very least it guarantees access to courts. However, the requisite quality of that access has been debated. *B.C.G.E.U.* and some decisions that followed identified that access to courts must be guaranteed in order to ensure claimants receive their rightful remedy. *Domm* found that access to the courts must be "meaningful." However, the Supreme Court in *Christie* did not accept the Court of Appeal's push for effective access, including the opportunity to receive necessary legal services. Judges have yet to suggest that the principle of the rule of law guarantees access insofar as it ensures the appropriate remedy.

Two recent Supreme Court decisions invite the possibility of a more systemic right to access justice under the rule of law. In *Hryniak v Mauldin*,[48] Karakatsanis J. echoes the Cromwell Report, as well as various comments from Chief Justice McLachlin: "Ensuring access to justice is the greatest challenge to *the rule of law* in Canada today."[49] He specifies that the rule of law is threatened where there is no "*effective* and accessible means of enforcing rights."[50] This opens up the constitutional guarantee to include more than mere access to the courts. Citizens must be able to effectively enforce their rights or, in other words, to obtain their rightful remedy. Whereas *Christie* was concerned about guaranteeing a "particular type of access,"[51] Karakatsanis J. is cognizant of the need for it. To him, the rule of law is "threatened" without effective access, though one wonders if it is in fact extinguished.

---

for a *Charter* claim was not met. It was otherwise found, at para 47, that *Christie* ruled out a "broad-based systemic claim to greater legal services based on unwritten principles."

[48] 2014 CarswellOnt 640 (SC) [*Hryniak*].

[49] *Ibid* at para 1 [emphasis added].

[50] *Ibid* [emphasis added].

[51] *Supra* note 37 at para 10.

The Cromwell Report asserted that access to justice is "not limited to access to courts, judges and lawyers…we must focus on fair and just outcomes that are reasonably acceptable to the participants."[52] Mindful of this, Karakatsanis J. cited Ontario Rule 1.04(1), setting out that all the rules "shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."[53] Though it is partially concerned with speed and efficiency, the rules specify that what must be secured is a just determination, in order to ensure access to justice.

The most recent decision to consider the constitutional right of access to justice is *Trial Lawyers' Assn of British Columbia v British Columbia (Attorney General).*[54] McLachlin C.J. held that certain fees infringed on the jurisdiction of superior courts "by, in effect, denying some people access to the courts."[55] Though it is not about effective access to justice, there is an important concern here over inaccessibility. A potential litigant electing not to pursue a claim due to the serious financial implications could be denied access to the courts *in effect*.

Still, *Trial Lawyers* does not question that individuals can be expected to pay in order to access justice and vindicate their rights. McLachlin C.J. is not prepared to hold that all hearing fees are unconstitutional. Rather, her focus is on what she deems to be the "real problem – using fees to deny certain people access to the courts."[56] The Chief Justice holds that such fees "paid by litigants who *can* afford them may be a justifiable way of making resources available for the justice system and increasing access to justice overall."[57] This should not be taken to derogate from the right of access founded upon the constitutional principle of the rule of law. As cited

---

[52] *Supra* note 30 at 120.
[53] *Supra* note 48 at para 32.
[54] 2014 CarswellBC 2873 (SC) [*Trial Lawyers*].
[55] *Ibid* [emphasis added].
[56] *Ibid* at para 22.
[57] *Ibid* [emphasis original].

earlier, the Chief Justice acknowledged in *Trial Lawyers* the importance of the rule of law and its connection to access to justice.

The *Trial Lawyers* decision, though supportive of the idea of effective access, did not provide any guarantee of a particular type of access to justice.[58] Instead, *Christie* was distinguished because the hearing fee had the potential "to bar litigants with legitimate claims from the courts."[59] Meanwhile, the "tax at issue in *Christie*…was not shown to have a similar impact."[60] Basing the decision on the effects of the fee requirement, McLachlin C.J. held that litigants "with ample resources will not be denied access to the superior courts by hearing fees."[61] Echoing *Polewsky*, though supplying a different test, the Chief Justice finds that hearing fees cannot stand when they "cause undue hardship to the litigant," because those with "modest resources are often capable of arranging their finances so that, with reasonable sacrifices, they may access the courts."[62] The Chief Justice left it open that a fee so high "that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional."[63] We are left to wonder if undue hardship may be found in situations where necessary legal services are not affordable, or where there is a pronounced resource imbalance between litigants. Where undue hardship is caused, access to the courts is "effectively" prevented.[64] This is still a crucial instance of progress. Though there is no assurance of effective access to justice, there is at least recognition that certain fees can

---

[58] The US Supreme Court case, *Turner v Rogers* 131 S. Ct. 2507 (2011), did outline a right of "meaningful access" providing that a claimant have the ability to identify critical issues and present relevant evidence. Laura K. Abel considered the possibility the decision calls for expanded access and a demand on courts to "provide unrepresented litigants with assistance short of full representation;" see "*Turner v Rogers* and the Right of Meaningful Access to the Courts." (2012) 89:4 Denv. U. L. Rev. 805 at 807.
[59] *Supra* note 54 at para 41.
[60] *Ibid*.
[61] *Ibid* at para 45.
[62] *Ibid*.
[63] *Ibid* at para 46.
[64] *Ibid*.

effectively deny access when they rise to the level of causing undue hardship in the pursuit of a successful claim. Unfortunately, the difference between the two standards is larger than it appears. The decision ensures that people can get access to the court without undue hardship, a helpful development, but it does not guarantee said access would be effective, insofar as it results in the appropriate remedy.

As Mary Eberts sees it, the "[t]reatment of access to justice in the jurisprudence is totally inconsistent with the public remarks" of Chief Justice McLachlin.[65] In *Christie*, for example, access to justice was defined as "*reasonable* and *effective* access to courts of law *and the opportunity* to obtain legal services," but Eberts laments that the Court finds no support for this under either the Constitution or the rule of law.[66] Though not providing a right to effective access, the Court "still asserts that lawyers play an important role in upholding the rule of law…by ensuring unlawful actions, private or public, do not go unaddressed."[67] However this has not led to an expansion of the right of access to justice to include the legal services necessary to guarantee the rightful remedy.[68]

As Morey points out, "*Trial Lawyers* still maintains a strong distinction between right of access to the courts and access to legal services."[69] Eberts suggests the reluctance is "because of the huge systemic and financial implications of such a decision" that would impose "a not

---

[65] *Supra* note 30 at 118.
[66] *Ibid* at 117 [emphasis added].
[67] *Ibid* at 118.
[68] Though not the focus of this paper, some consider access to justice to be a human right; see Francioni, Francesco. "The Rights of Access to Justice under Customary International Law," in Francesco Francioni, ed, *Access to Justice as a Human Right* (New York: Oxford University Press 2007) 1. Francioni, at p. 55, suggests "access to justice is an essential component of every system of human rights protection. For instance, Article 13 of the European Convention on Human Rights requires that "Everyone whose rights and freedoms as set forth in this Convention are violated *shall* have an *effective remedy* before a national authority;" see Lord Lester of Herne Hill QC, Lord Pannick QC & Javan Herberg, eds, *Human Rights Law and Practice* 3rd ed (London: LexisNexis 2009) at 565 [emphasis added].
[69] *Supra* note 31 at 277.

inconsiderable burden on taxpayers."[70] She also draws our attention to the ruling in *Little Sisters*, wherein it was deemed "inappropriate and imprudent judicial overreach" to on their own bring an "alternative and extensive legal aid system into being."[71] This is understandable. It may not be prudent to make such a ruling but certainly efforts could be made to guarantee more effective access. The court could expand the right to include the legal services necessary for an individual to obtain their appropriate remedy. The legislature can consider whether a state under the rule of law must establish a legal system capable of guaranteeing its citizens the effective exercise of their legal rights.

IV. ORIGINS AND MODERN NOTIONS OF THE RULE OF LAW

There has been little discussion in the jurisprudence about what the rule of law actually entails, but since the right of access to courts is founded upon it, the principle requires definition and understanding. The Magna Carta was a foundational document but many "accounts of the rule of law identify its origins in classical Greek thought, quoting passages from Plato and Aristotle."[72] According to Brian Tamanaha, the classical philosophers "thought [it] to be just that among equals everyone be ruled" and deemed what is unjust to be that which is "lawless" and "unfair."[73] To them, "even minor transgressions, if allowed to creep in, 'at last ruin the state.'"[74] While they may not have expressly used the term, classical Greek thinkers "had concerns about

[70] *Supra* note 30 at 119.
[71] *Ibid*.
[72] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (New York: Cambridge University Press, 2004) at 7.
[73] *Ibid* at 9.
[74] *Ibid*.

the rule of law."[75] They clearly understood the concept as leaving no room for any instance where the law fails to be applied.

John Locke believed that the law must never fail to apply. For him, "Where-ever law ends, tyranny begins."[76] Locke's Liberalism was "consummately legalistic," as evidenced by the preceding statement, as well as the notion that "freedom of men under government is, to have a standing rule to live by, common to every one of that society."[77] Plainly, Locke's theory was that the law must always be in application, for every citizen, in all circumstances. Invariably, his philosophy must be read as supporting entirely unhindered access to justice.

Expanding on Locke, modern philosophy sees the rule of law as promoting liberty "by allowing individuals to know the range of activities in which they are completely free to do as they please."[78] The key element of this freedom is an individual's foreknowledge of the limits of permissible conduct,[79] with Locke himself seeing the rule of law's governing principle to be that "the people may know their duty."[80] This would be a flimsy principle without effective access. The law must rule citizens by being accessible and determinable by them. When the rule of law was deemed an unwritten constitutional principle in *Roncarelli* it conveyed "a sense of orderliness, of subjection to known legal rules."[81] Furthermore, the *Manitoba Language Rights* case considered that "people should be ruled by the law and obey it and will [therefore] be able to be guided it."[82] In *Re B.C.G.E.U.* Dickson C.J. states, "There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall

---

[75] *Ibid* at 10.
[76] *Ibid* at 49.
[77] *Ibid*.
[78] *Ibid* at 66. This is the view of Friedrich Hayek in particular; *ibid*. Also, Tamanaha summarizes other philosophers' views: "to live under the rule of law is not to be subject to the unpredictable vagaries of other individuals;" *ibid* at 122.
[79] *Ibid*.
[80] *Ibid* at 49.
[81] *Supra* note 31 at 290.
[82] *Ibid*.

and who shall not have access to justice."[83] This is essentially a restatement of Locke's theory. The rule of law necessitates access to justice and where that fails, there is only tyranny. Guaranteeing access to courts is not enough unless said courts can guarantee the appropriate remedy will be granted: "Of what value are the rights and freedoms guaranteed by the Charter if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them?"[84] It is evident that our Supreme Court supports the idea that the law must always be in effect via determinability and access.

Friedrich Hayek's theory may best summarize the requirements. In his view, the rule of law must necessarily possess three attributes: generality, equality of application, and certainty. Generality requires that the law apply "without exception, to everyone whose conduct falls within the prescribed conditions of application." The principle of equality simply demands that the rule of law "apply to everyone without making arbitrary distinctions among people." Certainty connotes an ability "to predict reliably what legal rules will be found to govern [conduct] and how those rules will be interpreted and applied."[85] While Hayek acknowledged that it is impossible for any legal system to perfectly adhere to all three of the attributes he puts forth, he believed they could be approximated.[86] Hayek's theory could stand as an ideal to be striven for in order to ensure that law rules effectively by giving all individuals access to it at all times.

These theories resemble the concept of formal legality, which Tamanaha identifies as "the dominant understanding" of the rule of law "for liberalism and capitalism."[87] In order to meet such a standard, Tamanaha believes that "attention must be directed at ascertaining whether

---

[83] *Supra* note 7 at para 30.
[84] *Ibid*.
[85] *Supra* note 72 at 66.
[86] *Ibid*.
[87] *Ibid*.

such predictability is actually conferred."[88] The importance of effectiveness has long been important to rule of law philosophers, and that necessitates procedural considerations.[89] One must wonder if one individual can in effect be subject to another when they are potentially denied their rightful remedy as a result of the other individual's ability to afford more effective legal services. This appears to violate the accepted view of the rule of law outlined above. The views of these philosophers entail a justice system where citizens may know their rights and demand their enforcement, through a just process, in order to access their effective remedy.

Following the Magna Carta, there gradually developed a "connotation that at least a minimal degree of legal procedures—those that insure a fair hearing, especially the opportunity to be heard before a neutral decision-maker—must be accorded in the context of the judicial process."[90] Such a process is necessary in order to determine whether a remedy is legally required, and to subsequently apply it. The ability of an individual to "guide him or herself by the law may be frustrated if access is denied by reason of long delays or excessive costs." [91] Morey outlines the concern that a "person who wishes to plan their life on the basis of what the law prescribes will be frustrated in their expectations if the rights that they hold in principle cannot be accessed in fact."[92] The views of Isaiah Berlin are also pertinent: "what matters is not the form of restraints on power…but their effectiveness."[93] In being governed by the rule of law, one must be able to presume the law will always apply. One's inability to access justice undermines that presumption. We need a modern understanding of the rule of law and the associated implications for the legal system and profession upholding it. The Declaration of the

---

[88] *Ibid* at 122.
[89] Habermas viewed the rule of law as guaranteed "by the particular procedure by which it comes about" and Dworkin, in recognising the need for "accurate public conception" of rights, acknowledged the need for positive law to enforce them upon demand; *ibid* at 99 & 102.
[90] *Ibid* at 26.
[91] *Supra* note 31 at 313.
[92] *Ibid* at 329.
[93] *Supra* note 72 at 58.

1990 Conference on Security and Cooperation in Europe defines the rule of law as "justice based upon the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression."[94] What is required is a new and improved framework to achieve this "full expression" where access to justice is guaranteed in an effective manner.

V. THE CONSTITUTIONAL MANDATE AND HOW TO MEET IT

Though their ultimate decisions on the matter have been measured, the judiciary has been vocal about the extent to which the rule of law demands effective access to justice. It is a foundational principle of our society, reflecting "Canada's 'commitment to an orderly and civil society in which all are bound by the enduring rules, principles, and values of our Constitution as the supreme source of law and authority.'"[95] According to McLachlin C.J., the ability to access justice "is fundamental to the rule of law. If people decide they can't get justice, they will have less respect for the law…they will tend not to support the rule of law."[96] The Chief Justice found that "[i]f people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, *as laws will not be given effect*."[97] Therefore, any impediment to an individual's ability to bring legitimate issues before a judge will prevent the associated laws from taking effect, and in that instance, the law will be incapable of ruling. That the current Chief Justice is concerned with the rule of law's dependence upon access to justice only reinforces the fact that the constitutional principle has the potential to be developed further.

---

[94] *Ibid* at 111.
[95] *Supra* note 27 at 75.
[96] *Supra* note 30 at 115-16.
[97] *Ibid* [emphasis added].

Although the *Pleau* decision was ultimately narrow in scope, MacAdam J. appreciated the functional impediments to effective access, which pervade our system. To make his point he goes to such lengths as to cite an observer's description of the Task Force on Systems of Civil Justice:

> Ensuring the existence and health of a forum for civil justice to which we all have access *ought to be a ground-level, first-order valve in our society*. All of us ought to be able to protect our rights and interests and seek what is due in matters that can have such a profound effect on our lives. In recognizing certain claims the law creates rights which we are supposed to have regardless of our economic status in society, the colour of our skin or the religion we practise. Access to the forum in which these rights are given life and force is a matter which should not be a luxury reserved for the very few who can afford it.
>
> The fact that the majority of Canadians cannot afford to seek justice through the current system is a problem which far outstrips in magnitude concerns about maximizing procedural and due process protections for those litigants who are presently able to access the system.[98]

There is no mention of the rule of law, yet the idea that ensuring access should be society's first priority accords with the belief that a state under the rule of law must enjoy universal and unencumbered access to justice. Outlined is the belief that all of us *must* be able to "protect our rights and interests and seek what is due."[99] This can be read as promotion not only of access to courts, but also of access to our rightful remedy.

There is nothing preventing us from taking incremental steps to more effectively uphold the law by improving access to justice. Tamanaha is of the opinion that "if the rule of law is to function effectively, a necessary contribution is to be found within the attitudes and orientation of those trained in law."[100] The legal profession has a spotty record in this respect. Max Weber believed that law was "kept obscure, unclear, and inaccessible—factors which militate against the requirements of the rule of law—to keep lawyers indispensable as intermediaries and

---

[98] *Supra* note 17 at para 92 [emphasis added].
[99] *Ibid*.
[100] *Supra* note 72 at 59.

facilitators."[101] Tamanaha cites "concerns that the legal profession serves the interests of the elite class, which provides them the most lucre, turning the law to the benefit of these masters."[102] He continues, recognizing that the legal profession "is located at the crux of the rule of law…"uniquely situated to undermine [it]."[103] It is incumbent upon us not to undermine but to uphold. We should more often qualify our duty to our client as a duty to justice in the first place.

Mary Eberts considers it fundamental in a society governed by the rule of law that access be broad and effective. In her estimation, services "need to be widely available for such a law-based democracy to work, to continue to renew its legitimacy, and to maintain its ability to elicit the consent of the governed."[104] Further, this must apply to "lawyer's services aimed at assisting individuals to participate in…applications of law for the resolution of disputes in family, commercial, employment and other areas open to litigation."[105] Eberts acknowledges the gravity of the access to justice challenge in this country but she believes that the burden of ensuring access "falls with particular harshness on what [she calls] the legal proletariat."[106] These are the lawyers "whose personal circumstances or commitment to social justice, or both, have isolated them as a separate and less advantaged sector of the bar."[107] Often when the access to justice conversation takes place "lawyers are urged to provide more services at little or no cost."[108] Eberts likens it to efforts to alleviate hunger, where those assisting have their energies absorbed "so that they have little energy left for changing the underlying conditions that create the hunger."[109] Obviously, the lawyer's duty to ensure that justice is accessed must not be an

---

[101] *Ibid.*
[102] *Ibid.*
[103] *Ibid.*
[104] *Supra* note 30 at 121.
[105] *Ibid.*
[106] *Ibid* at 117.
[107] *Ibid.*
[108] *Ibid* at 126.
[109] *Ibid.*

impractical burden. Any reform to uphold the rule of law by guaranteeing effective access to justice should not merely subject lawyers to undue hardship in place of litigants.

Legal services are a resource with obvious, determinable value. Suggesting that they should be provided where necessary to ensure an appropriate remedy has serious economic implications. As Roach and Sossin point out, "[b]ehind every claim to a right, however, is a claim on resources."[110] As already mentioned, the rule of law is connected to a capitalist system. Max Weber's view was that "capitalism requires a formal rule-oriented legal system in order to provide the security and predictability necessary for market transactions,"[111] According to Hayek, the rule of law cannot even operate "in the context of a socialist economic system or the social welfare state."[112] Thus, ensuring effective access to justice under the rule of law should not be done according to socialist principles but this means serious resource concerns.

Tamanaha recognises the "additional, unsettling questions about the cost and availability of legal counsel."[113] Guaranteeing effective access to justice may not necessarily entail our current legal system becoming universal, rendering all legal professionals employees of the state. Trebilcock did not "conflate access to the justice system with access to full representation by a lawyer."[114] However some services could be deemed necessary to ensure that an individual that is entitled to a legal remedy is certain to obtain it. As Roach and Sossin point out, "the focus of the public interest bar has shifted from the right to government-funded legal representation to other access to justice initiatives."[115] A blanket right to legal representation does not truly make a

---

[110] Kent Roach & Lorne Sossin, "Access to Justice and Beyond" (2010) 60:2 University of Toronto Law Journal 373 at 383.
[111] *Ibid.*
[112] *Supra* note 72 at 97.
[113] *Ibid* at 122.
[114] *Supra* note 110 at 383.
[115] *Ibid.*

lot of sense, as an overuse of resources would appear inevitable. Thus, more scholars are considering what services are truly necessary to ensure effective access for all.

Michael Trebilcock has for years argued for economical solutions to the access to justice crisis, noting that the "'only normative reference point that is defensible is a consumer welfare perspective.'"[116] Forrest Mosten pointed out, "market demand rather than societal policy has been the source of [the] growth of new service products and opportunities to improve legal access."[117] He introduced us to the concept of "unbundling," also known as "discrete task representation or alternatives to full-time representation."[118] In their analysis of Trebilcock's contributions, Roach and Sossin recommend this initiative.[119] Alongside Samreen Beg, Sossin analyzes it further, defining the service as one "of limited scope for which a lawyer, paralegal, or legal service provider is retained…without the general expectation that the lawyer represent the client generally."[120] Endorsement of this idea is on the rise in Canada.[121] It is important not to take our foot off the gas and to consider further just how much the unbundling concept can improve access to justice.

Unbundling has the potential to focus legal services in a much more needs-based way, managing the provision of services according to what is necessary to ensure effective access. Beg and Sossin propose three service delivery models, that are not mutually exclusive, which could each be put in place: general counselling and legal advice; limited court appearances; and preparing documents.[122] Mosten suggests that the limited scope lawyer may research, draft, or

---

[116] *Ibid* at 386.
[117] Forrest S. Mosten, "Unbundling Legal Services; A Key Component in the Future of Access to Justice" (1997) 38:1 Law Office Economics and Management 4 at 12.
[118] *Ibid* at 4.
[119] *Supra* note 110 at 387.
[120] Samreen Beg & Lorne Sossin, "Should Legal Services be Unbundled," in Anthony Duggan, Lorne Sossin & Michael Trebilcock, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press 2012) 193 at 195.
[121] *Ibid*.
[122] *Ibid* at 208-12.

negotiate, potentially "convert[ing] to full representation as the attorney of record in court appearances or continue coaching pro se litigants how to do it on their own."[123] The initiative could come in many forms but the common purpose is the provision of timely, necessary services, in order to ensure effective access. The concept is clearly resource-sensitive and it would be wise for the government and the legal profession to move to more widespread use of it.

These reforms would be accompanied by fresh concerns requiring regulation, but to Beg and Sossin, "the potential benefits outweigh the potential downsides" and unbundling "represents a significant and positive step toward a more accessible justice system."[124] It is an initiative based on "consumer" need, not unlike our universal healthcare services. It is difficult to argue that all, or even a large portion of services, should be granted to citizens, but a true right to a remedy is unlikely to leave room for any court appearance fees provided a litigant is ultimately entitled to a legal remedy.

VI. CONCLUSION

When former Chief Justice Brian Dickson spoke to the University of Windsor Faculty of Law in 1988, he focused on "the lawyer's ethical obligation with regard to access to justice."[125] To him, a career in law "should never be viewed as a mere business or means to gain a livelihood […] The admittance to and continuance in the practice of law implies on the part of the lawyer a basic commitment to the concept of equal justice for all."[126] It falls upon lawyers and judges to ensure there is effective access to the legal system so that the rule of law is constant, never

[123] *Supra* note 117 at 6 & 7.
[124] *Supra* note 120 at 221.
[125] *Supra* note 6 at 1.
[126] *Ibid* at 4.

failing to provide an individual with their rightful remedy. To no one will we sell justice by allowing the resources of litigants to have any impact on the quality, or even the provision, of a remedy. But resources remain the ultimate question. It is clear that the constitutional mandate represented by the rule of law demands that we ensure *effective* access to justice, no matter the cost. That does not mean we cannot be efficient about it. Ultimately, access to justice "is a matter of political will"[127] and we witnessed what such a will can accomplish in the institution of universal healthcare. The very principle upon which our system of government is founded, the rule of law, demands that we solve this problem for good. When just one person is unable to access justice, the rule of law fails, and so have we in our duty toward it.

[127] *Supra* note 110 at 392.