A Matter of Integrity: Rule of Law, the *Remuneration Reference*, and Access to Justice

by

C. Christian Morey

A thesis submitted in conformity with the requirements for the degree of Master of Laws (LL.M.)

Graduate Department of the Faculty of Law

University of Toronto

© Copyright by C. Christian Morey (2014)
A Matter of Integrity: 
Rule of Law, the *Remuneration Reference*, and Access to Justice

Christian Morey  
Master of Laws (LL.M.)  
Faculty of Law  
University of Toronto  
2014

**Abstract**

Under what circumstances should unwritten constitutional principles affect the validity of ordinary legislation? In this paper, the author reviews the jurisprudence of the Supreme Court of Canada in cases applying the unwritten constitutional principles of judicial independence and the rule of law. Based on this review, the author criticizes the Court's decision to use unwritten principles to invalidate ordinary legislation in a case relating to the remuneration of judges, but not in cases relating to “access to justice”. The author argues that the courts should recognize and enforce a negative duty on the part of government to avoid imposing barriers to access to justice, understood as both access to the courts and access to legal services.
ACKNOWLEDGEMENTS

I would like to thank my thesis supervisor, Professor David Dyzenhaus, for his invaluable insights and feedback. In addition, I would like to thank the members of the University of Toronto Faculty of Law for the opportunity to learn and develop my understanding of these important issues over the course of the past year.

This paper is dedicated to my family, with love and gratitude, for all their encouragement and support. In particular, I would like to thank my grandparents, Inacio Antonio Francisco De Assis Lopes and Hipolita Christine Lopes, for their inspiration and example.

C. Christian Morey, August 2014
# TABLE OF CONTENTS

Abstract.................................................................................................................................................. ii

Acknowledgements................................................................................................................................... iii

Table of Contents................................................................................................................................... iv

I. Introduction........................................................................................................................................ 1

II. The Jurisprudence of the Supreme Court...................................................................................... 4
   A. Access to Justice and the Charter................................................................................................. 4
      1. Negative Liberty.......................................................................................................................... 4
      2. Constitutional Litigation............................................................................................................ 7
      3. In Search of a General Right of Access..................................................................................... 10
      1. Definition...................................................................................................................................... 11
      2. Effect........................................................................................................................................... 12
      3. Rule of Law and Access to Justice............................................................................................ 15

III. Rule of Law and Judicial Independence........................................................................................ 19
   A. Analysis of Cases........................................................................................................................... 19
   B. The Rule of Law “Spectrum”......................................................................................................... 23
      1. Overview..................................................................................................................................... 23
      2. Major Rule of Law Theories ....................................................................................................... 23
   C. Judicial Independence as a Component of Rule of Law.............................................................. 26

IV. Formal and Substantive Theories................................................................................................... 29
   A. Definitions....................................................................................................................................... 29
   B. Locating the Court's Theory on the Rule of Law “Spectrum”.................................................... 31
   C. Consequences of a Strictly Formal Theory.................................................................................... 33
   D. Consequences of a Substantive Approach.................................................................................... 34
V. Applications................................................................................................................................... 36

A. Integrity of the Judicial System.............................................................................................................. 36
   1. Unlitigated Cases................................................................................................................................. 36
   2. Unrepresented Litigants.................................................................................................................. 38

B. Access to Justice as a Negative Duty....................................................................................................... 38

C. Opportunity: Vilardell v Dunham........................................................................................................... 41

D. Further Applications................................................................................................................................. 42
   1. Criticism of the Negative Duty Approach.......................................................................................... 42
   2. Regulatory Barriers............................................................................................................................. 44

VI. Conclusion........................................................................................................................................... 46
I. Introduction

Does the principle of rule of law require some degree of access to justice? From a theoretical perspective, this question lends itself to wide variety of answers. To begin with, the rule of law is an “essentially contested” concept that lends itself to any number of possible interpretations.¹ These range in content from “thin”, formal theories that insist only on the minimal properties that law must have in order to guide behaviour, to “thick” theories that interpret the rule of law as incorporating substantive principles such as democracy and the protection of human rights.² Similarly, “access to justice” might be thought to mean anything from a simple right of physical access to the courts to a more expansive definition that would incorporate the alleviation of psychological and social barriers to accessing legal services.³

In recent years, the often prohibitive cost of accessing legal services has been the subject of much concern. Given the complexity of many legal disputes, litigants who do not have access to legal representation generally find themselves at a disadvantage. In a speech delivered in 2007, Chief Justice Beverley McLachlin characterized this problem as follows:

The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical. Unfortunately, many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system. Some of them decide to become their own lawyers. Our courtrooms today are filled with litigants who are not represented by counsel, trying to navigate the sometimes complex demands of law and procedure. Others simply give up. Recently, the Chief Justice of Ontario stated that access to justice is the most important issue facing the legal system.⁴

Although the express terms of the Canadian Charter of Rights and Freedoms⁵ have been interpreted to guarantee access to legal aid in specific circumstances, the Charter does not include a general right of access to justice. Nevertheless, the Supreme Court of Canada has indicated that a general right of physical access to the courts is protected by the unwritten constitutional principle of the

³ Patricia Hughes, “Supreme Court of Canada Constitutional Cases 2007: Defining Access to Justice” (2008), 42 SCLR (2d) 517 (QL), at paras 1,3.
⁵ Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].
The principle of rule of law has been recognized as having legal effect in Canada since at least 1959, and is incorporated into the text of the preamble to the Charter. However, there is some debate as to what legal weight ought to be assigned to the rule of law and other unwritten constitutional principles. In particular, the jurisprudence in this area does not support the claim that anything beyond a bare right of physical access to the courts is required by the rule of law.

The aim of this paper is to provide a critique of the Supreme Court's jurisprudence regarding the principle of the rule of law, with specific application to the question of whether and to what extent the rule of law should be understood as guaranteeing some degree of access to justice. In particular, I will contrast the reasoning applied in the Court's access to justice cases with the Court's statements regarding the importance of the unwritten principle of judicial independence. My claim is that the Court's approach to where and when unwritten principles may be used to invalidate ordinary legislation is internally inconsistent, in that greater weight is assigned to the principle of judicial independence than to the principle of rule of law. As I will show, judicial independence is traditionally understood as a component of rule of law. I therefore claim that the arguments used to justify the recognition and enforcement of an unwritten constitutional principle of judicial independence also serve to justify the protection of at least some degree of access to justice; in particular, I will argue that the courts have a legitimate mandate to enforce a negative duty on the legislative branch to avoid imposing barriers to access to justice through ordinary legislation.

This paper consists of six Parts, including this introduction and a brief conclusion. In Part II, I will review the Court's jurisprudence on the subjects of rule of law, judicial independence, and access to justice. In Part III, I will show that the Court's approach to cases involving judicial independence is inconsistent with its approach to the interpretation of the principle of rule of law. In Part IV, I will argue that the Court's protection of judges' financial security is to be explained as a substantive decision about the importance of judicial independence relative to other competing principles; in particular, I will consider and reject the possibility that the Court's decisions may be justified in formal, value-neutral terms. Finally, in Part V, I will argue that funding decisions relating to access to justice, including both access to the courts and access to legal services, affect the integrity of the justice system in a manner that is incompatible with the rule of law.
analogous to decisions relating to the remuneration of judges, and should be subject to a similar degree of judicial oversight.
II. The Jurisprudence of the Supreme Court

A. Access to Justice and the Charter

A full review of the many problems relating to delivery of legal aid is beyond the scope of this paper. However, the primary concern relating to these programs is that they are unable to provide coverage to all those who require it. To begin with, the maximum level of annual income that an individual may have in order to qualify for legal aid is quite low – in Ontario, for example, the cutoff to qualify for a legal aid certificate is $12,500 per year, with contribution agreements required for those making more than $10,500 per year. In addition, since the 1990s, funding for legal aid programs has been capped at a level insufficient to meet the demand for everyone who would otherwise qualify. The result is that many prospective litigants are unable to access legal services, particularly in the areas of civil and administrative law. Even in the realm of criminal law, many accused are required to proceed without the benefit of counsel.

Due to the perceived inadequacy of these programs, various court challenges have been launched with the aim of locating a constitutional right of minimal access to legal services. The success of these actions has depended in large part on the type of legal proceeding underlying the challenge. First, in the area of criminal law, the courts have recognized that access to counsel may be constitutionally required, particularly where liberty and security of the person are at stake. Second, the courts have adopted a fairly narrow test for deciding when to require funding for constitutional challenges that would otherwise go unlitigated. Finally, barring a few exceptions, challenges asserting a right to counsel in areas of civil and administrative law have generally met with failure.

1. Negative Liberty

The Charter contains a number of express provisions that have implications for what might be called “negative liberty”; that is, defences against the state's exercise of power over ordinary citizens.

---


10 Rankin, supra note 8, at 108.

11 Ibid.

12 Ibid.

13 David Dyzenhaus, "Normative Justifications for the Provision of Legal Aid" in Report of the Ontario Legal Aid Review:
Section 10(b) provides that “[e]veryone has the right on arrest or detention... to retain and instruct counsel without delay and to be informed of that right.” Section 11(d) provides that persons charged with an offense have a right to be presumed innocent “until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”. Finally, s. 7 provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The cases in which these sections have been read as requiring access to legal services are primarily concentrated in the area of criminal law, with a few notable exceptions.

The claim that existing Legal Aid provisions may in some cases be found to be constitutionally inadequate was most strongly supported in the pivotal case of *R v Rowbotham*. In that case, the Ontario Court of Appeal was charged with hearing an appeal from a case with a number of co-accused. One of the defendants had been denied funds from the province's legal aid program on the grounds that her income exceeded the maximum cutoff, and had been forced to represent herself at trial. The Court observed that, while the appellant's income would have allowed her to hire legal representation for a trial lasting a few weeks, the proceedings were in fact drawn out for nearly a full year. In canvassing the history of the “right to counsel” in English and Canadian law, the Court observed that the right had only been recognized since 1841, and then had been read only as guaranteeing that persons should be guaranteed the right to hire counsel at their own expense. By contrast, the Court cited a number of American cases in which the right to be provided with counsel had been found to follow from the 6th and 14th amendments to the American Constitution; this right was deemed to be triggered “whenever liberty is at stake”.

Ultimately, the Court found that ss. 7 and 11(d) of the *Charter* required that the accused be granted a new trial with appropriate representation. In so doing, the Court provided the basis for what is now known as a Rowbotham application, which has significantly altered the nature of state funding for criminal proceedings. *Rowbotham* and its successor cases establish that, where an accused faces a “serious and complex” trial and does not qualify for legal aid, or where the funds available through

---

* A Blueprint for Publicly Funded Legal Services (Toronto: Queen's Printer, 1997), at 483; however, see note 206, infra.
14 [1988] OJ No 271, 1988 CanLII 147 (ON CA) [Rowbotham cited to CanLII]. The summary of *Rowbotham* given here is adapted from an earlier unpublished paper.
15 Ibid, at para 145
16 Ibid, at para 147.
legal aid are not sufficient to support a defence that adequately addresses the issues at stake, courts are empowered to order a stay of proceedings unless and until the Attorney-General takes appropriate steps to fund the defence.\footnote{19 See generally Andrew Nathanson, “Rowbotham Applications: Leveling the Playing Field” (unpublished), presented to The Advocates’ Club, November 17, 2003; available online at <http://members.shaw.ca/jack.wilson/files/papers/RowbothamApplications.pdf>.


20 [1990] 1 SCR 190 [Brydges].
21 Ibid., at 209.
22 Ibid., at 215.
23 [1994] 3 SCR 236 [Prosper].
24 Ibid., per Lamer J, at 259.
26 See also Trebilcock, supra note 8, at 53.
27 [1999] 3 SCR 46 [G.J.].

The relationship between financial hardship and the right to counsel guaranteed in s. 10(b) was later considered by the Supreme Court in the case of \textit{R v Brydges}.\footnote{20 [1990] 1 SCR 190 [Brydges].} In that case, a person being interviewed by police expressed concern that he would not be able to afford a lawyer, and subsequently did not pursue his right to legal counsel. At trial, the judge of first instance held that the police had a duty to inform the accused of the availability of a Legal Aid lawyer, and that evidence obtained from the accused without the benefit of counsel should be excluded. The Supreme Court sided with the trial judge on this point, and held that the police had a duty to inform the accused that his right to counsel was not “contingent on affordability”\footnote{21 Ibid., at 209.}. In addition, the reasons provided by Lamer J. also suggested that, under the \textit{Charter}, the right to retain counsel should be interpreted to include “the right to have access to counsel free of charge where the accused meets certain financial criteria set up by the provincial Legal Aid plan, and the right to have access to immediate, although temporary, advice from duty counsel irrespective of financial status.”\footnote{22 Ibid., at 215.} However, these remarks were later qualified in the case of \textit{R v Prosper}.\footnote{23 [1994] 3 SCR 236 [Prosper].} In that case, a majority of the Court held that, while the police are obligated to inform accused persons of the availability of duty counsel and Legal Aid where they exist, the availability of such services is not constitutionally guaranteed in all circumstances.\footnote{24 Ibid., per Lamer J, at 259.}

Because Rowbotham applications are premised on a possible violation of the liberty interest guaranteed by s. 7, these applications are generally restricted to the context of criminal law. Moreover, such orders are not available in all criminal cases; for example, \textit{R v Rain}\footnote{25 (1998), 223 AR 359, 68 Alta L R (3d) 371 (CA).} indicates that such orders may be restricted to cases in which the accused is at risk of imprisonment.\footnote{26 See also Trebilcock, supra note 8, at 53.} However, s. 7 also has some application outside of the criminal context. In \textit{New Brunswick (Minister of Health) v G.J.}\footnote{27 [1999] 3 SCR 46 [G.J.].}, the Supreme Court held that an order depriving a parent of the custody of their child and placing the child...
in the care of the state would constitute “a serious interference with the psychological integrity of the parent”, contrary to s. 7's guarantee of security of the person. As such, the Court held that an impecunious parent contesting such an order would be entitled to funded legal counsel, provided that the hearing were “sufficiently complex” as to require the assistance of a lawyer to ensure a fair hearing. In addition, Singh v Minister of Employment and Immigration stands for the proposition that access to legal counsel may be required in refugee hearings, in which the applicant's security of the person would be threatened in the event of deportation.

2. Constitutional Litigation

In addition to the provisions of the Charter that deal with negative liberty, the Constitution Act, 1982 also contains provisions that require congruence between the terms of the Constitution and the actions of government. Section 24(2) provides that “[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances”. In addition, s. 52 of the Constitution Act, 1982 provides that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”. Taken together, these provisions grant to the courts a power to strike down ordinary legislation that does not conform to the requirements of the Charter, and allow ordinary citizens to initiate proceedings for the purpose of obtaining a declaration of invalidity. However, this right would be ineffective if those affected by unconstitutional legislation were unable to bring their cases forward due to lack of funds.

From the inception of the Charter until 2006, the federal government administered a Court Challenges Program, which was designed to facilitate the litigation of Charter cases. However, the courts have been called upon to consider whether the government may be subject to any additional obligation to fund the litigation of cases that are brought in the public interest. One important decision on this subject was provided in British Columbia (Minister of Forests) v Okanagan Indian Band. The case arose when the Crown in right of British Columbia sought to enforce a stop-work order against members of the Okanagan Indian Band, who had been harvesting timber on Crown land. The Band

29 Ibid, at para 79.
30 [1985] SCR 177.
31 Bhabha, supra note 8, at para 3.
32 British Columbia (Minister of Forests) v Okanagan Indian Band, 2003 SCC 71, [2003] 3 SCR 371 [Okanagan]. The summary of Okanagan given here is adapted from an earlier unpublished paper.
claimed that it had aboriginal title to the area, but did not have the financial means to fund a full hearing into the merits of their claim. For this reason, the Band applied for an award of costs in advance of the case in order to allow them to cover the expenses that a full trial would require.

After losing at trial, the Band's claim for an award of advance costs was upheld at the Court of Appeal and the Supreme Court. In his majority reasons, Justice Lebel concluded that an award of advance costs may be justified when an applicant meets the following criteria:

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 -- in short, the litigation would be unable to proceed if the order were not made.

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.\(^{33}\)

Justice Lebel described these conditions and being necessary, but not necessarily sufficient, for the purpose of justifying an award of costs; in particular, he specified that such awards were to be awarded only at the discretion of the court, and then only in a manner tailored to the needs and circumstances of the case.\(^{34}\)

Despite this ruling, the doctrine of advance costs has been applied extremely rarely in Canadian jurisprudence. The reasons for this limited approach are set out in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*.\(^{35}\) This was the second case initiated by Little Sisters Book and Art Emporium claiming discriminatory treatment by Customs Canada in determining whether imported materials were “obscene” within the meaning of s. 163(8) of the *Criminal Code*. The bookstore had previously been successful in striking down a reverse-onus provision in the *Code* that required them to prove that their seized materials were not obscene. However, a majority of the Supreme Court in the first action declined to strike down the obscenity provisions in their entirety or to issue an injunction against the seizure of further materials by Canada Customs, noting that the Court's findings “should provide the appellants with a solid platform from

\(^{33}\) *Ibid*, para 40.

\(^{34}\) *Ibid*, at para 41.

\(^{35}\) [2007] SCJ No 2, 2007 SCC 2 [*Little Sisters No. 2*].
which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary.”

Little Sisters’ conflicts with customs did in fact continue, and in 2004 the store launched a new case alleging continued practices of bias. At trial, the store successfully applied for an award of advance costs. However, a majority of the Supreme Court found that an advance costs award was not justified in this case. This conclusion was reached by two different routes. Bastarache and Lebel JJ., writing for five members of the Court, based their decision on a novel reading of the second step of the Okanagan test; in their view, the requirement that the case should possess prima facie merit was to be read in the context of the words “interests of justice”, as that term was used in Okanagan:

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. 37

According to the learned justices, the “interests of justice” will be impaired only in rare and exceptional cases, of which this was not one. 38 By contrast, McLachlin J. would have revised the third Okanagan criterion by requiring courts to consider whether “special circumstances” exist in the case under consideration. 39 In finding that the matter at issue did not meet this criterion, Justice McLachlin relied on the premise that Okanagan “was not intended to provide a general funding mechanism for important cases.” 40

It is worth noting that Okanagan Indian Band was decided before the Court developed its framework regarding the duty to consult and accommodate with First Nations groups in Haida Nation v. British Columbia (Minister of Forests) 41; had it been otherwise, the case might well have been resolved through different means. In any case, from 2004 to 2011, advance costs awards were sustained in only 3 other cases, all involving aboriginal law (of these, only one was decided after Little Sisters No. 2). 42 However, following the cancellation of the Court Challenges Program in 2006, an advance

37 Okanagan, supra note 32, at para 40.
38 Little Sisters No. 2, supra note 35, at para 51.
40 Ibid, at para 94.
41 [2004] 3 SCR 511 [Haida Nation].
42 Tsilhqot’in Nation v Canada (Attorney General), sub nom. Nemaiah Valley Indian Band v Riverside Forest Products Ltd., 2001 BCSC 1641, [2001] BCJ No 2484, aff’d 2002 BCCA 434, [2002] BCJ No 1652; Keewatin v Ontario (Minister of Natural Resources), [2006] OJ No 3418; Hagwilget Indian Band v Canada (Minister of Indian Affairs and Northern Development), [2008] FCJ No 723, 2008 FC 574. Note however that there have also in this time been interim costs awards granted under the previously existing headings of family law (see e.g. Koch (Guardian ad litem of) v Koch...
costs award was granted to a defendant who sought to challenge a traffic ticket on the grounds that it had not been issued in French. The Supreme Court upheld the award, marking the first time such an award had been granted to a non-aboriginal litigant. Nevertheless, the Court in its reasons maintained that such awards should be granted only in exceptional circumstances.

3. In Search of a General Right of Access

Apart from cases involving personal liberty and/or the public interest, there remains the question of what protection, if any, is afforded to the right to access legal services in general. Given that the problems arising from a lack of access to justice are essentially problems of inequality, in that barriers to access have a disproportionate effect on lower-income litigants, one obvious place to ground such a right would be in s. 15 of the Charter. However, while s. 15 provides a guarantee that no person will be the subject of unequal treatment by the state by reason of membership in an enumerated or analogous class or persons, the courts have previously held that socioeconomic status does not constitute an analogous ground of discrimination for the purposes of s. 15. Thus, in Polewsky v. Home Hardware Stores Ltd., the Ontario Superior Court of Justice held that hearing fees in small claims court did not offend s. 15. Similarly, in Pleau v. Canada (Attorney General), another case challenging the constitutionality of hearing fees, the Supreme Court of Nova Scotia held that prospective litigants do not constitute a protected class of persons under s. 15. Nevertheless, the courts in both Polewsky and Pleau found the hearing fees in dispute to be unconstitutional in whole or in part by reason of the fact that they served to limit access to the courts. Both cases relied heavily on the premise that access to the courts is protected as an aspect of the constitutional principle of the rule of law.

---

43 R v Caron, 2011 SCC 5.
44 Ibid, at para 5.
45 [2003] OJ No 2908 [Polewsky].
46 1999 NSCA 159 [Pleau].
B. The Rule of Law: An “Unwritten Constitutional Principle”

1. Definition

Although the phrase “rule of law” appears in the preamble to the Charter, the Supreme Court had previously recognized the rule of law as an unwritten constitutional principle as early as 1959, in the case of Roncarelli v Duplessis. While Roncarelli mentions the rule of law only in passing, the definition and origins of the principle were more fully explored in the Reference re Resolution to Amend the Constitution. In that case, the Court recognized that the rule of law has constitutional force in Canada in light of the intention that Canada's Constitution should be “similar in principle to that of the United Kingdom”, as set out in the preamble to the Constitution Act, 1867. The Court also defined the rule of law as “a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.”

In the Reference re Manitoba Language Rights (Man.), the Court cited Joseph Raz for the proposition that "'The rule of law' means literally what it says: the rule of the law ... It has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it". The Court in that case held that the rule of law requires, at a minimum, that law should be supreme over government as well as individuals, and that there must exist “an actual order of positive laws which preserves and embodies the more general principle of normative order.” Later, in the Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, the Court added the requirement that "the exercise of all public power must find its ultimate source in a legal rule". These last three principles are cited in later cases as the core components of the rule of law.

47 Supra note 7.
52 Ibid, at para 60.
53 [1997] SCJ No. 75 [Remuneration Reference]
55 See e.g. Reference re Secession of Quebec, [1998] 2 SCR 217 [Secession Reference], at para 71, and British Columbia v Imperial Tobacco Ltd, 2005 SCC 49 [Imperial Tobacco], at para 58.
2. Effect

The question of whether unwritten principles could be used to strike down ordinary legislation was answered shortly after the adoption of the Charter. In the Remuneration Reference, the Court considered provincial acts and regulations enacted in the provinces of Prince Edward Island, Alberta, and Manitoba, some of which would have had the effect of lowering judges' salaries. In the opinion of the majority (per Lamer CJ), this aspect of the impugned legislation called into question to financial security of the judges affected, which implied that the legislation infringed on the principle of judicial independence.\(^56\)

The independence of superior court judges is guaranteed under terms of ss. 96-100 of the Constitution Act, 1867. In addition, the requirement that accused persons be guaranteed a “a fair and public hearing by an independent and impartial tribunal” under s. 11(d) of the Charter requires that independence be guaranteed to provincial court judges empowered to decide criminal cases. However, these guarantees leave open the possibility that provincial court judges without jurisdiction to preside over criminal hearings might not be entitled to the same degree of security.\(^57\)

In light of this issue, a majority of the Court found that judicial independence constitutes an unwritten constitutional principle that applied to all judges in Canada. As with the principle of rule of law, the basis for the recognition of this principle is the fact that Canada's Constitution was intended to be “similar in principle to that of the United Kingdom”\(^58\). In particular, the majority held that the preamble to the Constitution Act “invites the use of... organizing principles to fill out gaps in the express terms of the constitutional scheme.”\(^59\) On this basis, the majority held that judges' salaries could be reduced only upon the recommendation of an independently constituted commission, and that the enactments that had been passed without the advice of such a commission were unconstitutional.\(^60\)

LaForest J., dissenting in part, would have held that the express terms of the Constitution Act, 1867 and the Charter provided a sufficient guarantee of judicial independence, and that an independent commission was not required to ensure an independent tribunal within the meaning of s. 11(d).\(^61\)

---

\(^56\) Remuneration Reference, supra note 53, at para 197.
\(^57\) Ibid, at para 86.
\(^58\) Ibid, at para 94.
\(^59\) Ibid, at para 95.
\(^60\) Ibid, at para 200.
\(^61\) Ibid, at paras 296-7.
The Manitoba Language Reference later established that the rule of law might be used to affect the validity of ordinary legislation, albeit temporarily. The Court in that case upheld a challenge to legislation enacted in the province of Manitoba on the grounds that it had not been enacted in both English and French, contrary to the guarantee of bilingualism set out in s. 23 of the Manitoba Act, 1870. However, given that the legislation affected comprised all legislation passed in the province since its creation, the Court observed that to simply declare all the impugned legislation to be invalid would leave the province without any governing law in all areas falling under the province's jurisdiction. In order to avoid this result, the Court invoked the principle of rule of law to justify a novel remedy whereby the Court declaration of invalidity would be suspended for a period of time sufficient to allow the provincial legislature to re-enact its legislation in both languages.

The normative force of unwritten principles would subsequently be given a much more narrow reading in British Columbia v. Imperial Tobacco Ltd. This case is noteworthy in that it provides what are arguably the Court's most detailed reasons on the question of what circumstances may justify the application of unwritten principles, including the rule of law, as a means of invalidating legislation.

The case arose as a result of a constitutional challenge brought by tobacco manufacturers in the province of British Columbia. The province had sought to recover the cost of health care services provided in the treatment of illnesses contracted as a result of smoking tobacco by creating a new cause of action through legislation. The cause of action was created in such a way as to overrule certain common-law principles that would otherwise have made it difficult for the province to succeed in recovering damages from the manufacturers in tort. One of the most important elements of the legislation was that the cause of action was deemed to be applicable to acts committed by tobacco manufacturers prior to the passage of the legislation; in other words, the statute had retroactive effect. The affected companies argued that the legislation should be held invalid on the grounds that it was incompatible with the rule of law. In addition to the issue of retroactivity, the manufacturers argued that

---

62 Supra note 50.
63 RSC 1970, App II.
64 Manitoba Language Reference, supra note 50, at para 109.
65 Supra note 55.
66 Tobacco Damages and Health Care Costs Recovery Act, SBC 2000, c 30, s 2.
67 Ibid. Section 10 of the Act specifically states that it has retroactive effect. For purposes of clarity, it should be noted that there exists a technical distinction between retroactive legislation (legislation that operates prior to its enactment) and retrospective legislation (legislation that affects the future application of the law as it relates to past events). However, both types of law are subject to the same theoretical problems: see Elizabeth Edinger, “Retrospectivity in Law”, (1995) 29 UBC L Rev 5, at paras 11-12. In this paper, I will refer to legislation that is not wholly prospective as “retroactive” without any intended loss of generality.
the legislation violated the rule of law in the sense that it was not general (it targeted tobacco manufacturers specifically), that it denied the manufacturers the right to an impartial hearing (in that it altered the common-law burden of proof applicable to the cause of action), and that it conferred special privileges on the government (in that it required judges to make a rebuttable presumption in the government's favour upon the finding of certain facts). 68

The result in Imperial Tobacco is perhaps less important than the reasoning applied to derive it. In particular, the Supreme Court's reasons may be usefully contrasted with those of the British Columbia Court of Appeal, who also would have upheld the legislation as constitutional. 69 A majority of the Court of Appeal relied on the Supreme Court's previous decision in Babcock v Canada (Attorney General) in finding that, while unwritten constitutional principles may in some cases serve to invalidate legislation, these principles must be balanced against other competing principles. 70 In particular, the principle of Parliamentary sovereignty holds that Parliament is presumptively entitled to legislate as it sees fit, subject only to the constraints imposed by the Constitution itself. 71 In applying this observation, the Court of Appeal found that there was “no real infringement” of the aspects of rule of law identified by the manufacturers, with the exception of the element of retroactivity. 72 On that point, the Court held that the balance was “more even”, but that it should fall in favour of upholding the legislation in light of the fact that liability would attach only to the commission of a “tobacco-related wrong” that would have constituted a breach of duty under the law as it was at the time that it was committed. 73

In contrast to this approach, the Supreme Court's reasons take the stronger view that “[e]xcept in respect of criminal law... there is no requirement of legislative prospectivity embodied in the rule of law”. 74 In support of this view, the Court noted that the principles that the tobacco manufacturers sought to have protected were more general versions of rights already entrenched in the Charter; in particular, section 11(g) of the Charter guarantees that no one will be convicted of a criminal offence on a retroactive basis. To argue for the expanded version of these rights, the Court held, would be to make the written text of the Charter “redundant”. 75 In addition, the Court noted that retroactivity is

---

68 Imperial Tobacco, supra note 55, at para 63.
69 British Columbia v Imperial Tobacco Ltd, 2004 BCCA 269 [Imperial Tobacco (CA)].
71 Ibid, at para 111.
72 Ibid, at para 114.
73 Ibid.
74 Imperial Tobacco, supra note 55, at para 69.
75 Ibid, at para 65.
already present in the normal operation of the common law, in that the reasoning applied in deciding a novel case is not available to the parties prior to the decision, but is nevertheless determinative of the dispute between them.\textsuperscript{76}

3. **Rule of Law and Access to Justice**

The relationship between the principles of rule of law and access to justice was first explored in *British Columbia Government Employees' Union v. British Columbia (Attorney General)*\textsuperscript{77}. The case arose out of a labour dispute between the province of British Columbia and its public employees, whose number included workers employed by the court system. As part of its strike action, the applicant labour union had briefly set up picket lines around the courthouses within the province, and requested that persons wishing to cross the picket line obtain a “picket pass” from the strike organizers in order to indicate support for the strike.\textsuperscript{78} In response, the Chief Justice of British Columbia issued an *ex parte* injunction prohibiting any picketing around the entrances to the courts. The union challenged the injunction, and the matter was appealed as far as the Supreme Court of Canada. In finding that the Chief Justice had the constitutional authority to issue the injunction, the Supreme Court affirmed the decisions of the lower courts that the injunction was authorized by reason of being required to uphold the rule of law. In support of this finding, the Court observed that “[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice”.\textsuperscript{79} In addition, the Court adopted the following passage from the reasons of the British Columbia Court of Appeal:

\begin{quote}
We have no doubt that the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. It is the preservation of that right which with which we are concerned in this case. Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court.\textsuperscript{80}
\end{quote}

The reasoning in *BCGEU* would later be applied in *Polewsky*\textsuperscript{81} and *Pleau*\textsuperscript{82} to justify the creation of new exemptions for court fees in the Small Claims Court of Ontario and in the Supreme

\begin{footnotes}

\textsuperscript{76} *Ibid*, at para 72.
\textsuperscript{77} Supra note 6.
\textsuperscript{78} *Ibid*, at para 2.
\textsuperscript{79} *Ibid*, at para 25.
\textsuperscript{80} *Ibid*, at para 26.
\textsuperscript{81} Supra note 45.
\textsuperscript{82} Supra note 46.
\end{footnotes}
Court and Court of Appeal of Nova Scotia, respectively. However, in \textit{British Columbia (Attorney General) v Christie}, the Court would significantly narrow the scope of its earlier remarks.

In 1993, the government of British Columbia passed a law imposing a 7\% tax on legal services provided within the province (this was in fact a slightly revised version of a similar law passed in 1992, which had been struck down as being unconstitutionally vague). The government's stated motive for imposing the tax was to create revenue to fund the province's legal aid program; however, as the tax monies were collected under general revenue, this goal could not be shown to be realized.

The constitutionality of the revised Act was challenged in \textit{John Carten Personal Law Corp. v British Columbia (Attorney General)}. The plaintiff in \textit{Carten} argued that the tax was unconstitutional by reason of inhibiting access to justice. The case was dismissed on the grounds that the plaintiff had failed to show that any person had in fact been denied access to legal services as a result of the tax; however, the majority's reasons indicated that, if the plaintiff had been able to lead such evidence, the tax might have been held to constitute an unconstitutional infringement of the principle of access to justice.

The cause was then taken up once again in \textit{Christie}. The plaintiff in this case, Dugald Christie, provided legal services to low income clients in Vancouver. Many of these clients were unable to pay for the services that Christie provided; however, due to the constraints of the Act, Christie was required to pay tax on the amount that he had charged, but not collected. On the basis of this evidence, Christie was able to lead evidence that he was unable to continue to provide legal services to low income clients, and that certain specific persons who would otherwise have received his services had been deprived of access to legal counsel as a result. At trial, the judge of first instance accepted this evidence as proof that the tax had deprived at least some people of access to justice in the form of legal services, and held that the tax was unconstitutional as a result.

The trial judge's findings were subsequently affirmed by a majority of the Court of Appeal. In particular, the majority accepted the trial judge's characterization of the issue to be tried; the issue, according to the majority, “is not whether the government must provide and pay for legal counsel in

\begin{itemize}
\item \textit{2007 SCC 21 [Christie]}
\item \textit{Social Service Tax Amendment Act (No. 2), 1993}, SBC c 24.
\item \textit{Christie v British Columbia (Attorney General), 2005 BCCA 631 [Christie (CA)]}, at para 31.
\item \textit{Ibid}, at para 36.
\item \textit{(1997) 40 BCLR (3d) 181 [Carten].}
\item \textit{Supra note 85, at para 35.}
\end{itemize}
any matter requiring legal services, but whether the state can impose an additional financial burden on those seeking to obtain legal services.” On this basis, the majority would have struck down the tax as an unconstitutional infringement of the rule of law to the extent that it applied to “legal services related to the determination of rights and obligations by courts of law or independent administrative tribunals.”

In contrast to this view, the Supreme Court held that the relevant question was whether there exists a general right, protected by the Constitution, to have access to legal counsel in any court case. The Court went on to conclude that this right, if recognized, would require the creation of a “constitutionally mandated legal aid scheme for virtually all legal proceedings”. Noting that this result would be financially onerous, the Court found that the rule of law does not include a general right to counsel in all proceedings, and upheld the tax on legal services as constitutional. The Supreme Court's reasons do not make clear why they found it preferable to frame the issue in such a broad manner, as compared to the approach favoured by the Court of Appeal; in particular, the Supreme Court's reasons do not distinguish between a positive duty on the government to guarantee access to legal services through a universal legal aid scheme, and a negative duty to forbear from enacting legislation that impairs access to the courts.

In 2008, the Canadian Bar Association launched a challenge seeking to have the British Columbia Legal Aid program struck down as unconstitutional by reason of its providing inadequate access to legal services for impoverished persons. This case was dismissed on the basis that the Bar Association lacked standing to bring the case forward, and that their petition did not disclose a justiciable cause of action; in particular, the British Columbia Court of Appeal held that the precedent in Christie served to rule out the possibility of a systemic claim for greater access to legal representation on the basis of the rule of law.

Finally, and more promisingly, in the recent case of Vilardell v Dunham, the British Columbia Court of Appeal held that the province's rules for providing exemptions for the imposition of hearing...
fees were unconstitutional by reason of not being available to all persons who would require such an
exemption in order to enjoy reasonable access to the courts. The Court noted that the rule providing an
exemption for hearing fees in the case of poverty can be traced back to the Statute of Henry VII\textsuperscript{98} in
1494, which makes it a foundational element of Canada's inherited common law system.\textsuperscript{99} In addition,
the Court emphasized that hearing fees are in fact designed to act as a barrier, in order to deter frivolous
litigation.\textsuperscript{100} Finally, the Court accepted evidence to the effect that “a significant percentage” of
ordinary citizens would be unable to reasonably afford hearing fees for a 10-day trial, but would not
qualify for the statutory exemption.\textsuperscript{101} Accordingly, the Court applied the remedy of declaring that the
existing exemption was to be read as being available to persons who are impoverished “or in need”.\textsuperscript{102}
The case was subsequently appealed and heard before the Supreme Court; as of the time of this writing,
judgment has been reserved.

\textsuperscript{98} 11 Henry VII, c 12.
\textsuperscript{99} Vilardell, supra note 97, at para 9.
\textsuperscript{100} Ibid, at para 19.
\textsuperscript{101} Ibid, at para 20.
\textsuperscript{102} Ibid, at para 33.
III. Rule of Law and Judicial Independence

A. Analysis of Cases

In this section, I will explore some of the implications of the cases discussed above. In particular, I am interested in the question of whether the decision in the Remuneration Reference is consistent with the results in Imperial Tobacco and Christie. This analysis will focus on the application of unwritten constitutional principles in each of these cases.

There are three possible ways in which unwritten constitutional principles might affect the interpretation of ordinary legislation. First, it is possible that unwritten principles have no role to play in the interpretation of ordinary legislation; in this case, the rule of law amounts to empty rhetoric as far as judicial outcomes are concerned. A second possibility is that unwritten principles provide a guide to the interpretation of ordinary legislation in the case of ambiguity, but cannot override a clear expression of legislative intent. Finally, it is possible that unwritten principles may in some cases serve to invalidate a piece of duly enacted legislation that otherwise conforms to the express terms of the Constitution.

Peter Hogg has argued that the second of these options is to be preferred. In his view, the rule of law is an ideal that informs how laws are created and administered, but does not possess any “direct force” for the purposes of rendering ordinary legislation invalid. A similar view was adopted by Justice Southin in her dissent in Christie.

The main reason for adopting this option is that it reflects the Court's stated preference for adhering to the express terms of the written Constitution. The Court has noted that the preambles to the Constitution Act 1867 and 1982 “strictly speaking... [are] not a source of positive law”. According to Hogg, this means that they “should not be treated on the same plane as a direct provision of the Constitution”. Another suggested reason to avoid assigning weight to unwritten principles is that it would risk undermining the legitimacy of judicial review, and dramatically expand its scope.

103 Peter W. Hogg and and Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005), 55 UTLJ 715, at 717.
104 Ibid, at 718.
105 Christie (CA), supra note 85, at paras 18-19.
106 Secession Reference, supra note 60, at para 53.
107 Remuneration Reference, supra note 53, at para 94.
108 Hogg, supra note 103, at 720.
109 Imperial Tobacco, supra note 55, at para 64; see also Robin Elliot, “British Columbia v. Imperial Tobacco Canada Ltd.: Judicial Independent and the Rule of Law” (2004-2005), 41 Can Bus LJ 370 at 384,
However, as Hogg acknowledges, the Court's previous jurisprudence is not entirely consistent with this option.\(^\text{110}\) In particular, the *Remuneration Reference* stands for the proposition that the unwritten principle of judicial independence is capable of invalidating ordinary legislation. More specifically, judicial independence may be applied to “fill gaps” in the structure of the Constitution; that is, where the express terms of the Constitution serve to protect judicial independence, but leave a gap such that judges presiding in a specific type of court are not protected, it is legitimate to apply the unwritten principle of judicial independence to protect those courts not expressly identified in the Constitution.\(^\text{111}\)

In contrast to the *Remuneration Reference*, *Imperial Tobacco* stands for the proposition that the unwritten principle of rule of law may not be applied to fill gaps in the express terms of the Constitution. In particular, if the courts were to hold that the rule of law could be used to invalidate legislation on the grounds that ordinary legislation should be prospective rather than retroactive, or that there exists a right to a fair hearing in all cases, as opposed to only criminal cases, this would serve to make the express terms of the Constitution “redundant”.\(^\text{112}\)

The contrast between the decisions in the *Remuneration Reference* and *Imperial Tobacco* is most pronounced with respect to the question of whether unwritten principles may be used to protect the right to a fair hearing in a civil proceeding. It is of course true that not every form of quasi-judicial proceeding will require a right to a full hearing;\(^\text{113}\) however, *Imperial Tobacco* was specifically concerned with a statutory civil action brought before the ordinary courts. In that case, the Court held as follows:

> [T]he appellants' proposed fair trial requirement is essentially a broader version of s. 11(d) of the *Charter*, which provides that "[a]ny person charged with an offence has the right ... to ... a fair and public hearing". But the framers of the *Charter* enshrined that fair trial right only for those "charged with an offence". If the rule of law constitutionally required that all legislation provide for a fair trial, s. 11(d) and its relatively limited scope (not to mention its qualification by s. 1) would be largely irrelevant because everyone would have the unwritten, but constitutional, right to a "fair ... hearing"... Thus, the appellants' conception of the unwritten constitutional principle of the rule of law would render many of our written constitutional rights

\(^{110}\)Hogg, *supra* note 103, at 727.
\(^{112}\)Imperial Tobacco, *supra* note 55, at para 65.
\(^{113}\)See e.g *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 SCR 817, at para 33.
redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers. [emphasis in original]\(^{114}\)

However, in the *Remuneration Reference*, the majority found that the basis for recognizing the importance of judicial independence was to ensure that “justice will be done”, \(^{115}\) which we might reasonably understand to require a fair trial. \(^{116}\) In addition, the majority found that judicial independence must extend beyond the express terms of the Constitution, precisely because it might otherwise not apply in courts without jurisdiction over criminal matters:

\[T\]here are serious limitations to the view that the express provisions of the Constitution comprise an exhaustive and definitive code for the protection of judicial independence... To some extent, the gaps in the scope of protection provided by ss. 96-100 are offset by the application of s. 11(d), which applies to a range of tribunals and courts, including provincial courts. However, by its express terms, s. 11(d) is limited in scope as well -- *it only extends the envelope of constitutional protection to bodies which exercise jurisdiction over offences. As a result, when those courts exercise civil jurisdiction, their independence would not seem to be guaranteed*. The independence of provincial courts adjudicating in family law matters, for example, would not be constitutionally protected. \(^{117}\) [emphasis added]

To summarize, then: on the one hand, the Court has said that there is no general constitutional requirement of a fair hearing in civil cases, because the express terms of the *Charter* limit the guarantee of a fair hearing to criminal proceedings. On the other hand, the Court has said that the principle of judicial independence must extend beyond the express terms of the Constitution, since these provisions do not apply to courts that are not empowered to hear criminal matters, and is essential that civil litigants before such courts be assured of receiving a fair hearing.

It is important to note that the Court's remarks in *Imperial Tobacco* were *obiter dicta*, in the sense that the Court found that the impugned legislation “provides for a fair trial in any event”. \(^{118}\) Nevertheless, there would appear to be a *prima facie* inconsistency between the reasoning applied in the *Remuneration Reference* and the reasoning applied in *Imperial Tobacco*.

If the apparent inconsistency between these two cases were to be justified, it would be necessary to draw a principled distinction between the two decisions. One possible distinction would be to claim that *Imperial Tobacco* is unlike the *Remuneration Reference* in that *Imperial Tobacco* involved

\(^{114}\) *Imperial Tobacco*, supra note 55, at para 65.
\(^{116}\) See Part III.C, *infra*.
\(^{117}\) *Ibid*, at para 85-6
\(^{118}\) *Imperial Tobacco*, supra note 55, at para 65.
a claim for unwritten constitutional rights. One might argue that the consequence of upholding this claim would have been to effectively create a parallel “second charter”, which would have risked making the existing Charter redundant.\(^{119}\) However, this distinction cannot be fully sustained. This is because the Remuneration Reference does in fact effectively create three new constitutionally protected procedural rights for judges. In the first place, judges have the right to have their salaries proposed by an independent body with a mandate to ensure that judges maintain financial security.\(^{120}\) Second, in the event that the Legislature elects to impose a different salary than the one proposed, judges have the right to receive reasons for this decision.\(^{121}\) Finally, judges have the right to have these reasons subjected to judicial review to ensure that they are sufficiently reasonable.\(^{122}\) According to the majority, these remedies are necessary to ensure the financial security of judges, and hence the integrity of the justice system.\(^{123}\) I will assess the implications of this claim below.\(^{124}\)

Another way of resolving the apparent inconsistency would be to claim that judicial independence and the rule of law are separate and distinct constitutional principles. This would in fact seem to be the Court's official position. For example, in *Imperial Tobacco*, the Court analyzed arguments relating to judicial independence and the rule of law separately.\(^{125}\) In addition, the Court in *Imperial Tobacco* held that the defendants' rule of law arguments “overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court - most notably democracy and constitutionalism - very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms)” [emphasis added].\(^{126}\) This would seem to suggest that rule of law is unlike judicial independence in that it does not flow by necessary implication from the express terms of the Constitution.

In the following section, I will argue that this claim should be rejected, and that judicial independence is best understood as an aspect of rule of law. In particular, I claim that inconsistency with the principle of judicial independence is a particular case of inconsistency with the rule of law, and that the arguments that support using the principle of judicial independence to “fill gaps” in the

\(^{119}\)Elliot, *supra* note 109, at 384.
\(^{120}\)Remuneration Reference, *supra* note 53, at para 166.
\(^{121}\)Ibid, at para 180.
\(^{122}\)Ibid.
\(^{123}\)Ibid, at paras 9-10.
\(^{124}\)See Part III.C, *infra*.
\(^{125}\)Imperial Tobacco, *supra* note 55, at paras 44, 57.
\(^{126}\)Ibid, at para 66.
constitutional structure apply equally well to the principle of rule of law. As will be shown, this argument is supported by both theoretical argument and by the Court's own reasons in the *Remuneration Reference*.

**B. The Rule of Law “Spectrum”**

1. **Overview**

   The concept of the rule of law has been described in a number of different ways by various theorists. In *Imperial Tobacco*, the Court quotes from Hogg's article, cited above, in which the author identifies a “spectrum” of theories that differ significantly in the amount of content that they each ascribe to the rule of law.\(^{127}\) This concept of a rule of law spectrum is well-developed in the theoretical literature on this subject.\(^{128}\) In particular, the rule of law is often characterized as having “thick” and “thin” conceptions, depending on the extent of the requirements that it is considered to include.\(^{129}\) A theory that incorporates more requirements into the rule of law is considered to be “thicker” than one with fewer requirements.

   Hogg's account of the rule of law spectrum includes “those who... argue that the rule of law is lawyers’ rhetoric that means nothing”.\(^{130}\) The Court in *Imperial Tobacco* chose to leave out this sentence when quoting from Hogg's article. This is understandable; given that the *Charter* holds that Canada “recognizes” the rule of law, it would hardly be open to the Court to declare it a fiction.

   With the above definitions in mind, we may now consider some prominent rule of law theories, and consider where they fall on the “spectrum” described above.

2. **Major Rule of Law Theories**

   In order to identify what a minimally thin theory of the rule of law might look like, it is useful to consider what properties, if any, are present in all conceptions of the rule of law. David Dyzenhaus suggests that one such property is what he refers to as the “publicity condition”.\(^{131}\) This condition is based on the theory of Thomas Hobbes, which Dyzenhaus describes as “perhaps the most austere is the

---

\(^{127}\) Hogg, *supra* note 103, at 717.  
\(^{128}\)Tamanaha, *supra* note 2, at 91.  
\(^{129}\)Ibid.  
\(^{130}\)Hogg, *supra* note 103, at 717.  
\(^{131}\)Dyzenhaus, *supra* note 13, at 477.
In Hobbes' view, law is the product of an “uncommanded commander”; as such, the sovereign lawmaker is not subject to any substantive constraints with respect to the content of the law. However, it is nevertheless a necessary condition for rulership by means of law that the law should be knowable; otherwise, the sovereign would not be able to compel obedience through the use of the law. This condition would seem to rule out retroactive laws, as these cannot be known at the time over which they purport to exercise authority.

Professor Dyzenhaus argues that the publicity condition is connected to many different conceptions (or “aspects”) of the rule of law. Thus, for example, Friedrich Hayek's definition of the rule of law (which Dyzenhaus describes as “[t]he best known statement of the rule of law”) requires that “government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge” [emphasis added].

Hayek's definition of the rule of law is quoted with approval in the work of Joseph Raz. According to Raz, “'[t]he rule of law' means exactly what it says: the rule of the law”. In particular, rule of law is to be distinguished from the concept of “rule of the good law”, since an overly broad interpretation of the rule of law would “lack any useful function”. However, the rule of “the law” in this sense is not to be understood as the rule of whatever laws meet the conditions of validity established within a given legal system, as this would make the concept of rule of law essentially a tautology. Rather, the rule of law requires “open, general, and relatively stable laws”; more precisely, it requires that “the making of particular laws should be guided by open and relatively stable general rules”.

In Raz's account, rule of law is a strictly formal concept, in that the positive and negative qualities of a law do not affect whether it is consistent with the rule of law. By contrast, Lon Fuller's

132Ibid.
133Ibid.
134Ibid.
137Ibid, at 212.
138Ibid, at 211.
139Ibid, at 213.
140Ibid.
141Ibid, at 224.
theory of “legality” presents a more nuanced view.\textsuperscript{142} According to Fuller, retroactivity constitutes one of “eight ways to fail to make law”.\textsuperscript{143} The reason for this description is essentially the one implied by the publicity condition – a retroactive law is one that is not capable of being obeyed.\textsuperscript{144} However, in Fuller's view, retroactive legislation is permissible when it remedies a prior defect in publicity,\textsuperscript{145} or, in the case of the common law, a prior defect in the interpretation of the law.\textsuperscript{146} In either case, retroactivity is consistent with legality only if “it alleviates the effect of a previous failure to realize two other desiderata of legality: that the law should be made known to those affected by them and that they should be capable of being obeyed”.\textsuperscript{147}

Finally, Ronald Dworkin is known for promoting a “thick” theory of rule of law. In Dworkin's view, the rule of law properly considered is part of a “larger and mutually supporting web of... moral and political values.”\textsuperscript{148} On this view, we cannot ascertain what the rule of law requires in any case without making reference to other important values, including democracy and constitutionalism. In particular, this theory rejects the possibility that rule of law and democracy can be properly understood as competing (or “detached”) values.\textsuperscript{149}

Brian Tamanaha had suggested that these iterations of rule of law may be seen as cumulative, as the requirements embodied in thicker conceptions tend to include the features that are included in thinner versions.\textsuperscript{150} Similarly, David Dyzenhaus describes these theories as related “aspects” of the rule of law, and notes that they all connect to the publicity condition in some way, although some of these theories “require us to develop a richer understanding of publicity that Hobbes had in mind”.\textsuperscript{151}

The requirement of access to justice is not as widely recognized in rule of law theory as the requirement of prospectivity; in particular, “many of the most influential accounts of the rule of law

\begin{flushleft}

\textsuperscript{143} Fuller, \textit{supra} note 142, at 33.

\textsuperscript{144} Ibid, at 39.

\textsuperscript{145} Ibid, at 55.

\textsuperscript{146} Ibid, at 57.

\textsuperscript{147} Ibid, at 54.

\textsuperscript{148} Ronald Dworkin, “Hart's Postscript and the Character of Political Philosophy” (2004), 24(1) Oxford J Legal Stud 1, at 23.

\textsuperscript{149} Ibid.

\textsuperscript{150} Ibid.

\textsuperscript{151} Dyzenhaus, \textit{supra} note 13, at 482.
\end{flushleft}
make no reference to courts or the independence of the judiciary”. However, Dyzenhaus argues that since the publicity condition requires that the law must be knowable, it may also require access to legal advice where such advice is necessary in order to obtain knowledge of the law.

Raz's theory also states that easy access to the courts is an essential component of the rule of law. The basis for this claim is that an individual's ability to guide themselves by the law may be frustrated if access is denied by reason of long delays or excessive costs. This claim is distinguishable from a claim that access to legal counsel is required by the rule of law; however, Raz does stress that a “fair hearing” is essential. In addition, Raz holds that courts must have the power to review parliamentary legislation to ensure conformity to the rule of law.

C. Judicial Independence as a Component of Rule of Law

As noted above, the concept of rule of law is subject to many different interpretations, not all of which directly address the need for judicial independence. However, many legal theorists, including Hogg and Raz, consider judicial independence to be a necessary component of rule of law. As Raz notes, judicial independence is necessary to ensure that those subject to the law may be guided by it:

Since the court's judgment establishes conclusively what the law is in the case before it, the litigants can be guided by law only if the judges apply the law correctly. Otherwise, people will only be able to be guided by their best guesses as to what the courts are likely to do – but these guesses will not be based on the law but on other considerations... The rules concerning the independence of the judiciary – the method of appointing judges, their security of tenure, the way of fixing their salaries, and other conditions of service – are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law. They are, therefore, essential for the preservation of the rule of law.

In addition, the Court's reasons in the Remuneration Reference underscore this relationship:

[T]he purpose of the constitutional guarantee of financial security... is not to benefit the members of the courts which come within the scope of those provisions. The benefit that the members of those courts derive is purely secondary... Judicial independence is

---

152Rankin, supra note 8, at 131 (footnote 187), citing the works of Hayek, Fuller, and John Finnis (Natural Law and Natural Rights (Oxford: Clarendon Press, 1980) at 270 – 285). See also Waldron, supra note 142, at 7.
153Dyzenhaus, supra note 13, at 477.
154Raz, supra note 51, at 217.
155Ibid.
156Hogg, supra note 103, at 718.
157Raz, supra note 51, at 216.
158Ibid, at 217.
valued because it serves important societal goals -- it is a means to secure those goals... One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule.¹⁵⁹

To summarize, judicial independence is deemed to warrant constitutional protection “because it serves important societal goals”. Those two goals are public confidence in the administration of justice and, tellingly, maintenance of the rule of law.

It does not follow immediately from the above that judicial independence is simply an aspect of the rule of law. In particular, we might value judicial independence for other reasons as well. However, the Supreme Court lists only one other value; namely, “public confidence in the administration of justice. Moreover, if Raz is correct, “public confidence in the administration of justice” is simply to be understood as confidence that judicial decisions will be rendered in accordance with the law, and not on the basis of arbitrary considerations. This, too, is to be understood as an aspect of rule of law, since it is necessary to ensure that people can be guided by the law.

Other scholars have also written about the connection between public confidence in the administration of justice and the rule of law. Jeremy Waldron notes that many theories of the rule of law are solely concerned with what he calls the “output function” of the judicial process – that is, a process of adjudication is deemed to be adequate if it returns a result that is consistent with what the law prescribes.¹⁶⁰ However, this would in principle seem to permit a wide range of dubious proceedings – secret trials, ex parte trials, and so on – so long as they apply the law faithfully. Waldron suggests that a robust theory of the rule of law should account for the fact that most members of the public would not accept proceedings of this kind as legitimate.¹⁶¹ In the language of the Court, we might describe this missing element as “public confidence in the administration of justice”. Here, public confidence is what I would characterize as a second-order form of rule of law – that is, we might say that first-order rule of law demands that a trial produce a result that is correct in law, whereas second-order rule of law would demand that the result be publicly demonstrated to be correct.

¹⁵⁹Remuneration Reference, supra note 53, at paras 9-10.
¹⁶¹Ibid.
The definition of second-order rule of law given above might seem to suggest that first-order rule of law could be considered to be more essential than second-order rule of law. However, Fuller suggests that, in fact, the opportunity to present reasoned arguments is a necessary prerequisite to a legal judgment. In particular, Fuller claims, “[i]n a very real sense it may be said that the integrity of the judicial process itself depends upon the participation of the advocate”. This is because, in the absence of partisan advocacy, a judge must take on “not only the role of judge, but that of representative for both of the litigants”. This blurring of roles compromises the ability of the judge to remain impartial.

I had suggested above that we might reasonably suppose that a fair trial is implicit in the notion that “justice should be done”. If Fuller is correct, this is strictly necessary – we cannot have justice through legal adjudication unless a trial is fair, in the sense that both parties are able to present rational arguments to support their case, and to be judged accordingly. On this view, we cannot have first-order rule of law (correct outcomes) without second-order rule of law (an informed and rational adversarial process). In any case, however, we certainly cannot explain the value of second-order rule of law, including the right to a fair and impartial hearing, without making reference to the value of first-order rule of law.

If the above arguments are correct, the Court's decision in the Remuneration Reference cannot be explained except by reference to the importance of judicial independence considered as an aspect of the rule of law. It is therefore untenable to argue that judicial independence may be used to invalidate ordinary legislation, but the rule of law cannot. However, one might nevertheless argue that judicial independence is the only aspect of rule of law thus far considered that warrants constitutional protection. This position may be argued on either formal or substantive grounds. In the next section, I will explain what I mean by “formal” and “substantive” in this context.

163Ibid, at 382.
164Ibid.
165Ibid.
IV. Formal and Substantive Theories

A. Definitions

If I am right in claiming that judicial independence is correctly understood as an aspect of rule of law, then each of the Remuneration Reference, Imperial Tobacco, and Christie should be subject to the same process of justification. This would seem to imply that the results in these cases are to explained by the substantive importance of the principles at stake in each of those cases. In other words, the fact that the Court has applied judicial independence to invalidate ordinary legislation is to be explained by the fact that, in the Court's view, judicial independence has more importance or value in the Canadian constitutional order than do the principles of legislative prospectivity or access to justice.

In order to support this conclusion, it is necessary to consider and reject an alternative possibility. This possibility is hinted at in Imperial Tobacco, in which the Court quotes Justice Strayer of the Federal Court of Appeal to the effect that "[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be". In particular, the Court in that case rejected the defendants' theory of rule of law in part because it fell at one “extreme” end of the spectrum of competing rule of law theories. This leaves open the possibility that the Court is simply applying a “thin” theory of the rule of law, located at the other end of the rule of law spectrum. In particular, one might suppose that this “thin” theory includes the principle of judicial independence, but does not include the various principles at stake in Imperial Tobacco and Christie. In this case, it might be argued that the Court's decisions are not based on substantive value judgments, but are better explained as following from the application of a value-neutral “formal” theory of the rule of law.

The distinction between “formal” and “substantive” conceptions of the rule of law relates to the concept of the rule of law “spectrum” identified earlier – in particular, “thin” theories of rule of law tend to be formal theories. A formal theory in this sense is one that seeks to determine the minimum features that a legal system must have in order to satisfy the logical requirements of the rule of law.

166Singh v Canada (Attorney General), [2000] 3 FC 185 (CA), at para 33; cited in Imperial Tobacco, supra note 55, at para 62.
167Imperial Tobacco, supra note 55, at para 63.
168Tamanaha, supra note 2, at 91.
169Ibid.
Formal reasoning may contrasted with substantive forms of argumentation, which seek to define rule of law in a way that best promotes the attendant values that the rule of law is meant to serve.\textsuperscript{170}

The implications of this difference of approaches may be illustrated by considering the claim that "advocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be".\textsuperscript{171} Depending on whether one takes a formal or a substantive approach to interpreting the rule of law, this may been seen as either a rebuke or a tautology. Dworkin, for example, would argue that any argument over what the law requires is essentially an argument over which interpretation “provides the best justification for the law in this area as a whole“\textsuperscript{172}. If this is true, then argument over what role is to be assigned to the rule of law is necessarily an argument over what the law as a whole should be.\textsuperscript{173} However, the Court's endorsement of Justice Strayer's statement might suggest that, regardless of what advocates might argue, the question of whether rule of law should affect the validity of ordinary legislation is to be answered by determining what the rule of law “really” requires. This would seem to suggest a formal approach to the rule of law.

The Court's decisions can be explained as following from a value-neutral decision-making process only if the theory of rule of law applied by the Court is indifferent to the substantive content of the law. This would require not only that the Court's theory of rule of law be a formal theory, but also that the application of the theory to the law should be formal; in other words, it must not incorporate substantive considerations. In particular, this would rule out a process of “balancing” the rule of law against competing constitutional principles such as democracy and Parliamentary sovereignty.

The metaphor of balancing appears in the Court's decision in Babcock,\textsuperscript{174} and was later applied in the British Columbia Court of Appeal's decision in Imperial Tobacco.\textsuperscript{175} In particular, a majority of the Court of Appeal in that case accepted the manufacturers' premise that the rule of law can be used to strike down legislation, and that it contains a prohibition against retroactivity, but found that the infringement of the rule of law in that case was not so severe as to overrule the will of a democratically

\textsuperscript{170}Ibid.
\textsuperscript{171}Singh v Canada (Attorney General), [2000] 3 FC 185 (CA), at para 33; cited in Imperial Tobacco, supra note 55, at para 62.
\textsuperscript{172}Dworkin, supra note 148, at 4.
\textsuperscript{173}I will say more regarding Dworkin's theory in Section B.3.1, infra.
\textsuperscript{174}Supra note 70, at para 55.
\textsuperscript{175}Imperial Tobacco (CA), supra note 69, at para 111, citing Babcock, supra note 70, at paras 54-57.
elected legislature. By contrast, the Court's decisions in *Imperial Tobacco* and *Christie* are based on the findings that “[e]xcept in respect of criminal law... there is no requirement of legislative prospectivity embodied in the rule of law” and that “a broad general right to legal counsel as an aspect of, or precondition to, the rule of law”. If taken literally, these findings can be understood as claims about the content of the rule of law as a concept. On this view, the need for balancing does not arise in these cases.

In the following section, I will argue that the “value-neutral” interpretation of the Court's decisions in *Imperial Tobacco* and *Christie* must be rejected. Specifically, I will argue that at least some recourse to substantive considerations is necessary in order to distinguish the Court's theory of rule of law from a theory of “rule by law”.

**B. Locating the Court's Theory on the Rule of Law “Spectrum”**

In order to test the possibility that the Court's decisions might be explained in terms of a value-neutral formal theory of the rule of law, we might first attempt to locate the Supreme Court's theory of rule of law on the spectrum of thick and thin conceptions identified earlier. A logical place to begin this process is to compare the Court's theory to that of Joseph Raz. Raz is quoted in a number of the Court's decisions on the subject of rule of law, and his theory is best described as a “thin”, formal theory of the rule of law.

In *Imperial Tobacco*, in finding that the rule of law does not require that legislation should be prospective, the Court described its theory of the rule of law as consisting of three principles: first, law must be supreme over both government and private individuals; second, there must exist an actual order of positive laws; and third, the relationship between the state and the individual must be regulated by law. On this basis, it held that “it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content.”

In contrast to this view, it might be argued that the requirement that “the relationship between the state and the individual ... be regulated by law” is jeopardized by retroactive legislation, in that an individual is not granted the opportunity to regulate their interaction with the state when the law is not

---

176Ibid.
177*Imperial Tobacco*, supra note 55, at para 69.
178*Christie*, supra note 83, at para 23.
179Tamanaha, supra note 2, at 93.
180*Imperial Tobacco*, supra note 55, at para 58.
known in advance. This claim is supported by the Court's decision in the *Manitoba Language Reference*, in which the Court cites Raz for the proposition that the rule of law “has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it.” This second criterion necessarily means that retroactive legislation is incompatible with the rule of law, as “[o]ne cannot be guided by a retroactive law.” This observation applies equally well to the Court's statement in the *Patriation Reference* that the rule of law requires “subjection to known legal rules”.

Raz does acknowledge that the extent to which prospectivity is essential to the law is minimal; in other words, so long as there are prospective general rules that serve to determine how particular rules are to be identified as valid, a legal order may incorporate valid retroactive laws:

> It is, of course, true that most of the principles [of the rule of law] cannot be violated altogether by any legal system. Legal systems are based on judicial institutions. There cannot be institutions of any kind unless there are general rules setting them up... Similarly retroactive laws can exist only because there are institutions enforcing them. This entails that there must be prospective laws instructing those institutions to apply the retroactive laws if the retroactive laws are to be valid. In the terminology of H.L.A. Hart's theory one can say that at least some of the rules of recognition and of adjudication of every system must be general and prospective... Clearly, the extent to which generality, clarity, prospectivity, etc. are essential to the law is minimal and is consistent with gross violations of the rule of law. [emphasis added]

To say that a retroactive law may be both valid and a “gross violation of the rule of law” is quite a different claim than stating that “there is no requirement of legislative prospectivity embodied in the rule of law”, as the Supreme Court has said. By contrast, the Court of Appeal's approach in *Imperial Tobacco* would have acknowledged that prospectivity does have a role to play in the rule of law, but does not necessarily lead to invalidity; this approach is more consistent with Raz's view of the role of rule of law.

As noted above, Raz's theory of rule of law is a formal theory in the sense that it is only concerned with the “form” that the law takes – specifically, the rule of law requires only that people subject to the law must be able to inform themselves as to how the law will affect them. In particular,

---

181Raz, supra note 51, at 213.
182Ibid, 214.
183Patriation Reference, supra note 48, at 805-6; see also Edinger, supra note 67, at para 21.
184Raz, supra note 51, at 223-4.
185Imperial Tobacco, supra note 55, at para 69.
186Imperial Tobacco (CA), supra note 69, at para 112.
Raz allows that there are some cases in which it may be desirable to violate the rule of law in order to support other competing values. However, in such cases, it is inaccurate to state that such outcomes are consistent with the rule of law by reason of the fact that they are substantively justified.

The claim that retroactive legislation is incompatible with Raz's theory can be extended to a more general claim that such legislation is incompatible with any strictly formal theory of rule of law that incorporates the publicity principle. On this point, Tamanaha notes that formal legality is primarily a matter of following rules, and that “a retroactive rule is an oxymoron”. This is because one cannot follow a rule that did not exist at the time that it purports to regulate.

C. Consequences of a Strictly Formal Theory

The Supreme Court's proposed theory of the rule of law allows that retroactive legislation in the area of criminal law may be incompatible with the rule of law. To be clear, however, the claim that prospectivity in criminal law is required by the Constitution is distinguishable from the claim that prospectivity in criminal law is required by the rule of law. If the Court is to be understood as saying that the rule of law itself requires prospectivity in the criminal law, but not in other areas of the law, this amounts to a distinction made based on the content rather than the form of the law; that is, a substantive distinction.

From a substantive perspective, requiring prospectivity in the criminal law does help to limit a particular kind of injustice; namely, the imposition of criminal sanctions for acts that were legal at the time they were committed. However, from a strictly formal perspective, this restriction does not help to resolve the problem of retroactivity as it applies to other types of law. In particular, the publicity condition applies to criminal and non-criminal laws – a law is either knowable by those it affects, or it is not.

If we were to insist that the Supreme Court's theory of rule of law contains no prohibition against retroactivity in non-criminal cases, and that it is to be applied without any regard for substantive considerations – in particular, without recognizing a distinction between criminal and non-criminal law – we would be forced to conclude that the Court's theory includes no requirement of prospectivity whatsoever. Such a theory would be thinner than any of the theories previously

---

187Raz, supra note 51, at 228.
188Ibid, at 97.
189Imperial Tobacco, supra note 55, at para 69.
considered. Specifically, this theory would amount to a system of “rule by law”.\textsuperscript{190} On this view, the rule of law would simply require that positive laws enacted in the manner prescribed by the Constitution be given effect, regardless of their content.

A theory of rule of law with the no requirement of prospectivity whatsoever hardly qualifies as such; indeed, Tamanaha notes that “no Western theorist identifies the rule of law entirely in terms of rule \textit{by} law”[emphasis in original].\textsuperscript{191} There are two primary explanations for this fact. In the first place, from a formal perspective, the concept of rule of law so constituted would serve no useful descriptive purpose - as Raz observes, this conception amounts to “an empty tautology, not a political ideal”.\textsuperscript{192} Second, this theory would give us no reason to think that the rule of law is valuable or deserving of protection. In particular, if the government can retroactively legitimize any action, then the rule of law cannot act as a check on the arbitrary exercise of power. This would hardly be consistent with the Court's claims that the rule of law exists to ensure “accountability to legal authority”.\textsuperscript{193}

**D. Consequences of a Substantive Approach**

Based on the arguments given above, I claim that we must reject the premise that the Supreme Court's decisions regarding unwritten principles can be understood in terms of a strictly formal, value-neutral theory of the rule of law; in other words, these decisions must be understood to incorporate at least some substantive considerations (such as recognizing a distinction between criminal and non-criminal legislation). If we grant this premise, then the problem of retroactivity becomes much less troubling. The admissibility of substantive considerations leaves open the possibility that conformity to the rule of law can be sensitive to the context and purpose of the law under consideration; one example of this would be Fuller's example of a “curative” retroactive law.\textsuperscript{194} This consideration of sensitivity is also relevant to a balancing analysis – whereas rule of law considerations may weigh in favour of finding a given statute to be invalid, there may be more compelling values that weigh in favour of upholding it.

As the Court notes, there exists a strong substantive argument to the effect that ordinary legislation should be left intact unless it conflicts with the express terms of the Constitution.\textsuperscript{195}

\textsuperscript{190}Tamanaha, \textit{supra} note 2, at 92.
\textsuperscript{191}Ibid.
\textsuperscript{192}Raz, \textit{supra} note 51, at 213.
\textsuperscript{193}Ibid, at 805-6.
\textsuperscript{194}See Part III.B.2, \textit{supra}.
\textsuperscript{195}Imperial Tobacco, \textit{supra} note 55, at para 66.
However, the consequence of taking a substantive, context-sensitive approach to the rule of law is that testing legislation for conformity to the rule of law becomes an exercise in justification. Even if we acknowledge the importance of the democratic principle, we must still be concerned with internal consistency within the law – in other words, we must find the interpretation of the Court's obligations that best justifies the law in this area as a whole. In particular, the weight that we assign to the rule of law must include as much normative force as is necessary to sustain the decision in the Remuneration Reference.

The Remuneration Reference was decided before the Court's decisions in Babcock and Imperial Tobacco. In particular, the Court in the Remuneration Reference does not justify that decision in terms of a process of balancing. However, the same considerations regarding democracy and Parliamentary sovereignty were just as much at issue in that case, even if they were not directly addressed. In particular, the Remuneration Reference indicates that the principles of democracy and Parliamentary sovereignty may be overruled in particularly compelling cases.

It is of course possible to argue, as Professor Hogg does, that the Court's decision in the Remuneration Reference was wrongly decided, or that the remarks relating to unwritten principles were obiter dicta. However, there are at least three reasons why we might reject this view. First, the Remuneration Reference remains good law and continues to be applied in Canada, including in some cases that could not readily be sustained under the express terms of the Constitution alone. Even in decisions where it has interpreted the rule of law narrowly, the Court has never repudiated the claim that unwritten principles may affect ordinary legislation. Second, the reasoning in the Remuneration Reference remains compelling; that is, it would be problematic if the principles underlying an impartial hearing, including judicial independence, did not apply to family courts and other courts without jurisdiction to hear criminal matters. Third, as a more general statement of the second point, we might think that the courts should be empowered to maintain the integrity of the judicial system. In the following Part, I will argue that the integrity of the judicial system is precisely what is at stake where access to justice is concerned.

196Dworkin, supra note 148, at 4.
197Hogg, supra note 103, at 728.
198Ibid, at 728, citing Mackin v New Brunswick (Minister of Finance), [2002] 1 SCR 405. See also e.g. Provincial Court Judges' Assn of British Columbia v British Columbia (Attorney General), 2012 BCSC 1022.
199Imperial Tobacco, supra note 55, at para 60, citing Babcock, supra note 70, at para 53.
200Professor Hogg argues that the Court was wrong to find that judicial independence was in fact threatened in the Remuneration Reference: supra note 103, at 78-9. One might concede this point while still maintaining that provincial courts should in principle enjoy the same level of judicial independence as other courts.
V. Applications

A. Integrity of the Judicial System

There are at least two ways in which the integrity of the judicial system may be compromised by a lack of access to justice. The first case is one in which an otherwise meritorious case goes unlitigated due to a lack of funds. The second case arises when a trial proceeds, but one party is unfairly disadvantaged by lack of access to counsel.

1. Unlitigated Cases

Does the justice system have an interest in ensuring that every case involving a potential legal right is the subject of litigation? Lon Fuller would argue that it does not. In particular, there are many reasons why a holder of a legal right might elect not to pursue a remedy in court. These reasons may include a wish to avoid the costs necessarily associated with the litigation process. For this reason, it is not immediately obvious that the integrity of the justice system is affected whenever a potential right-holder fails to pursue a right in court. However, I claim that this line of reasoning relies on the premise that the decision not to litigate is a genuine choice; in other words, it does not apply a scenario in which a person is categorically unable to bring their case forward. I will develop this argument by exploring Fuller's thoughts on this subject.

Waldron comments that, given Fuller's respect for the process of adjudication, it is in some sense strange that his definition of legality does not include more attention to this aspect of law. In fact, the only one of Fuller's eight principles that touches on the adjudicative process is the requirement of “congruence between official action and declared rule”. Fuller does note in passing that this aspect of legality may be hindered by the “inaccessibility of the law”, and that it may require “representation by counsel”. However, taken at face value, this requirement would seem to leave a gap in the case where no official action takes place, on account of the fact that a meritorious case cannot be brought to trial.

We can frame this observation in relation to the way in which access to justice is addressed in the express terms of the Charter. In cases involving negative liberty (i.e. criminal law), official action

---

201 Waldron, supra note 142, at 8.
202 Ibid.
203 Fuller, supra note 142, at 81.
(i.e. arrest and prosecution) is the original cause of the litigation. Congruence between official action and declared rule therefore requires that the prosecution of the case be fair and yield the result prescribed by law. Similarly, in the case of litigation alleging unconstitutional government action, the principle of congruence between official action and declared rule requires that the impugned action be shown to be authorized by the rules that confer power on the government. However, in the case of civil litigation, “official action” is not triggered unless and until a trial is launched.

Fuller comments on this scenario by referencing a socialist critique of the principle that judges should not be the ones to initiate proceedings: courts on this view are like broken clocks that must be shaken in order to function, where “shaking costs money”.204 Writing elsewhere in the context of actions brought against the state, Fuller concedes that this obstacle is troublesome in that it “makes the correction of abuses dependent on the willingness and financial ability of the affected party to take his case to litigation“.205 However, in the context of civil actions, Fuller's answer to this criticism is to note that it may well be preferable for the holder of a legal right to elect not to pursue a remedy in court – in that case, there is no reason for the court to insist that the case be litigated.206 This implies that the “declared rule” relevant to the case is compatible with either the decision to litigate, or the decision not to.

I would argue, however, that the scenario described above is compatible with the rule of law only if the prospective litigant has the opportunity to make a genuine choice in deciding whether or not to pursue litigation. Certainly we would not think the rule of law to be satisfied in a state with clear civil laws, but no courts in which to enforce them. As Raz observes, 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.207 Further, as Dyzenhaus points out, it is offensive to the principle of equality before the law if a stronger party can avoid legal regulation because of lack of access to the law.208 This suggests that rule of law is and ought to be sensitive to the presence of barriers to civil litigation.

204 Fuller, supra note 162, at 385.
205 Fuller, supra note 142, at 81.
206 Fuller, supra note 162, at 386-7.
207 Raz, supra note 51, at 217.
208 Dyzenhaus, supra note 13, at 498. Dyzenhaus also argues that the provision of legal aid should not be restricted to cases involving “negative liberty” on the grounds that Canada recognizes a plurality of constitutional values, and that attempting to frame cases in terms of their relationship to negative liberty distorts our understanding of the values at stake in such cases: ibid, at 486.
If this theory is correct, there may be a need to reframe the requirement of “congruence between official action and declared rule” in order to better describe what rule of law requires where litigation is forestalled by reason of one's inability to access the courts. As a slightly unwieldy candidate, I would suggest “congruence between outcomes prescribed by law and outcomes realized in fact” (hereafter, simply “congruence”). This descriptor recognizes that an election not to proceed with litigation is consistent with the demands of rule of law, while a proceeding denied for reasons that are arbitrary with respect to rights of the parties involved is not.

2. Unrepresented Litigants

The argument for “congruence” given above speak to a need for access to the courts, rather than access to counsel specifically. However, as noted earlier, Fuller acknowledges that access to counsel may in some cases be required in order to ensure congruence between official action and declared rule. In particular, given that adjudication is a process that relies on the ability of both parties to present rational arguments, the adjudicative process may be compromised when one party is unable to effectively represent themselves. In a recent paper, Micah Rankin develops this line of argument in the context of Canadian access to justice. Specifically, Rankin argues that a failure of access to justice that results in high numbers of unrepresented litigants will serve to undermine the principle of judicial independence. In support of this claim, Rankin cites William Lucy for the proposition that an otherwise impartial process may become biased if it fails to account for significant differences between the parties, and references multiple studies documenting the fact that, on a statistical basis, unrepresented litigants fare considerably worse than parties with access to counsel. This last point demonstrates that a lack of access to counsel may adversely affect a judge's ability to be genuinely impartial.

B. Access to Justice as a Negative Duty

Is it within the government's legitimate authority to deprive people of their day in court? The decision in BCGEU indicates that it is not, and I suspect that most Canadians would share this intuition. However, it remains to be shown that one may draw a principled distinction between the obligation not to bar access to the courts on the one hand, and the obligation to guarantee access in all cases on the

209 Fuller, supra note 142, at 81.
210 Supra note 8.
211 Ibid, at 124.
212 Ibid, at 127.
213 Ibid, at 128.
other. In this section I will attempt to identify and justify such a distinction; specifically, I will argue in favour of the recognition of a negative duty on the part of government to avoid imposing barriers to access to justice.

The decision in *Christie* is strongly informed by the Court's choice to frame the issue at stake as relating to the discovery of a new constitutional right, rather than the imposition of a negative duty. This choice marks a stark contrast to the approach favoured by the Court of Appeal, who held that “the issue... is not whether the government must provide an pay for legal counsel in any matter requiring legal services, but whether the state can impose an additional financial burden on those seeking to obtain legal services”.\(^{214}\) Unfortunately, the Supreme Court's reasons do not explain why they chose to reject this approach – apart from noting that “counsel attempted to argue otherwise”, the Court essentially takes for granted that relief from the tax on legal services could only be supported by a general right to legal counsel, which would require “a constitutionally mandated legal aid scheme for virtually all legal proceedings”.\(^{215}\)

Given the premise that a general right to counsel is not a viable remedy to the problem of restricted access to justice, the question is whether it is possible to justify the recognition of a more limited remedy. Since I have argued that access to justice should be protected in order to maintain internal consistency with the Court's decision in the *Remuneration Reference*, it is logical to begin by asking what a remedy analogous to the one applied in that case would look like.

As noted above,\(^{216}\) the *Remuneration Reference* effectively creates three new constitutionally protected procedural rights for judges:

1) Judges have the right to have their salaries proposed by an independent body with a mandate to ensure that judges maintain financial security;

2) In the event that the Legislature elects to impose a different salary than the one proposed, judges have the right to receive reasons for this decision;

3) Judges have the right to have these reasons subjected to judicial review to ensure that they are sufficiently reasonable.

Again, these rights were deemed to require protection because of their role in promoting confidence in the administration of justice and maintenance of the rule of law. More specifically, the

above rights act as guarantors of financial security, which is a necessary component of judicial independence, which serves to promote the values identified above.\(^{217}\)

Professor Hogg has argued that judicial independence was not genuinely threatened by the legislation at issue in the *Remuneration Reference*.\(^{218}\) It is certainly true that no evidence was led in that case to suggest that the legislation at issue had in fact affected the outcome of any particular judicial decision. As such, it is not clear that the decision in that case was necessary to protect first-order rule of law (i.e. the “output function” of the judicial process). However, it might be argued that the remedy in that case was necessary to promote public confidence in the administration of justice. By this argument, if the Constitution did not provide a strong guarantee of financial security of the kind imposed in that case, the public would not be able to rule out the possibility that judicial decisions were being affected by considerations that were arbitrary with respect to the law.

By contrast, in *Christie*, evidence was led and accepted that the tax on legal services at issue in that case did in fact prevent at least some people from accessing legal services.\(^{219}\) Moreover, as Rankin has demonstrated, there is a strong negative correlation between undergoing litigation without counsel and winning one's case.\(^{220}\) In this scenario, we have evidence to suggest that the type of legislation at issue in *Christie* does in fact lead at least some cases to be affected (if not decided) by considerations that are arbitrary with respect to the legal rights of the parties involved.

For the purposes of examining what a remedy for this type of problem might look like, I will first look at the ways in which the concept of financial security of judges is analogous to the concept of access to justice for Canadians. Judges as a group make varying amounts of income; in particular, there is no specific level of remuneration for judges that is constitutionally prescribed. However, if an act of government would serve to reduce the level of remuneration enjoyed by some or all judges (relative to the rate of inflation), this would constitute a *prima facie* threat to those judges' financial security. In that case, the procedural rights enjoyed by judges in light of the decision in the *Remuneration Reference* would be triggered.

We might similarly note that Canadians enjoy varying degrees of access to justice. Some Canadians might enjoy very little access to justice; however, let us stipulate for the moment that the

\(^{217}\) *Remuneration Reference, supra* note 53, at paras 9-10.
\(^{218}\) Hogg, *supra* note 103, at 78-9
\(^{219}\) *Christie (CA), supra* note 85, at para 35.
\(^{220}\) Supra note 212.
amount of access currently available constitutes the baseline level of access, in the same way that judges' current salaries represent the baseline for establishing financial security. If an act (or inaction) of government would serve to reduce this level of access, either by decreasing existing levels of funding relative to inflation or by introducing additional barriers in the form of taxes or hearing fees, this would affect both first-order rule of law (in that we have reason to believe that this may affect the outcome of litigation) and public confidence in the administration of justice. I therefore claim that this scenario should call for a remedy analogous to the one introduced in the Remuneration Reference. Specifically, this would require the following (at minimum): first, that there be a presumption that funding for legal aid should remain constant relative to inflation, and second, that if the level of funding is to be decreased below this level, or if barriers to access are to be introduced in the form of taxes on legal services or other fees, these decisions must be justified by written reasons that are reviewable in a court of law to ensure “reasonableness”.

The set of rights described above are procedural rather than substantive in that they do not provide “guarantees” in the same way that Charter rights do. However, they do require that funding decisions for programs that promote access to justice be subject to a process of justification. The approach taken here recognizes that the government has broad authority to make policy decisions regarding the administration of the justice system, but requires that such decisions be consistent with the government's duty to avoid compromising the integrity of the justice system.

The remedy identified here is in some sense a limited remedy, as it leaves open the possibility that many prospective litigants would remain unable to access the justice system even if this remed were applied. However, this approach would have been sufficient to justify a different outcome in Christie. Moreover, an even stronger case arises where the issue is not access to legal counsel, but access to the courts themselves. This is precisely the issue contemplated in the case of Vilardell v Dunham.

C. Opportunity: Vilardell v Dunham

The upcoming decision in Vilardell presents a useful opportunity for the Court to reconsider its previous decisions on the relationship between the rule of law and access to justice. Vilardell is in many ways an ideal case, in that the facts are not subject to some of the same difficulties as were present in Christie. To begin with, the fact that the in forma pauperis exemption predates the creation of Canada
suggests that its constitutional status may not depend on the express terms of the Constitution Act. In addition, while Christie was concerned with taxes on all forms of legal services, Vilardell is exclusively concerned with access to the courts themselves (specifically, the denial of access through the operation of hearing fees). BCGEU stands for the principle that no one, including the government, is permitted to interfere with physical access to the courts; as the prior decisions in Polewsky and Pleau suggest, this principle should apply equally to financial access.

The Court of Appeal's decision in Vilardell incorporates an exercise in justification similar in principle to the one described above – specifically, the imposition of hearing fees is deemed to be justified only if there exists an exemption to ensure that such fees do not prevent access to the courts for those who cannot reasonably afford them. If my arguments in the preceding sections are correct, this finding should be upheld by the Supreme Court; that is, consistency with the decision in the Remuneration Reference should weigh in favour of ensuring that all prospective litigants have the opportunity to have their case heard by an impartial decision-maker. The alternative would see the Supreme Court apply unwritten principles to protect judges' salaries, but refuse to apply them to protect the right of access to the courts over which those judges preside.

D. Further Applications

1. Criticism of the Negative Duty Approach

In the preceding sections, I have attempted to show that there is a compelling basis for the recognition and enforcement of a limited constitutional duty on the part of governments to avoid imposing barriers to access to justice. In this section, I will examine whether characterizing the problem of access to justice in terms of a negative duty is appropriate or sufficient in light of other scholarship in this area.

One possible objection to characterizing access to justice as the subject of a negative duty is that it may not always be helpful to recognize a distinction between government action (violation of a negative duty to impose barriers) and government inaction (failure to provide a positive right). For example, Lorne Sossin has criticized the decision in CBA for its conclusion that the Canadian Bar

---

221 Vilardell, supra note 97, at paras 9-11.
222 Ibid, at para 19.
224 Vilardell, supra note 97, at paras 27-31.
Association should not be granted standing to launch a systemic challenge of the province's legal aid system.225 This ruling depended in part on the Court's finding that the Charter cannot be used to challenge governmental inaction in the same way that one might challenge an unconstitutional government action.226

Sossin argues that the CBA decision is flawed in that it relies on two artificial dichotomies. First, Sossin criticizes the idea that there is a viable distinction to be made between policy decisions and actions taken without legitimate authority.227 In fact, he argues, no official has the legal power to act in a way that violates the Charter, which means that a policy decision that is inconsistent with the Charter is by definition ultra vires.228 Second, he also rejects the premise that the underfunding of a legal aid program can be characterized as mere inaction on the part of government.229 This is because the provision of legal aid, and the decision of how to allocate resources within a legal aid program, are both forms of government action.230

Another possible objection to a remedy designed to prevent barriers to access is that this approach does not ask whether the current level of funding for access to justice programs is constitutionally adequate. A significant distinction between the decisions in the Remuneration Reference and the various access to justice decisions is that the financial security of judges was not seriously threatened in the former case.231 By contrast, the evidence led in Christie shows that access to justice is currently unavailable for at least some prospective litigants.232 In addition, the CBA action was founded on the premise that the current level of funding for legal aid results in an unfair system of justice that exacerbates the effects of poverty and other forms of marginalization.233

Finally, defining access to justice in terms of a negative duty on the part of government does not address all of the barriers that potential litigants may encounter. In addition to barriers of access to the

---

226 Ibid, at 730, citing CBA, supra note 95, at paras 47-49.
227 Ibid, at 729.
228 Ibid, at 730.
229 Ibid, at 731.
230 Ibid.
231 Hogg, supra note 103, at 78-9.
232 Christie (CA), supra note 85, at para 35.
courts and to legal services, prospective litigants may be burdened with social and psychological barriers that interfere with their ability to successfully navigate the justice system. These problems would continue to exist even if all government-related barriers were eliminated.

I do not raise these points in order to rebut them. Litigation is not an ideal avenue for creating a more accessible justice system – ultimately, an institutional solution will be needed. In addition, if an argument for a positive right to access to justice can be sustained, so much the better. However, if the arguments in favour of the recognition of a negative duty are persuasive, it is worth asking how far that duty can be said to extend. Specifically, it is worth asking whether existing barriers to access to justice are justifiable. In the following section, I will briefly examine one source of barriers to access that is often overlooked; namely, the regulation of the legal profession itself.

2. Regulatory Barriers

There are two major benefits that follow from the regulation of the legal profession. The first of these benefits is the protection of consumers. The fact that entry to the legal profession is restricted ensures that all those who obtain legal advice receive it from a qualified practitioner; in addition, the rules of the provincial law societies require that all lawyers carry insurance, which ensures that clients have an additional safeguard against inadequate representation. The second benefit is enjoyed by society at large, rather than by individual clients. The fact that legal decisions set precedent that guide future case law means that the quality of argument in those cases affects the quality of the legal system as a whole. If cases were argued by substandard lawyers, the quality of the legal system as a whole would suffer. Conversely, if lawyers are required to maintain a high level of competence, the quality of decisions will be correspondingly high. In economic terms, these are known as negative and positive externalities, respectively.

---

234 Hughes, supra note 3, at paras 1-3.
235 Dyzenhaus, supra note 13, at 499.
237 Ibid, at 1.
238 Ibid, at 18.
239 Ibid, at 77.
240 Ibid, at 20.
241 Ibid.
However, according to the Canada Competition Bureau, the regulation of the legal profession is itself a cause of increased prices for consumers of legal services. In particular, for each of these benefits identified above, there is a corresponding danger where unrepresented litigants are concerned. First, the strict entry requirements of the legal profession reduces the number of qualified professionals; as the Bureau observes, “this reduction [of supply] may be viewed as a decrease in service quality for those who longer choose to purchase the service or who are no longer able to.” Second, the concern regarding the externality that would result from permitting substandard lawyers to practice is amplified in the case of unrepresented litigants, who generally have no legal training whatsoever.

The preceding should not be taken as proof that the legal profession ought to be deregulated. However, it does indicate that a fundamental aspect of our legal system – the maintenance of a qualified legal profession – can be seen as the result of a form of government action that has the effect of creating barriers with respect to access to justice. The most straightforward way of offsetting the imposition of these barriers would be by means of a comprehensive and fully funded system of legal aid. If the government fails to live up to this responsibility, it should be required to provide a substantive justification for that decision.

242 Ibid, at 23.
VI. Conclusion

In criticizing the Supreme Court's decision in the Remuneration Reference, Professor Hogg suggests that the result in that case shows that the Court “has yielded to the temptation to use the concept [of rule of law] as a rule of positive law that reinforces the powers and privileges of judges”. This conclusion may be avoided if we accept the Court's argument that the Constitution is intended to preserve the integrity of the judicial system, and that the courts are the branch of government best suited to maintaining it. However, if we recognize this principle as the basis for judicial review of ordinary legislation, then applying this principle consistently is essential to ensuring the legitimacy of such review.

My goal in this paper has been to provide an argument to the effect that the integrity of the judicial system is at stake where access to justice is concerned. More fundamentally, however, I claim that access to justice is every bit as essential to the integrity of the judicial system as is judicial independence. This follows, I think, from our belief that it is the duty of the courts to see that justice is done – an impartial hearing is valuable only insofar as one has the opportunity to be heard.

---

243Hogg, supra note 103, at 732.