

SCC Rejects General Constitutional Right to Counsel

In a judgement dated May 25, 2007 the S.C.C. rejected the argument that there is a general constitutional right to state-funded counsel for civil law suits and found that the British Columbia [Social Services Tax Amendment Act](#) is, in fact, constitutionally valid. According to the Court, [s.92\(14\) of the Constitution Act, 1867](#), which gives provinces the authority to pass laws in relation to the administration of justice, includes the ability to legislate on access to justice.

On December 20, 2007 the British Columbia Court of Appeal considered the constitutionality of the Act, which places a 7% tax on legal services. The issue was brought before the courts by the late Dugald Christie, a Vancouver lawyer, who argued that the tax prevented some of his low-income clients from retaining counsel. The Supreme Court of British Columbia found that the tax breached a fundamental constitutional right to access to counsel, and the Court of Appeal upheld the decision. The British Columbia government appealed the decision to the Supreme Court of Canada (S.C.C.).

The S.C.C. pointed out that such a right would entail a number of consequences. According to the Court, a general right to state-funded counsel would include virtually all cases before a court or tribunal and extend beyond actual court services to include other legal costs and disbursements. Such a right might also extend to corporations and businesses, as they represent the interest of individuals. The court suggested that, “guaranteed legal services would lead people to bring claims before courts and tribunals who would not otherwise do so” and that the implications (fiscal and otherwise) would “alter the legal landscape”. [i] The S.C.C. concluded that the materials presented to the Court did not establish a constitutional right to state-funded counsel for civil law suits.

The decision does not foreclose the possibility that the right to state-funded counsel might be constitutionally mandated in some situations. [Section 10\(b\) of the Charter](#) explicitly provides that a detained or arrested person has a right to counsel. Furthermore, the S.C.C. has found that [s. 7 of the Charter](#) includes a right to state-funded counsel where court proceedings put life, liberty or security of the person at stake; for example, in the case of New Brunswick (Minister of Health and Community Services v. G.(J.) the S.C.C. found that a mother’s liberty and security of the person were affected by child protection proceedings involving her daughter, and the mother was therefore constitutionally entitled to counsel to ensure procedural fairness. The Court in Christie v. British Columbia stated that, “a right to counsel may be recognized in specific and varied situations” [ii], but cautioned that, “the right to counsel outside the s. 10(b) context is a case-specific multi-factored enquiry”. [iii]

Legal aid and state funded counsel in Canada has been the subject of much recent attention. The Canadian Bar Association recently launched a challenge to British Columbia’s legal aid

plan, with the aim of establishing a constitutional right to civil legal aid and has publicly criticized the federal government's September 2006 decision to eliminate funding for the Court Challenges Program, which provides legal assistance and support for cases involving language and minority rights.

[i] at para 14

[ii] at para 27

[iii] at para 25

Sources:

- British Columbia (A.G.) v. Christie, 2007 SCC 21 (Supreme Court of Canada).
- [Christie v. British Columbia, 2005 BCCA 631 \(B.C. Court of Appeal\)](#)
- [Christie v. British Columbia, 2006 BCCA 59 \(Supplementary Reasons\)](#)
- Christie v. AG of B.C. et al, 2005 BCSC 122 (Supreme Court of B.C.)
- CBA Announces Legal Team to Lead Court Challenge on Constitutional Right to Legal Aid The Canadian Bar Association (19 February 2005).
- New Brunswick (Minister of Health and Community Services v. G.(J.), [1999] 3 S.C.R. 46.
- [Save Court Challenges FAIFA](#)

Further Reading:

- Graham Darling, "SCC to determine if tax on legal services is unconstitutional" The Centre for Constitutional Studies.
- Kirk Makin, No right to tax-free counsel: Supreme Court The Globe and Mail (25 May 2007)