AN APPEAL TO JUSTICE: PUBLICLY FUNDED APPEALS AND *R.* v. *ROBINSON*; *R.* v. *DOLEJS*

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The authors argue that the legal aid system should be subject to the scrutiny of the Charter of Rights, and that courts reviewing the decisions of legal aid workers, where publicly funded counsel is denied in a criminal appeal, should show less deference to the decision made and should engage in a more thorough review. The obvious benefits which emanate from the presence of counsel are reviewed, and relevant statistics are provided. The authors critically assess two recent decisions by the Alberta Court of Appeal in which publicly funded appeals were denied by legal aid. It is argued that a more thorough appreciation of the legal aid system and s. 684 of the Criminal Code would serve to rebut many of the objections to more substantive review of the legal aid denial to publicly funded counsel which were raised by the Court of Appeal. The discretionary nature of the criteria used by the legal aid system is put forward in an attempt to show the need for more critical review. Sections 7, 10(b), 11(d) and 15 of the Charter are used, in light of recent comments by the Supreme Court of Canada, to buttress the case for a right to publicly funded appeals. The authors conclude by noting that the Supreme Court of the United States has taken a broader approach to the right to publicly funded counsel, and that the current Canadian position should be reconsidered.

Les auteurs soutiennent que le système d'aide juridique devrait ê tre évalué dans le cadre de la Charte des droits et libertés; les tribunaux chargés des demandes de révision devraient accorder moins de poids aux décisions des fonctionnaires qui refusent d'accorder l'aide juridique en matière d'appels criminels, et ils devraient procéder à une révision plus approfondie. Les avantages évidents que comporte la présence d'un avocat sont présentés, statistiques à l'appui. Les auteurs passent en revue deux décisions récemment rendues par la Cour d'appel de l'Alberta, refusant la demande d'aide juridique. Ils soutiennent qu'une évaluation plus complète du système juridique et de paragraphe 684 du Code criminel permettrait de réfuter de nombreuses objections que soulèvent la Cour d'appel à qui l'on suggère une révision plus approfondie des refus d'aide juridique. S'efforçant de démontrer la nécessité de procéder à des révisions plus exigeantes, les auteurs soulignent la nature discrétionnaire des critères utilisés par le bureau d'aide juridique. Les articles 7, 10(b), 11(d) et 15 de la Charte sont invoqués, à la lumière des commentaires récents de la Cour suprême du Canada, pour appuyer le droit aux appels financés à même les fonds publics. En conclusion, les auteurs notent que la Cour suprême des États-Unis a adopté une approche plus large à ce sujet et que la position actuelle du Canada est à reconsidérer.

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I. INTRODUCTION

There is a healthy skepticism unfolding about invoking *Charter*[1] rights. The *Charter's* guarantees are seen as enshrining only "negative" rights, which are aimed at sheltering the individual from government action, as opposed to creating "positive" social obligations on the part of government.[2] There is the concern that, if successfully invoked, *Charter* rights could result in the significant redirection of the limited financial resources of government, thereby skewing societal priorities in favour of the most litigious.[3]

This skepticism is reinforced by the invitation to courts to interpret the *Charter* purposively, furnishing the *Charter* with "broad and generous" interpretations of its provisions.[4] As a consequence, the *Charter*'s broadly-phrased promises of "fundamental justice" and "equality" are being tested against a variety of social welfare schemes, including legal aid plans.

It was partly in light of this skepticism that the Alberta Court of Appeal, in *R.* v. *Robinson* and *R.* v. *Dolejs*,[5] declined an opportunity to thoroughly address the important national issue of whether the Charter enshrines any positive financial obligations on the Court or government institutions to provide legal assistance to those in need. Nor did the Court test the legal aid system against the rigour of the *Charter's* rights and guarantees. As a result of narrowly defining the issues before it, and a sterile interpretive approach, the Alberta Court of Appeal foreclosed the possibility that the provision of legal assistance on appeal has any constitutional implications. The decision is a cautionary tale about the *Charter's* unfulfilled promise to the indigent criminally convicted.

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1. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.
2. See, for example, Andrew Petter, "Immaculate Deception: The Charter's Hidden Agenda" (1987) 45 The Advocate 857. For a less skeptical approach see Lorenne M.G. Clark, "Liberalism and the Living-Tree: Women, Equality, and the Charter" (1990) XXVIII Alta. L. Rev. 384.
3. See David Mullan, "Judicial Deference to Administrative Decision-making in the Age of the Charter" (1986) 50 Sask. L. Rev. 203 at 215.
4. See, for example, *Hunter* v. *Southam*, [1984] 2 S.C.R. 145; *R.* v. *Big M Drug Mart*, [1985] 2 S.C.R. 295.
5. (1990), 63 D.L.R. (4th) 289 (Alta. C.A.).

II. THE DECISION OF THE ALBERTA COURT OF APPEAL

Robinson is currently serving a ten year term of imprisonment for armed robbery and other related offenses; Dolejs is serving a life sentence for second degree murder. Each had applied for legal aid certificates to pursue their respective appeals and each was denied three times, at every stage of the legal aid process, because in the opinion of the Legal Aid Society of Alberta ("Legal Aid") their appeals lacked "merit or likelihood of success".[6]

Each subsequently sought an order from the Court directing that counsel be appointed at public expense, a discretion afforded to courts of appeal by virtue of s. 684(1) of the *Criminal Code*.[7] The *Code* permits justices of the courts of appeal to appoint counsel where "it appears desirable in the interests of justice that the accused should have legal assistance and it appears that the party has not sufficient means to obtain the services of counsel".

In addition, Robinson, initially appearing on his own behalf, alleged that he had an "unconditional, Charter-protected and fundamental right to the supply of appeal books and [to] the assistance of counsel in his appeal".[8] Kerans J.A., before whom Robinson first appeared, directed that Robinson's motion be joined with Dolejs' and that counsel be appointed to argue stated constitutional questions. All of the questions were couched in absolutist, unconditional language.[9] Legal counsel, in addressing the questions set by the Court, argued, *inter alia*, that the denial of funding for both counsel and transcripts on appeal offended the "principles of fundamental justice" under s.7, and led, effectively, to a right of appeal for the rich and not the poor resulting in inequality which offended s.15(1).

In light of the three denials from Legal Aid, the Court characterized the s. 684(1) application as a fourth tier of appeal. As a result, the Court placed a great deal of weight upon Legal Aid's decision to deny funding to the applicants and effectively affirmed that decision.[10] The Court considered whether the *Charter* guaranteed any financial assistance to the indigent appellants and, relying on a great deal of historical evidence, held that no assistance was guaranteed as a principle of fundamental justice. The Court concluded that, traditionally, there has never been an absolute right to appeal, but only a

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6. This criteria is set out in Legal Aid Rule 2(2) and also in the federal-provincial cost-sharing agreements on legal aid. See Statistics Canada, Canadian Centre for Justice Statistics, *Legal Aid in Canada* 1985 (Ottawa: Supply and Services, 1986) at 223.

7. R.S.C. 1985, c.C-46.

8. *Supra*, note 5 at 292.

9. "I. Did the applicant have an absolute right to have appeal books for his intended appeal prepared at public expense?
II. Did the applicant have an absolute right to have counsel to argue his intended appeal appointed at public expense?
III. If the second question is answered affirmatively, did the applicant have any absolute right to counsel of his choosing?" See *supra*, note 5 at 293.

10. Although later, in separate oral reasons, the court assented to Robinson's s. 684 (1) application, but not Dolejs'. Personal communication with James D. Brimacombe.

qualified, and often permissive, right regulated by statute.[11] While the Court acknowledged that s.675 of the *Criminal Code* did contain a qualified right of appeal,[12] it held that the provision had no status as a fundamental part of the criminal law, nor was it a matter having any constitutional implications. The Court concluded, with respect to the section 7 claim, that there is no unconditional right to an appeal, to counsel, or to funds for appeal books.

The Court treated the equality question as one of whether some irrelevant personal characteristic of the convicted accused was being employed to deny them funding. In the Court's view there was not. The indigent with a meritorious appeal would get funds, and those without would not. According to the Court, the *merit* of the appeal is the distinguishing feature and not the *poverty* of the appellant.

Provincial Courts in Alberta, and elsewhere in the country, hear thousands of criminal trials each year. Of these, a small percentage go on to appeal. The Court expressed a fear that, if any *Charter* right to publicly-funded counsel on appeal and to appeal books were recognized, the administration of justice would be inundated with unmeritorious appeals, thereby drained of both funding and limited judicial resources.

The comments which follow will address a number of questions which, we submit, were before the Court in these cases, but which it mostly declined to address:[13]

1) the importance of the presence of legal counsel in the criminal process;
2) whether the Court ought to have deferred to the decision of Legal Aid and whether the Court had a statutory duty under s.684 to consider, independently of Legal Aid's decision, the applicants' request for counsel on appeal;
3) whether the provision for qualified public assistance in appeals, either through legal aid plans or through s.684, is being provided in a way which comports with the *Charter*; and
4) whether the *Charter* guarantees a right to public assistance beyond that provided by s.684 or legal aid plans.

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11. *Supra*, note 5 at 308. On the right versus privilege distinction see I. Johnstone, "Section 7 of the Charter and Constitutionally Protected Welfare" (1988) U. of T. Fac. L. Rev. 1 at 15 *ff*. See also Justice Wilson's rejection of this distinction in *Re Singh and Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 209.

12. A right of appeal exists with respect to sentence or on questions of law, and with leave on questions of fact or mixed fact and law.

13. The applicants relied on a number of different *Charter* arguments to support their claim. We will not be addressing all of these claims here. For example, the issue of whether there is a constitutional right to the choice of counsel will not be addressed here. But see *R.* v. *Rockwood* (1989), 49 C.C.C. (3d) 129 (N.S.C.A.). As well, for the purposes of our discussion, we will subsume the claims that public assistance is recognized by sections 10(b), (which guarantees the right to retain and instruct counsel upon arrest or detention), and 11(d), (which provides for fair hearings in criminal matters), into the argument that such assistance is guaranteed under section 7 of the *Charter*. Although all of the sections can be read together to support a *Charter* right to publicly funded assistance, we will set out the section 7 and section 15 claims separately. For a unified approach, see *Griffin* v. *Illinois* (1956), 351 U.S. 12 at 17 and for a retrenchment from this approach see *Evitts* v. *Lucey* (1985), 469 U.S. 387 at 405.

III. THE ROLE OF COUNSEL

It is probably trite to say that legal counsel can assist enormously in the procedure and argument on appeal. Counsel can substantially increase the odds of success to an appellant. Over one hundred years ago, Sir James Stephen acknowledged that "[w]hen a prisoner is undefended his position is often pitiable, even if he has a good case".[14] The United States Supreme Court has long recognized the advantage that counsel provides at trial[15] and, with transcripts, on appeal.[16] Without counsel or transcripts, "only the barren record speaks for the indigent, and unless the printed pages show that an injustice has been committed, he is forced to go without a champion on appeal".[17]

Canadian courts, as might be expected, have also recognized the role counsel can play in the criminal process beyond that at the moment of arrest or detention. Counsel provides the citizen with "fair protection" against the power of the state in circumstances where he has suffered "the humiliation and degradation of being deprived of his liberty and threatened with continued deprivation of liberty."[18]

Legal assistance is recognized to be of great importance in post-conviction proceedings. Speaking of the sentencing process, Dickson J, as he then was, recognized that "[u]pon conviction the accused is not abruptly deprived of all procedural rights existing at trial ; he has a right to counsel, a right to call evidence and cross-examine prosecution witnesses, a right to give evidence himself and to address the court".[19]

Statistical analyses of the effect that the presence of counsel can have tends to bear out these assumptions. Reviewing a 1962 Toronto bail project study, Martin Friedland concluded that "[t]he common sense conclusion that an accused is "better off" with a lawyer is statistically supported".[20] A 1977 Halifax sentencing study found that, among first offenders pleading guilty to summary charges, sentencing patterns differed markedly depending upon the presence of counsel. Of the 257 cases studied, first offenders

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14. Quoted in *R.* v. *Rowbotham* (1988), 63 C.R. (3d) 113 at 169. See other similar authorities cited there.
15. See *Powell* v. *Alabama* (1932), 287 U.S. 45.
16. See *Douglas* v. *California* (1962), 372 U.S. 353.
17. *Ibid.* at 356. We do not intend to advocate the wholesale adoption of the American case law in this area. While U.S. courts have developed a right to state-funded counsel and transcripts in the direction we suggest, they have done so on the basis of a number of arbitrary distinctions. For example, state funding is only available on appeals as of right and not for appeals requiring leave or for collateral attacks on convictions, even in death penalty cases. See *Ross* v. *Moffit* (1974), 417 U.S. 600; *Pennsylvania* v. *Finley* (1987), 481 U.S. 551; *Murray* v. *Giarratano* (1989), 106 L. Ed. 2d. 1.
18. Per McDonald J. in *Panacui* v. *Legal Aid Society of Alberta*, [1988] 1 W.W.R. 60 at 66-67.
19. *R.* v. *Gardiner*, [1982] 2 S.C.R. 368 at 415 and quoted by the Saskatchewan Court of Appeal in *Elizabeth Fry Society of Saskatchewan Inc.* v. *Saskatchewan Legal Aid Commission*, [1989] 2 W.W.R. 168 at 172.
20. M.L. Friedland, *Legal Aid: Working Papers* (prepared for the Ontario Joint Committee on Legal Aid) (Toronto: Programme in Criminal Studies, Osgoode Hall Law School, 1964) Pt.III at 13. See also Ontario, *Report of the Joint Committee on Legal Aid* (March 1965) (Chairman: William B. Common, Q.C.).

represented by counsel were significantly more likely to receive a discharge or suspended sentence than persons without counsel. [21]

An American study of federal post-conviction *habeas corpus* applications for the two year period 1975-77 showed a "dramatic correlation between counsel involvement and a petitioner's chances for winning relief."[22] Such applications can be likened to the appeal process in Canada in that they are post-conviction applications, often of a technical nature. The applications are made to a Court of review which has narrow discretion to grant leave or allow an appeal.[23] With counsel present, 12.8 percent were successful, in whole or in part, while self-represented applicants were successful in only 0.8 percent of the cases. The authors of the study conclude that "counsel's rate of success was thus more than fifteen times greater" than that of the unrepresented group.[24] It follows that those represented by counsel can dramatically increase the odds of success on appeal while those without counsel are left to face the dismal odds of representing themselves.

Legal culture contributes to the notion that the unrepresented somehow are unworthy complainants. The old proverb 'one that is one's own lawyer has a fool for a client' has become a truism. The unrepresented litigant is not trained, in any serious way, to cope with the environment which accompanies court proceedings. As a result, both judges and lawyers are well aware that an unrepresented litigant must be treated differently and with caution so as not to seriously disrupt the regular flow of the proceedings.[25]

> Legal systems give no confidence to litigants to go it alone. They call for dependence on lawyers. The complexity of pre-trial procedure, the ritualized style of pleadings, the public arena of the court — all contribute to make the pursuit of even the most simple claim a professional venture.

It is true that the law is a "disabling profession", a discipline which traditionally has not encouraged self-help, but the deployment of technocrats and experts.[26] Much could be done to alleviate the alienation between lawyer and client, between client and the legal

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21. Sixty four percent of represented first offenders were likely to receive a discharge or suspended sentence as opposed to twenty percent of unrepresented persons. See Edward Renner and Alan H. Warner, "The Standard of Social Justice Applied to An Evaluation of Criminal Cases Appearing Before Halifax Courts" (1981) 1 Windsor Yearbook of Access to Justice 62 at 69.

22. Karen M. Allen, Nathan A. Schachtman, and David R. Wilson, "Federal Habeas Corpus and Its Reform: An Empirical Analysis" (1982) 13 Rutgers Law J. 675 at 746.

23. The study showed that the great majority of the applications were unsuccessful: Federal District Courts granted total or partial relief in only 3.2% of applications. *Ibid.* at 683.

24. *Ibid.* at 746-747. The authors of the study acknowledge that, as the court itself appointed counsel in some cases, this may have contributed to the higher success rate with counsel. But, even petitioners who retained their own counsel "also fared dramatically better".

25. J. Caplan, "Lawyers and Litigants: A Cult Reviewed" in I. Illich et al., eds., *Disabling Professions* (Great Britain: Burns & MacEachern Ltd., 1977) 93 at 101.

26. *Ibid.*

process.[27] But until such changes have been achieved, the assistance of counsel is a necessary precondition to a full and fair appeal hearing.

Justice William O. Douglas eloquently expressed this point over twenty five years ago:[28]

> ...the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and the marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

It was in order to lessen the harshness of free market justice that governments were impelled to establish legal aid regimes. One of the main objectives of the Federal Government when it decided to involve itself in the provision of legal aid in 1969, according to then Finance Minister John Turner, was "to move as far as we can towards equality of access and equality of treatment before the law for rich and poor alike."[29] By providing counsel to the indigent, the wealth factor could be neutralized and equal consideration be given to all regardless of their financial resources.

IV. THE COURT'S DEFERENCE TO THE LEGAL AID REGIME

Legal Aid has been delegated the responsibility of administering public funds for the benefit of the indigent accused and convicted. In the exercise of its decision-making power to appoint counsel, it can be argued that Legal Aid acts as a statutory tribunal and is subject to the superintending jurisdiction of the Superior Court of Alberta.[30] Legal Aid's existence and operation is governed by the Bencher's of the Law Society of Alberta under sections 4 and 7(2)(i) of the *Legal Profession Act*.[31] Although the statute does not explicitly confer decision-making authority on Legal Aid, the effect of the statute and the attendant agreements between the Law Society of Alberta and the Attorney General of

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27. See R.V. Ericson and P.M. Baranek, *The Ordering of Justice: A Study of Accused Persons As Dependants in the Criminal Justice Process* (Toronto: University of Toronto Press, 1982) at 76 *ff.* and A.V. Alfieri, "The Antinomies of Poverty Law and a Theory of Dialogic Empowerment" (1987-88) 16 N.Y.U. Rev. Law & Social Change 659.

28. *Supra*, note 16 at 358.

29. Canada, House of Commons, *Debates* (November 7, 1969), quoted in D. Hoehne, *Legal Aid in Canada* (Lewiston, Lampeter, Queenston: The Edwin Mellen Press, 1989) at 99.

30. We note that a contrary conclusion was reached by Andrekson J. in *Gochanour* v. *The Solicitor General of Alberta* (1990), 74 Alta. L.R. (2d) 12 (Q.B.). In this decision, Justice Andrekson pointed to the fact that Legal Aid is incorporated under the *Societies Act*, R.S.A. 1980, c. S-18, which fact led him to conclude that Legal Aid is not a public body subject to public scrutiny or the general jurisdiction of the Court. He fails, however, to recognise that the existence of the legal aid plan in Alberta is authorized by the *Legal Profession Act*, R.S.A. 1980, L-9. The *Act* permits the Attorney General and the Law Society of Alberta to enter into an agreement respecting the operation of a plan to provide legal aid to persons in need. Furthermore, the *Legal Profession Act* sets out, *inter alia*, that the agreement may provide for the establishment of a board, committee or other body to administer the plan.

31. R.S.A. 1980, c.L-9.

Alberta, and the Law Society of Alberta and Legal Aid, are to indirectly confer such authority on Legal Aid.[32]

In the present cases, the Court neither identified nor explored Legal Aid's status as a statutory tribunal. Alberta, unlike other provinces, has not enacted a statute specifically governing the organization and powers of a Legal Aid plan.[33] However, the agreements already mentioned clearly recognize the delegated authority of Legal Aid.[34] Recent case law, both in Canada and in England, would lead one to conclude that Legal Aid, in its decision-making capacity with respect to the appointment of counsel, would be characterized as a statutory tribunal,[35] rendering prerogative and public law remedies available as against decisions of Legal Aid.

The Courts' inherent supervisory role over statutory tribunals, however, must not be confused with its independent jurisdiction under s. 684 of the *Criminal Code*. Nor is there any statutory basis for the Court of Appeal, exercising its jurisdiction under s. 684,

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32. See the agreement of 13 February 1979 between Her Majesty the Queen in Right of Alberta, as represented by the Attorney General for the Province of Alberta, and The Law Society of Alberta which provides that the Law Society shall operate a plan to provide legal aid to individuals in need thereof in accordance with the agreement and the Rules made by the Benchers of the Law Society. The agreement further provides that the Law Society may delegate the performance of any or all of its obligations under this agreement to Legal Aid. See also, the agreement of 31 May 1979 between the Law Society of Alberta and Legal Aid of Alberta whereby the Law Society delegates the performance of its obligations to Legal Aid and sets out rules governing the operation of Legal Aid.

33. Examples of other jurisdictions which have enacted legislation establishing and governing legal aid plans include: British Columbia - *Legal Aid Services Society Act*, R.S.B.C. 1979, c. 227, as am.; Manitoba - *Legal Aid Services Society of Manitoba Act*, C.C.S.M. c. L105; and Ontario - *Legal Aid Act*, R.S.O. 1980, c. 234, as am. Furthermore, in its 1988/89 *Report*, the Task Force on Legal Aid stated that it is significant to note that Alberta is the only province which does not have enabling legislation for the provision of legal aid. The Task Force recognized that every legal aid plan involves public funding from the two senior levels of government and that public funding carries with it the attendant requirement of public scrutiny. The Task Force went on to recommend that enactment of such legislation be considered in Alberta. See Alberta, *The Report of the Task Force on Legal Aid* (Edmonton, 1989) (Chairman: M. Neil McCrank).

34. *Supra*, note 32.

35. In *Roberval Express* v. *Transport Drivers Union*, [1982] 2 S.C.R. 888, the Supreme Court of Canada set out that several matters are to be considered in determining whether or not a tribunal is a statutory tribunal. The earlier test, set out by the Supreme Court in *Howe Sound Co.* v. *International Union of Mine, Mill, and Smelter Workers (Canada), Local 663*, [1962] S.C.R. 85 (a tribunal to which the parties, by statute, are required to resort to), was not the sole factor to be considered. The Supreme Court preferred that the focus instead be on the duties and powers conferred by statute. Justice Chouinard referred to considerations set out by Lord Goddard in *R.* v. *National Joint Council for the Craft of Dental Technicians*, [1953] 1 Q.B. 704. Goddard focused on powers and duties conferred by statute which, when exercised, may lead to the detriment of subjects who are required to submit to the statutory jurisdiction. Lord Goddard also recognized that supervisory jurisdiction had been extended to cases where a body had been entrusted by parliament with duties partly of an administrative character and partly of a judicial character and where its decision could affect the parties positions. The recent English Court of Appeal decision of *R.* v. *Panel on Take-Over and Mergers, Ex Parte Datafin*, [1987] 1 All E.R. 564, provides an even clearer indication that courts must look at the effect of the arrangement which confers power on the tribunal as opposed to the formal statutory structure by which such power is conferred. We wish to acknowledge the research assistance of C.D. Boyer in relation to this area of the law.

to be seen as a final stage of appeal following the decisions of Legal Aid. Unfortunately, confusion as to the Court's role appears to have occurred in the present cases. The Court essentially set itself up as a "third appeal (or fourth application) for public funding"[36] and, in effect, adopted an approach of curial deference to the decision of Legal Aid.[37] The Court's analysis of its jurisdiction under s. 684 was based largely on its view of the adequacy of the existing structure for the provision of legal services to the indigent in Alberta. In view of the Court's characterization of criminal appeals in Canada as a "sharply qualified, often merely permissive"[38] process, the Court paid little more than lip service to the issue of the applicants' entitlement to public funding in relation to their appeals.

The Court of Appeal's deference to the Legal Aid decision to deny funding was further exemplified in the description of its own practice in dealing with s. 684 applications.[39] The Court indicated that it often receives little background information regarding the decision being appealed. In particular, the Court stated that "frequently it is given little objective information about the case or the trial that produced the conviction."[40] It went on to state that one certain piece of evidence it has before it is "that Legal Aid (Alberta) has considered but refused to provide the assistance that the applicant wants and that its refusal has twice been confirmed under the internal appeals ... referred to."[41] The court recognized its broad ability, pursuant to s. 683 of the *Code*, to order the production of relevant materials and to obtain evidence which would be of assistance in making its determination under s. 684. However, it hastily dismissed this process as being slow and costly. Another potential source of information, referred to by McClung J., was the legal opinions provided to Legal Aid and the applicant relating to the merits of an appeal. It was not mentioned in the two cases whether these materials had been requested by, or provided to, the Court. In any event, and in spite of the Court's broad-ranging power of inquiry into matters relating to the proceedings of an appeal and its jurisdiction to review the accuseds' ability to obtain financial assistance, the Alberta Court of Appeal was content to treat the earlier decision of Legal Aid as final and conclusive.[42]

Throughout these decisions, the Court of Appeal's concern with the cost of providing legal services to the indigent can be seen to influence both its willingness to accept the existing Legal Aid system and its own conclusions as to whether the *Charter* enshrines any rights in relation to the provision of legal assistance on appeal. As indicated, the Court placed great emphasis on the cost of delivering legal aid services. After referring to the tax dollars spent on providing legal aid in criminal matters, it acknowledged that, at present, "much of the unofficial cost of representation is assumed by the lawyers of the

36. *Supra*, note 5 at 296-297.
37. In the event that the Court of Appeal was designated by statute as a fourth stage of appeal, and absent any *Charter* considerations, an approach of curial deference would have been appropriate. See *C.U.P.E.* v. *New Brunswick Liquor Control Board*, [1979] 2 S.C.R. 277.
38. *Supra*, note 5 at 308.
39. *Ibid.* at 297-99.
40. *Ibid.* at 297.
41. *Ibid.*
42. *Ibid.* at 298.

Criminal Bar who are assigned and who take cases at reduced rates."[43] It is interesting that the Court did not refer to the "recovery of costs" mandate incorporated in the rules of Legal Aid. That mandate demands that Legal Aid endeavour to recover the fees and disbursements from the Legal Aid client that were expended on his or her behalf. It is noteworthy that the rules allow Legal Aid to secure repayment of costs by requiring the applicant to provide promissory notes, mortgages of real or personal property, or an assignment of cash bail for legal costs.[44] While it is clear that the recovery programme does not represent complete, or even substantial, reimbursement of legal aid expenditures, the existence of the programme is of importance in addressing the issues raised in these cases.[45]

The Court of Appeal should have explored the scope and underlying philosophy of both s. 684 and the provincial legal aid regime. For example, it should have considered whether, given that the legal aid scheme appears to be based partially on a model of credit lending rather than on a strict poverty law model, it is aimed at providing legal services or assistance in the same instances as s. 684.[46] As well, it should have been recognized that Legal Aid is entitled to refuse assistance based on the applicant being a recidivist, or as a result of the total amount of legal aid that the applicant is currently receiving, or has received, from Legal Aid.[47] Uncritical adoption by the Court of Legal Aid decisions to fund or not to fund counsel on appeal in effect sanctions such reasons for refusal without providing an independent examination of either the merits of the appeal or the applicant's financial need for legal assistance.

The Court of Appeal also failed to provide clear and detailed criteria as to the circumstances in which it will order the provision of counsel under s. 684. Consequently, the test under s. 684, and that employed by Legal Aid, fails to meet a basic fundamental principle: laws which impact on the liberty and security of a person must be reasonably discernible and precise. It is to a consideration of that issue to which we now turn.

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43. *Ibid.* at 295.

44. The Legal Aid Society of Alberta Rules (as approved by the Law Society and Legal Aid Society, 31 May 1979), Part III - Repayment by Legal Aid Client, Rules 1 and 2; See also *The Legal Aid Society of Alberta 1989 Annual Report*, at 13, which sets out that "At the time of the initial interview, applicants must agree in writing to repay the Society."

45. Richard L. Abel writes:"Because the contributions may cost as much to collect as they are worth, the purpose, apparently, is to discourage applications and to make those granted seem more meritorious; the purpose is not to generate revenue." See his "Law Without Politics: Legal Aid Under Advanced Capitalism" (1985) UCLA L. Rev. 474 at 555. To the same effect see Legal Aid Services of Manitoba, *An Evaluation of the Effects of a User Fee and Other Fiscal Restraint Policies on the Service Delivery System of Legal Aid Manitoba: Final Report, 1978/79* (July, 1980) at 81.

46. *Supra*, note 44. Rule 14 sets out that "a legal aid client shall be obligated to pay to the Legal Aid Society the fees and disbursements expended on his behalf in providing legal aid in such amount as may be determined under Part III - Repayment by Legal Aid Client". Of note is the fact that the Society does not pursue cost recovery in relation to Court Ordered Counsel. See *The Legal Aid Society of Alberta 1989 Annual Report* at 13.

47. *Ibid.* Part IV - Criminal Matters, Rule 6; *The Legal Aid Society of Alberta Rules* (as approved by the Law Society and Legal Aid Society, 31 May 1979).

V. THE RULES FOR THE PROVISION OF COUNSEL AND THE PRINCIPLES OF FUNDAMENTAL JUSTICE

An emerging principle of fundamental justice under the *Charter* is the "void for vagueness" doctrine.[48] The doctrine calls for clarity and explicitness in the law when a liberty or security interest of a person is at stake. Two rationales are offered for the principle: (1) to give fair notice of conduct that is prohibited by law; and (2) to narrowly confine the discretion of law enforcement officials so as to avoid encouraging "arbitrary and erratic arrests and convictions".[49]

The *Morgentaler*[50] case presents a practical application of the doctrine and a suggestion of its scope. In *Morgentaler*, it will be recalled, Chief Justice Dickson held that equivocal criteria for legal abortions set out in the *Criminal Code* offended the principles of fundamental justice. The criteria were being employed by therapeutic abortion committees in circumstances where a woman's liberty and security of the person, and even life, were at stake. Dickson J. held that "[t]he absence of any clear legal standard to be applied by the committee in reaching its decision is a serious procedural flaw."[51]

The Supreme Court has more recently confirmed the doctrine as a principle of fundamental justice. The Court, however, substantially circumscribed the doctrine's scope by saving laws which have been given clarity by judicial interpretation. Lamer J., in his concurring judgment, wrote that much legal language lacks certainty, but was prepared to uphold vague laws if the impugned language "can be or has been given sensible meanings by courts."[52]

In the cases discussed here, the criteria for funding on appeal include "merit or likelihood of success" and "desirable and in the interests of justice". As in *Morgentaler*, these are vague and equivocal criteria being applied when a liberty and security interest is at stake, namely, representation by counsel (with the assistance of transcripts) when counsel's presence generally has a direct bearing on the possibility of success on appeal. Admittedly, the application of the vagueness doctrine in the context of funding counsel

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48. The "void for vagueness" argument is closely tied to the criminal law principle of legality. See Bruce P. Archibald, "The Constitutionalization of the General Part of the Criminal Law" (1988) 67 Can. Bar Rev. 403 at 413 *ff*. For a discussion of Italian constitutional law in this area see Alberto Cadoppi, "Recent Developments in Italian Constitutional - Criminal Law" (1989) XXVIII Alta. L. Rev. 427 at 431-33. The ensuing discussion would also apply in the context of the *Charter's* section 1 analysis. See *infra*, note 129.

49. *Papachristou* v. *City of Jacksonville* (1972), 405 U.S. 156 at 162. See also G.T. Trotter, *LeBeau: Toward a Canadian Vagueness Doctrine* (1988), 62 C.R. (3d) 183.

50. (1988), 44 D.L.R. (4th) 385.

51. *Ibid.* at 412, Lamer J. concurring.

52. *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code* (1990), 109 N.R. 81 per Lamer J. For a critique of this kind of approach see A.A. Borovoy, "False News Laws and Freedom of Expression" (1987), 56 C.R. (3d) 77.

is one step removed from its usual application in constitutional cases[53] — the definition of a crime — but for the purpose of confining unfettered discretion,[54] the principle clearly has relevance.

Indeed, such a requirement of clarity comports with the very notion of assigning benefits on the basis of "merit".[55] For these purposes, it is useful to adopt James Fishkin's definition of the principle of merit: "widespread procedural fairness in the evaluation of qualifications for positions."[56] The notion of procedural fairness is built into the definition so as to ensure that reasonable and fair criteria are employed in the assignment of benefits.

While criteria such as merit or likelihood of success can be given some meaning by courts, this is usually accomplished by review of the record, and after written and oral argument by legal counsel; essentially, after the various components of the appeal process have run their course. But no inquiry at all is required to be undertaken by Legal Aid.[57] The application of the criteria for funding, absent any investigatory prerequisites, makes the foundation for an apparent objective assessment of merit weak indeed.

It should not be surprising, then, that the application of these funding criteria becomes a very subjective exercise.[58] While the relevant Legal Aid rules permit that an opinion from the applicant's lawyer, an independent lawyer, or both, may be requested by Legal Aid to assist in making a decision,[59] this rule does not provide that an opinion is mandatory for the review of appeal applications. While no doubt of assistance to legal aid officials, even when requested, the opinion's value would rest ultimately upon an analysis of the nebulous concepts of "merit and likelihood of success". Unfortunately, no further guidance as to factors to be considered in rendering the opinion are set out in the rules.

Even among the judiciary, the question of merit has been shown to be a highly subjective assessment. Judges can disagree significantly about the prospective merit of an appeal. This was recognized by Justice Miller of the U.S. Court of Appeals in *Jones* v.

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53. A parallel administrative law principle of vagueness may also have application in these circumstances as "it leaves those responsible for implementing the [law] free to apply the rule in a purely subjective manner". See *Re City of Montreal and Arcade Amusements Inc.* (1985), 18 D.L.R. (4th) 161 at 184, (S.C.C.) per Beetz J.

54. See *Papachristou, supra*, note 49 at 168.

55. There is a great deal of irony in the use of a "merit" test in these circumstances. It bespeaks of an assignment of limited rights and goods based upon a natural competition. It seems odd to think of an appellant "earning an opportunity" to counsel. Should the right to counsel be distributed according to a marketplace theory of equal opportunity?

56. James S. Fishkin, *Justice, Equal Opportunity, and the Family* (New Haven and London: Yale University Press, 1983) at 22.

57. Nor would it make sense to have legal aid duplicate the appeal process. But this does not mean it must be all (a whole appeal) or nothing (no requirement that legal aid apply any clear criteria).

58. See Richard Moon, "The Constitutional Right to State Funded Counsel on Appeal" (1989) 14 Queen's L. J. 171 at 172-75. Although Moon's article was published after this comment was substantially completed, we were able to benefit by his thoughtful treatment of the same subject.

59. *Supra*, note 44, Part IV - Criminal Matters, Rule 5.

Miller[60]. Miller J. noted that, for an eighteen month period, from 1957 to 1959, the Court had decided 24 appeals where an indigent, representing himself, had been denied leave to appeal by the lower (District) Court on the ground that the appeal lacked "merit". The Court of Appeals reversed convictions in 11 of 24 of those cases. In six others, the convictions were affirmed by split decisions. "Thus", concluded Justice Miller, "in 17 of 24 cases at least one judge of this Court thought the conviction should be reversed". That is, in over 70 percent of these cases, appellate judges differed with each other over whether there was merit to an appeal. Justice Miller cautioned that "[a] free society should be ready to assume the burden of infinitely more than 24 appeals to avert 11 miscarriages of justice."

Convicted accused, facing lengthy prison terms, deserve similar recognition of the need for uniform and clearly defined criteria in the determination of their right to public assistance on appeal.

It might be argued in reply that the applicants have not been deprived of their "liberty" without fundamental justice. They have forfeited their liberty by committing crimes and their forfeiture is presumed to have been done with justice — the presumption of innocence having been subsumed by virtue of their convictions and sentences.[61] But the very rationale for an appeal process is to ensure that possible errors are reviewed by a higher and more authoritative court. The state has provided, therefore, a potential avenue for liberty which is available even to the convicted. For example, where a correctional facility denied inmates access to their bank accounts to pursue appeals, according to Strayer J., the authority had deprived inmates of such a liberty and security interest.[62]

Moreover, the prospects of facing long term imprisonment may qualify as a deprivation of "security" of the person.[63] Lamer J., in *Mills* v. *The Queen*, has spoken about the effects which pre-trial delay can have on the security of the person.[64] They include stigmatization, loss of privacy, stress, anxiety, and uncertainty. In *R.* v. *Vaillancourt*, Lamer J., writing for the majority, was of the view that the stigmatization resulting from conviction may deprive one of section 7 rights.[65]

Something less than a "deprivation" of liberty and security may qualify to trigger section 7. The corresponding word in the French version refers to "porté atteinte".[66]

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60. (1959), 266 F. 2d. 924 at 925-26.
61. See *R.* v. *Vaillancourt* (1988) 43 C.C.C. (3d) 238 at 248 (Ont. H.C.J.).
62. *Henry* v. *Commissioner of Penitentiaries*, [1987] 3 F.C. 420 at 426. Similar concerns might arise under the new proceeds of crime amendment to the *Criminal Code*, R.S.C. 1985, c. C-46, Pt. XII.2.
63. See *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 207 (Wilson J.). See also M. Jackman, "The Protection of Welfare Rights Under the Charter" (1988) 20 Ott. L. Rev. 257 at 267 *ff.*
64. [1986], 1 S.C.R. 863 at 919-20.
65. [1987], 2 S.C.R. 636 at 651. See too the comments of the majority in *Irwin Toy Ltd. v. A.-G. Que.* (1989), 58 D.L.R. (4th) 577 at 633 regarding the economic scope of "security of the person".
66. This argument was brought to our attention by the decision of Walsh J. in *Re Litwack and National Parole Board* (1986), 26 C.C.C. (3d) 65 at 74.

According to Jeraute's dictionary, "porter atteinte aux interêts" means to damage, encroach, infringe, endanger or impair interests.[67] The French version of s.24(2) uses the same language and confirms this approach. It talks of excluding evidence in conditions "qui portent atteinte" while the English version of 24(2) talks of evidence obtained in a "manner that infringed or denied". The Supreme Court of Canada has indicated that the text which better protects the right in question should be the one favoured by the court.[68] Therefore, relying upon the French version, s.7 could be invoked in circumstances where there has been an infringement, impairment, or prejudice.

The differing versions aside, it is apparent that, on a broad and generous interpretation which secures "the full benefit" of section 7,[69] imprisonment for any length of time is a deprivation of liberty and security of the person.[70] In a decision which post-dates *Robinson*, Justice Lamer summarized section 7 in this way:[71]

> Put shortly, I am of the view that s.7 is implicated when the State, by resorting to the justice system, restricts an individual's physical liberty in any circumstances. Section 7 is also implicated when the State restricts the individual's security of the person by interfering with, or removing from them, control over their physical or mental integrity.

VI. BEYOND STATUTE: A CHARTER RIGHT TO COUNSEL AND THE PRINCIPLES OF FUNDAMENTAL JUSTICE

The legal rights in the *Charter* nowhere refer explicitly to a right to counsel at trial or appeal. However, a reading of sections 10(b) and 11(d), together with the more open-ended provisions of section 7, has led courts to require the provision of trial counsel at public expense beyond that provided by statute. Counsel has been ordered to be provided in cases where "representation of the accused by counsel is essential to a fair trial"[72] or where a charge is "serious and complex".[73] While these are narrow readings of a *Charter* right to legal aid counsel, they go some distance towards recognizing the frailty of the criminal justice process for those who have no defender other than themselves.

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67. Jules Jeraute, *Vocabulaire Francais-Anglais et Anglais-Francais de termes et locutions Juridiques* (Paris: R. Pichon et R. Durand -Auzias, 1953) at 20. See also Ontario, *Ontario French-English Legal Lexicon* (Ontario:Attorney General, March 1987) at 198 where "porter atteinte" is defined as prejudice, or at 11 as to affect adversely.

68. See, for example, *R.* v. *Therens* (1985), 18 C.C.C. (3d) 481 at 509 and *R.* v. *Collins* (1987), 74 N.R. 276 at 301.

69. Per Dickson C.J.C. in *R.* v. *Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 at 359-60; and see *Hunter* v. *Southam* (1984), 11 D.L.R. (4th) 641.

70. "Liberty in the constitutional sense should embrace any form of release from custody - by parole, good-time credit, or any other system." See Susan N. Herman, "The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court" (1984) 59 N.Y.U. L. Rev. 482 at 536. Incarceration results in more than a loss of physical liberties, but also a host of civil deprivations. See Special Project, "The Collateral Consequences of a Criminal Conviction" (1970) 23 Vand. L. Rev. 929.

71. *Reference Re ss.193 and 195(1)(c) of the Criminal Code* (1990), 109 N.R. 81 (S.C.C.).

72. *Rowbotham, supra*, note 14 at 173.

73. *Panacui, supra*, note 18 at 67. See also *R.* v. *White* (1977), 1 Alta. L.R. (2d) 292 at 305 (Alta. Q.B.) and *R.* v. *Powell and Powell* (1984), 51 A.R. 191 (Alta. Prov. Ct.).

The principles of fundamental justice, according to the Supreme Court of Canada, are essentially "procedural in nature".[74]

> Many have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights.
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> ...
>
> Whether any given principle may be said to be a principle of fundamental justice...will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves.[75]

We have already discussed the essential, and traditionally recognized, role of counsel on appeal. The *International Covenant on Civil and Political Rights*,[76] to which Canada is a signatory, also informs *Charter* interpretation in this area. Article 14(3)(d) provides that everyone charged with a criminal offence has, at a minimum and "in full equality", the right to "have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

The Supreme Court of Canada in *R.* v. *Brydges*[77], although not explicitly a section 7 case, provides guidance as to the requirements of the principles of fundamental justice in this area. The Court recognized that in order for the *Charter* right at issue, providing that those detained or arrested be informed of their right to counsel, to be meaningful, the Court would have to interpret the *Charter's* reach to include the right to be informed of provincial legal aid and duty counsel programs. After reviewing the legal aid regimes, the Court's previous jurisprudence on s. 10(b), and the *International Covenant* referred to above, Lamer J., writing for the Court, concluded:[78]

> All of this is to reinforce the view that the right to retain and instruct counsel, in modern Canadian society, has come to mean more than the right to retain a lawyer privately. It now also means 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.

Lamer J. added, however:[79]

> ...that the issue of whether there is a constitutional right to have the assistance or representation of counsel is not before the Court. This issue normally arises when an accused cannot bring himself within the provincial Legal Aid plan and duty counsel cannot, as they usually cannot, furnish a full defence. A consideration of this issue goes beyond an examination of s.10 of the Charter, to ss.7 and 11(d). That matter will have to be decided when the facts of the case raise the issue and the matter is fully argued before the Court.

The Court construed the right to counsel to extend to a right to be informed of the existence of legal aid plans and duty counsel. By doing so, it recognized that the right to counsel would otherwise be meaningless for the indigent who did not know about legal

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74. *Reference Re s.94(2) of Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289 at 309.
75. *Ibid.* at 302 and 310.
76. 999 U.N.T.S. 171.
77. (1990), 74 C.R. (3d) 129 (S.C.C.).
78. *Ibid.* at 148-49.
79. *Ibid.* at 150.

aid schemes. By analogy, fundamental justice means more than what the private legal marketplace can provide but, also, what the state has provided by way of public legal aid plans and duty counsel. The Court's ruling in *Brydges*, and its open invitation to consider these kinds of issues, is an encouraging interpretive signal.

The greater part of the Court of Appeal's decision is devoted to a historical survey of appeals in criminal matters. As previously indicated, the Court concludes that appeals are, at best, a qualified and often permissive right.[80] Notwithstanding this history, the right of appeal could still be considered a fundamental part of the criminal law.[81] More significantly, the Court's finding that the state is not obliged to provide an avenue of appeal should not, in itself, be determinative of the issue of a right to publicly-funded counsel on appeal.

It was the conclusion of the 1965 Joint Committee on Legal Aid in the Province of Ontario:[82]

> ...that overwhelming opinion today is that legal aid should form part of the administration of justice in its broad sense. It is no longer a charity but a right.

This sentiment was echoed by the 1970 Alberta Joint Committee on Legal Aid.[83] And the Supreme Court of Canada in *Brydges* has given constitutional recognition to the fundamental character of Canada's legal aid and duty counsel systems.

Therefore, once a person has been accorded a route for appeal, a concomitant right to be represented by counsel on appeal may be considered a fundamental part of the criminal law.[84] Just as proof of subjective foresight in the context of a murder prosecution is a requirement of fundamental justice,[85] as might be a general right against self-incrimination in any criminal prosecution,[86] so might be a right to counsel on appeal, even if qualified. Once government begins to traffic in liberty, it must do so fairly and

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80. *Supra*, note 5 at 308. To reach its conclusion, the Court of Appeal relied upon the proceedings and evidence of the Special Joint Committee on the Constitution. On the reliability of such evidence see Paul Brest, "The Misconceived Quest for the Original Understanding" (1980) 60 Boston L. Rev. 204.

81. Justice Sutherland in *Powell* v. *Alabama*, *supra*, note 15 at 60 wrote that "If recognition of the right of a defendant charged with a felony to have the aid of counsel depended upon the existence of a similar right at common law as it existed in England when our constitution was adopted, there would be great difficulty in maintaining it as necessary to due process".

82. *Supra*, note 20 at 97.

83. Alberta, *Report and Recommendations of the Joint Committee on Legal Aid* (Edmonton, Alberta: 5 January 1970) (Chairman: Judge S.S. Lieberman).

84. See, for example, *Powell* v. *Alabama*, *supra*, note 15 at 67-8 where Justice Sutherland, for the Court, characterized the right to counsel question as one of whether "the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'". He concluded that "a consideration of this right [to counsel] and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character."

85. See *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636.

86. See David M. Paciocco, "Self-Incrimination: Removing the Coffin Nails" (1989) 35 McGill L. J. 73 and, most recently, *Herbert v. The Queen* (1990), 57 C.C.C. (3d) 1 (S.C.C.).

with justice.[87] Unfortunately, the Court's characterization of the constitutional questions in absolute terms predetermined its unsatisfying result.

The cases which have recognized a *Charter* right to counsel beyond statute have been confined to the trial process. Should a right to counsel at trial be distinguished from a right on appeal? Other than the anticipated saving of public money, there is little to be gained by such a distinction. Much of the fact-finding, interviewing of witnesses, and research of the law is conducted by counsel at the trial stages.[88] The emphasis on legal argument and preparation which characterizes an appeal speaks to the importance of the assistance of legal counsel at this stage of the process as well. Due to the specialized training necessary, both to conduct a trial and an appeal, it makes little sense to provide counsel in one and not the other.[89] As the 1965 Ontario Joint Committee on Legal Aid concluded, "to do otherwise would be to grant half a loaf."[90]

There may be legitimate concern that extending section 7 to include a constitutional right to public funding on appeal means affirming the section's substantive, and not just procedural, reach.[91] Such concerns need not arise in these cases. First, the presence of counsel has been traditionally regarded as a component of *procedural* fairness.[92] Second, the presence of counsel does not determine, although it can affect, the substantive outcome. The presence of counsel concerns the legal means by which substantive ends are determined.[93] This is not to deny, however, that a right to counsel on appeal is closely tied to the possible substantive outcomes. It exemplifies the close connection, interdependence, and often artificial distinction, between procedure and substance.[94]

VII. THE RULES FOR PROVISION OF COUNSEL AND EQUALITY

The *Charter* guarantees equality before and under, and equal protection and benefit of, the law without discrimination. In *R.* v. *Turpin*, Wilson J. wrote that the "guarantee of

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87. See Herman, *supra*, note 70.

88. See Comments, "Due Process: The Right to Counsel in Parole Release Hearings" (1968) 54 Iowa L. Rev. 492 at 502-06.

89. Quoting Justice Black in *Griffin* v. *Illinois* (1956), 351 U.S. 12 at 18: "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."

90. *Supra*, note 20 at 65.

91. These concerns arise, primarily, out of the reasons for judgment of Lamer J. in the *Motor Vehicle Reference*, *supra*, note 74.

92. See Ontario, *Royal Commission Inquiry into Civil Rights, Report No. 1*, Vol. 1 (Ontario: Queen's Printer, 1968) (Commissioner: James C. McRuer) at 215.

93. See Eric Colvin, "Section 7 of the Canadian Charter of Rights and Freedoms" (1989) 68 Can. Bar Rev. 560 at 567.

94. "The myth that ideal procedural rules are neutral as to substantive ends is an appealing instance of what Shklar calls the ideology of "legalism". The isolation of procedure from substantive expectations is simply an instance of a value system that serves to "isolate law completely from the social context within which it exists." "See Winston P. Nagan, "Civil Process and Power: Thoughts From a Policy - Oriented Perspective" (1987) 39 Univ. of Florida L. Rev. 453 at 470-71, quoting Judith N. Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964) at 2.

equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any great disability in the substance and application of the law."[95] Her reference to both substance and application means that both the intent and effect of the law may be reviewed under s.15. If the unintended effect of a law is to impact on certain groups "in a disproportionately negative way", according to Judge Abella, "it is a signal that the practices that lead to this adverse impact may be discriminatory."[96] Systemic discrimination, a term often used interchangeably with unintended discrimination,[97] occurs when a supposedly neutral law has an adverse impact on a certain group.

As either unintended or systemic discrimination, refusal on the basis of merit, likelihood of success, or desirability, has an adverse impact on the applicant denied. Their chances of success on appeal are lessened substantially. And they are denied the opportunity, available to represented appellants, of having their argument presented in a meaningful way to courts of appeal.[98]

Adverse impact alone is insufficient to found a section 15 claim. One must also prove that inequality results because of "discrimination". In order to determine whether discrimination has occurred, the Supreme Court of Canada has suggested that one look to the enumerated grounds set out in section 15 of the *Charter* and, in the alternative, to anagous grounds.[99] In doing so, we must bear in mind that Justice Wilson has directed that the equality guarantees be read with "sufficient flexibility",[100] in a "broad and generous manner",[101] and be given their "full content" independent of the balancing process under s.1 of the *Charter*.[102]

First, it is worth considering whether the other Legal Aid criteria, which did not come into play in these cases, signal discrimination. Legal Aid, and by implication the Court by adopting Legal Aid's determinations, may take into account factors which are included among the enumerated grounds in s.15 or analogous to them. For example, previous similar convictions can disqualify an applicant from receiving Legal Aid. Criminal conviction is included among the prohibited grounds for certain purposes in British Columbia,[103] and in Ontario[104] and at the federal level for convictions where a pardon

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95. *R.* v. *Turpin* (1989), 69 C.R. (3d) 97 at 123.

96. *Report of the Commission on Equality in Employment* (Ottawa: Supply and Services, 1984) at 307 and see *Brooks* v. *Canada Safeway*, [1989] 1 S.C.R. 1219 at 1238.

97. See Dale Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1989) at 119-20.

98. See Wilson J. in *Turpin*, *supra*, note 95 at 124 and discussion in text associated with notes 14 to 29.

99. See McIntyre J. in *Andrews* v. *Law Society of British Columbia*, [1989] 2 S.C.R. 143 at 182. As McIntyre explains, distinctions "based on an individual's merits and capacities will rarely" be classed as discriminatory (at 175).

100. See Madame Justice Wilson in *Andrews*, *ibid.* at 153.

101. *Ibid.* at 175 per McIntyre J.

102. See *Turpin*, *supra*, note 95.

103. *Human Rights Act*, S.B.C. 1984, c.22, s.9. Conviction has also been read into the *Québec Charter of Rights and Freedoms*, R.S.Q. 1977, c.C-12, prohibition against discrimination by reason of "social condition". See W. Pentney and W.S. Tarnapolsky, *Discrimination and the Law*, 2nd ed. (Don Mills: De Boo, 1985) at 9-52.

104. *Human Rights Code*, S.O. 1981, c.53, s.4.

has been obtained.[105] As well, previous applications for Legal Aid can disqualify an applicant. This may be discrimination by reason of "social status" or "poverty" which, as we argue below, may be a ground analogous to section 15.[106] "[F]ailure of proof of the applicant's ordinary residence within Canada" can also disqualify an applicant. This latter ground may amount to, or be closely analogous to, discrimination based upon "national origin" which is included among the enumerated grounds in section 15.[107]

In order to succeed in an equality claim, denied applicants must prove that they have been discriminated against, and that they are part of a disadvantaged group which can avail itself of section 15. In *Turpin*, in what may prove to be a beacon for future equality rights litigation, Justice Wilson wrote that:[108]

> ...[a] finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

Neither "poverty", "social status" or "social condition" are enumerated in section 15, however, they may be analogous to the stated grounds.[109] Justice McIntyre has indicated that, generally speaking, the more common forms of discrimination can be found in the various provincial human rights statutes and that the principles applied in such statutes "are equally applicable in considering questions of discrimination under s.15(1)."[110]

It is instructive, therefore, that in Québec "social condition" is an unconditionally prohibited ground of discrimination,[111] as are, in some circumstances, "source of income" in Manitoba,[112] and "receipt of public assistance" in Ontario.[113] The developing jurisprudence in Québec holds that "social condition" refers to the position one

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105. *Canadian Human Rights Act*, R.S.C. 1985, c.H-6, s.3(1).

106. See text accompanying notes 111-19, *infra*.

107. See *Andrews*, *supra*, note 99; *Turpin*, *supra*, note 95; Gibson, *supra*, note 97 at 252-55. The *Charter's* mobility rights guarantee provides, *inter alia*, to citizens and permanent residents the right to move and take up residence, and pursue the gaining of a livelihood, in any province (s.6(2)). Section 6 (3)(b) specifies that those rights are subject to "any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services". It would be a distortion of the Charter's mobility rights to test the provision of legal aid to appellants against this exception. The exception presumes that applicants for social services can merely move to their province of residence for assistance, an option that is not available to incarcerated appellants. Also, it is unlikely that the exception applies to distinctions between residents from different nations. Rather, the guarantee is directed at interprovincial mobility, with the purpose of securing "to all Canadians and permanent residents the rights that flow from from membership or permanent residency in a united country". Per La Forest J. in *Black* v. *Law Society of Alberta*, [1989] 4 W.W.R. 1 at 21 (S.C.C.), and see Pierre Blache, "Mobility Rights" in G-A. Beaudoin & E.Ratushny, *The Canadian Charter of Rights and Freedoms* (Carswell: Toronto, 1989) 303 at 311-16.

108. *Supra*, note 95 at 126.

109. See, for example, *Kask* v. *Shimizu*, [1986] 4 W.W.R. 154 (Alta. Q.B.), not followed in *Crothers* v. *Simpson Sears Ltd.*, [1988] 4 W.W.R. 673 (Alta. C.A.).

110. *Supra*, note 99 at 175.

111. *Supra*, note 103, s.10.

112. *Human Rights Code*, R.S.M. 1987, c.H175, s.9 (2)(j).

113. *Supra*, note 104, s.2 and see, generally, Pentney and Tarnapolsky *supra*, note 103 at 9-46 and 9-47.

occupies in society by virtue of one's birth, income, or level of education.[114] A number of commentators have acknowledged good reasons for including "poverty"[115] or "social status"[116] among analogous grounds. Those in poverty are often not only disadvantaged economically, but often "statistically related" to the enumerated grounds, such as those of sex, race, and disability.[117]

While grounds of poverty, social status, and conviction are not of the nature of immutable characteristics as are race, colour or sex, they are closely tied to the enumerated grounds and do represent a number of traditionally disadvantaged and disenfranchised communities.[118] With respect to these categories, it may fairly be said that they represent groups that have historically been the subject of "stereotyping, historical disadvantage or vulnerability to...social prejudice", namely, what Justice Wilson has referred to as, "the indicia of discrimination".[119]

It might be argued in reply that the Legal Aid and *Criminal Code* criteria are salvaged by virtue of section 15(2), which is designed to save laws the object of which is to ameliorate the conditions of a disadvantaged group. But here, the laws fail to assist numbers of applicants who are themselves members of the target group[120] with a resulting aggravation of their disadvantage.[121] Denied applicants are forced then to choose between abandoning their appeals or fending for themselves before appellate

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114. See *Johnson* v. *Commission des Affaires Sociales*, [1984] C.A. 61 at 69-70, quoting Judge Thomas Toth of the Québec Superior Court. To the same effect see *Levesque* v. *Québec (Procureur General)* (1988), 10 Q.A.C. 212 at 220-21.

115. See William Black and Lynn Smith, "Case Comment on Andrews v. Law Society of British Columbia" (1989) 68 Can. Bar Rev. 591 at 607.

116. Gibson, *supra*, note 97 at 251.

117. See Marc Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982) 4 Sup. Ct. L. Rev. 131 at 135-36. Richard L. Abel, in his international survey of legal aid literature, wrote that "[p]erhaps the most striking [statistic] is the disproportionate number of women among legal aid clients". See *supra*, note 45 at 553. It was also recognized by the Canadian Sentencing Commission in its 1987 Report, *Sentencing Reform, A Canadian Approach*, that "inherent in proposals to equalize the impact of fines is a recognition that some offenders, such as native offenders and female offenders, are seriously handicapped in their ability to pay fines because of their relative poverty." (376). Thus, to effectively attack the systemic discrimination of these offenders in the criminal justice process, it can be argued that "poverty" ought to be recognized as an analogous ground to those enumerated in s.15(1).

118. Dr. Wilson Head is quoted as saying:"Is there a different law for the poor and the rich? For the minorities and the rich? Most minority groups are poor. They get it in the neck because they are poor. They get it in the neck because they are young. They get it in the neck because they are uneducated. They get it in the neck because they are racial minorities". See Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution, vol.1 (Halifax: December 1989) at 150.

119. *Supra*, note 95 at 127, per Justice Wilson.

120. The target group here would be those facing criminal process who cannot afford the assistance of legal counsel. As we have argued, even if the "merit" or "likelihood of success" criteria were incorporated to narrow the definition of the group, the criteria are indeterminate enough to leave out many members of the target group. See *Apsit* v. *Manitoba Human Rights Commission*, [1988] 1 W.W.R. 629 at 642 (Man. Q.B.).

121. See William Black and Lynn Smith, "The Equality Rights" in G.-A. Beaudoin and E.Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (Carswell: Toronto, 1989) at 598 at 605, and Gibson, *supra*, note 97 at 317 *ff.*

courts. On the basis of the Legal Aid criteria, moreover, they may be distinguished because of previous applications (poverty), previous convictions (criminal record), and national residence or origin.

VIII. BEYOND STATUTE: EQUALITY AND A CHARTER RIGHT TO COUNSEL

Having provided an avenue for the consideration of appeals, it may be argued that the state cannot deny equal consideration of appeals by reason of financial status. In *Brydges*, discussed above, the Supreme Court of Canada extended the meaning of the right to counsel to include the right to be informed of the existence of legal aid and duty counsel. In essence, the Court has endeavoured to neutralize wealth as a factor in the administration of criminal justice.

That there may be, as the Court of Appeal concludes, no general "right" of appeal is not determinative of the issue. The *Charter* may not have created a right of appeal, but it may have "enhanced the quality of the less than absolute right."[122] Once having provided for appeal hearings, a regime of equality need not call for equality of result but, rather, equality of opportunity in the consideration of appeals. Equal consideration in the appeal process can be ensured by the provision of funding for necessary transcripts and counsel. Equality would require, therefore, that the state act positively by providing funding to accommodate the disadvantage suffered by the indigent appellant.[123]

This point has been made effectively by Michael Walzer:[124]

> The rich and poor are being treated differently in American courts, though it is the public commitment of courts to treat them the same. The argument for a more generous provision [of legal aid] follows from that commitment. If justice is to be provided at all, it must be provided equally for all accused citizens without regard to their wealth (or their race, religion, political partisanship, and so on).

The lengthy historical record reviewed by the Court of Appeal is not determinative of this issue. For example, in the course of denying the *Turpin* appeal, Madame Justice Wilson, delivering the judgment of the Court, wrote:[125]

> [T]he argument that s.15 is not violated because departures from its principles have been widely condoned in the past and that the consequences of finding a violation would be novel and disturbing is not, in my respectful view, an acceptable approach to the interpretation of Charter provisions.

This is not to say that all distinctions between the rich and the poor will trigger s.15 protection. What would be determinative is the context within which such discrimination takes place: in this instance, in circumstances where the applicants face lengthy prison

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122. Per Thurlow C.J. in *Re Howard and Inmate Disciplinary Court* (1986), 19 C.C.C. (3d) 195 at 208, and see MacGuigan J. at 218 (Fed. C.A.).

123. See *Re Ontario Human Rights Commission et al. and Simpson Sears Ltd.* (1985) 23 D.L.R. (4th) 321 at 334 (S.C.C.), and Gibson, *supra*, note 97 at 136-37.

124. M. Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (New York: Basic Books Inc., 1983) at 85.

125. See *supra*, note 95 at 123.

terms for serious crimes.[126] That is, the wealth or indigence of an appellant should bear no relationship to whether he or she receives the benefit of a fair hearing on appeal.

The Court of Appeal, in its summary dismissal of the equality submission, resorted to what can only be described as false analogy. The Court first concluded that an appellant's presumption of innocence had been subsumed in the trial conviction. It then stated that:[127]

> Section 684 of the Criminal Code may discriminate against the proven guilty much as the Ten Commandments discriminate against sinners or limitation periods discriminate against the careless, but that hardly consigns it to the scrapheap of legislation that offends section 15(1) of the Charter.

The approach adopted by the Court illustrates that it has failed to recognize the frailties of the criminal justice system and the fact that, indeed, an innocent person may be found guilty at trial. As exemplified in a number of well known Canadian cases, the *Marshall* case being the most recent and notorious,[128] the criminal law is a human process and the right to counsel on appeal is not merely a confection to be handed out to those who, by reason of economic status or "merit", are so entitled. The right of appeal, as shown by the Court's own review of legal history, has been achieved through a long and still ongoing struggle for fundamental justice and equality. Moreover, the Court missed the point of the discrimination before them. It was not a case of the guilty being treated differently than the innocent, but the convicted poor being treated differently than the convicted rich.

IX. THE REASONABLE LIMIT ARGUMENT[129]

The Court of Appeal reasoned that the costs associated with publicly funded counsel and appeal books would be an immense burden on the state. This argument might be compelling if one were to assume that all appeals by indigents would be funded. We have already mentioned the troubling way in which the Court framed the constitutional question in either/or terms: either there is an absolute and unconditional right to publicly-funded counsel and appeal books or no right at all. By tying its hands in this way, it is not surprising that the Court found it unnecessary to address other possible funding arrangements.

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126. Wade MacLauchlan writes that a claim of inequality "ought to be more closely scrutinized where the unequal treatment involves the imposition of a penal sanction than where the question is one of distribution of some benefit" in "Of Fundamental Justice, Equality and Society's Outcasts" (1986) 32 McGill L.J. 213 at 225.

127. *Supra*, note 5 at 320-21.

128. See Royal Commission on the Donald Marshall, Jr., Prosecution, *supra*, note 118.

129. Regarding the application of section 1 to equality claims see the differing judgments of McIntyre J. and Wilson J. in *Andrews*, *supra*, note 99. There is no reference in the reasons for judgment to s.1 evidence being tendered by the government. Because of the manner in which the Court relied on the costs associated with legal aid, we will assume for these purposes that it was this evidence which would have been offered to satisfy the s.1 requirements.

Nevertheless, there arguably may be a substantial and pressing need being met by the Legal Aid and *Criminal Code* rules,[130] namely, the saving of substantial public revenues by restricting the number of claims on the legal aid system. By creating more onerous requirements and narrow qualifications for assistance, fewer appeals are required to be financed by the public purse. With respect to the rules which require the filing of appeal books, the objective served is the more efficient determination of appeals by having the substance of the proceedings in the lower Court in the hands of the appeal Court.[131]

The Court of Appeal characterized the implications of any *Charter* right to public funding of appeals as a " stunning ... reallocation of public resources" leading to "far more than administrative inconvenience".[132] The Court went on to state its opinion that "one early casualty would be the Court's ability to administer its civil jurisdiction."[133] In order to support its position, the Court referred to Legal Aid expenditures for criminal matters in 1987: approximately $9,547,328.00.[134] It is interesting to note that the Court did not set out what portion of this amount relates to criminal appeals, despite its later 'floodgates' argument that wholesale appellate review of convictions would entail "an enormous diversion of public spending ... at both the federal and provincial levels."[135] Its sole statistical evidence was that 845 appeals were heard in 1988 of the approximately 76,000 convictions registered.[136]

Moreover, the Court did not distinguish between those convictions which were obtained at trial and those which were the result of a guilty plea. Surely the latter convictions must be subtracted from any formulation because they are the least likely to be appealed. Justice Dickson, as he then was, noted that "American statistics suggest that about 85 percent of the criminal defendants plead guilty or *nolo contondere*."[137]

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130. For the purposes of our discussion, we are assuming that the legal aid rules and s.684 of the *Code* would qualify under section 1 as being "prescribed by law". See *R.* v. *Therens*, [1985] 1 S.C.R. 613 and *R.* v. *Thomsen*, [1988] 1 S.C.R. 650-51. However, the void for vagueness doctrine, discussed above, could be raised at this stage of the analysis. See *Irwin Toy Ltd.* v. *Attorney-General of Québec* (1989), 58 D.L.R. (4th) 577 at 617-18 (S.C.C.), *Reference Re ss.193 and 195.1(1)(c) of the Crim. Code*, *supra*, note 52; and *Re Ontario Film and Video Appreciation Society* (1983), 147 D.L.R.(3d) 58 at 67 (Ont.Div.Ct.), aff'd. (1984), 154 D.L.R.(3d) 766 (Ont.C.A.).

131. See, generally, Frank I. Michelman, "The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights - Part II" (1974) Duke Law J. 527 at 558-563.

132. *Supra*, note 5 at 324.

133. *Ibid.*

134. *Ibid.* at 295. It is likely that the total amount of legal aid cited by the Court of Appeal includes expenditures for young offenders, some $ 1.7 million in 1987-88. See *Legal Aid Society of Alberta 1988 Annual Report* at 20.

135. *Supra*, note 5 at 324. In fact, according to the Legal Aid Society of Alberta, in the period April, 1987 to March 31, 1988, there were a total of 674 applications for legal aid coverage in criminal appeals. Of these, 103 Crown appeals and 303 accused appeals were funded at an average cost of $1,250. per appeal, or a total cost of $541,250. Personal communication with David McGuire of Legal Aid Society of Alberta.

136. Based on the 1987-88 data, Legal Aid probably funded some 400 of these applications, roughly one-half of the appeals heard. *Ibid.*

137. *R.* v. *Gardiner*, *supra.*, note 19 at 414. According to Ericson and Baranek "for the vast majority of accused in the lower courts 'the process is the punishment'. The easiest way to avoid the full impact of possible punishment is to avoid as much of the process as possible." See Richard V.

We do not know, then, whether the establishment of high hurdles for screening appeals is financially necessary, because the statistical evidence before the Court suggesting such a need was based on conjecture.[138]

The legislative objective of fiscal responsibility generally should not act as a "proxy for prejudice".[139] Canada has committed itself to undertake the cost of entrenched equality rights for numerous groups, the result of which may demand the diversion of public resources. Indeed, governments allotted to themselves three years within which to adjust and amend their activities to comport with the *Charter's* equality guarantees.[140] Fiscal considerations are important, but not necessarily determinative. As R.H. Tawney observed:[141]

> In reality, the consequences of social expenditure depend, not merely on its amount, but on the character of the evils removed and opportunities opened by it.

The Supreme Court of Canada in *Singh*[142] indicated that arguments which attempt to justify *Charter* breaches on the basis of administrative convenience or cost could not succeed. Again, in *Turpin*,[143] the Court indicated that a claim that the consequences of finding a *Charter* breach would be "novel and disturbing" is not an acceptable approach to *Charter* interpretation. It is not necessary to advocate the wholesale provision of public funding for each and every appellant in order to argue that the *Charter* requires, at the very least, government be held to its commitment to fundamental justice and equality on a fair and clearly discernible basis.

III. CONCLUDING REMARKS: THE CHARTER AND BEYOND

This is not to underestimate the impact that a *Charter* right to counsel on appeal may have on the fiscal resources of the current Legal Aid regime. Rather, our aim has been to emphasize why it makes sense to find such a right.

Mary Jane Mossman, in a 1985 article, wrote:[144]

> Overall the analysis depends on the underlying assumption that the *Charter*, especially section 15, is intended to effect legal change in Canada. In this context, the existence of a right to legal aid seems quite consistent.

Ericson and Patricia M. Baranek, *supra*, note 27 at 278.

138. For a more sophisticated economic analysis see Notes, "Dollars and Sense of an Expanded Right to Counsel" (1970) Iowa L. Rev. 1249.

139. M. David Lepofsky, "Equality Rights for Handicapped Persons in the Charter: Putting the Accent on Individual Ability" in Frank E. McArdle, ed., *The Cambridge Lectures 1985* (Montreal: Les Editions Yvon Blais, 1986) at 150.

140. See M. Gold, *supra*, note 117 at 131-32.

141. R.H. Tawney, *Equality* (London: George Allen and Orwin Ltd., 1964) 219. See also Lawrence H. Tribe, "Constitutional Calculus: Equal Justice or Economic Efficiency?" (1985) 98 Harv. L. Rev. 592 and A. Alan Borovoy, *When Freedoms Collide: The Case for Our Civil Liberties* (Toronto: Lester & Orpen Dennys, 1988) at 148 *ff.*

142. *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 218-19.

143. *Supra*, note 95 at 123.

144. See "The Charter and the Right to Legal Aid" (1985)1 J. L. Soc. Pol. 21 at 41.

Similarly, Michael Walzer wrote that the provision of legal aid "raises no theoretical problems because the institutional structures for providing it already exist, and what is at stake is only the readiness of the community to live up to the logic of its own institutions."[145]

The language of the *Charter* permits of a generous reading of fundamental justice and equality. This reading would do away with the notion of merit, with the notion of Legal Aid as an investment, and would guarantee funding as of right for any appellant who qualifies financially.[146] It would reject the notion of equal opportunity at the funding stage, keeping in mind that such funding is merely a guarantee of "formal" justice — the "merit" of the appeal is still left to be decided by courts.

An alternative view of the *Charter* would mandate public funding, not because it is a claimant's right, but because it is a public duty.[147] This reading expands the notion of "us" to include "them", "reminding ourselves to keep trying to expand our sense of 'us' as far as we can".[148]

Fundamental justice and equality dictates that fair and impartial criteria be set out in advance by the legislature or parliament.[149] Recognizing the limits on judicial resources, an impartial body may be designated to apply those criteria: be it Legal Aid, registrars, magistrates, or justices of the Court of Appeal. If sufficient guidance is provided in legislation, arbitrariness and subjectivity is more likely to be avoided. The Court's failure, quite apart from the *Charter* issues, to acknowledge even the need for such fair and objective criteria is a troubling omission.

Reading even a qualified right to publicly-funded counsel and appeal books into the *Charter* would not mean that the millennium in criminal justice would have arrived.[150] The costs of legal assistance will continue, as before, to put pressure on the public purse.

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145. *Supra*, note 124.

146. See Michael Walzer, "In Defence of Equality" in I. Howe, ed., *Twenty Five Years of Dissent* (New York: Methuen, 1979) 297 at 308 and J.S. Fishkin, *supra*, note 56 at 109.

147. See Robert E. Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (Chicago: University of Chicago Press, 1985) at 146.

148. See Richard Rorty, *Contingency, irony, and solidarity* (Cambridge: Cambridge University Press, 1989) at 196.

149. Such a system might aim to re-create the types of choices that are made by clients in the private market. But when the long-term liberty of the individual is at stake, it is likely that potentially successful avenues of appeal would be pursued. Therefore, the fairest test, and the one most approximate to the private market, might be one which presumptively provides funding if the claim is not clearly frivolous and a rational argument is available to the appellant. See, *Coppedge* v. *Kansas* (1962) 369 U.S. 438 at 448 and the *Alberta Report and Recommendations of the Joint Committee on Legal Aid*, *supra*, note 83 at 28-29. See also Marshall J. Berger, "Legal Aid for the Poor: A Conceptual Analysis" (1981-82) 60 N. Car. L. Rev. 282 at 355 *ff.*

150. See, for example, the need for expanding the financially circumscribed legal aid programs in the United States in Norman Lefstein, *Criminal Defense Services for the Poor: Methods and Programs for Providing Legal Representation and the Need for Adequate Financing* (for the American Bar Association Standing Committee on Legal Aid and Indigent Defendants, May 1982) and Penny J. White, "A Noble Idea Whose Time Has Come" (1988) 18 Memphis State Univ. L. Rev. 223.

Counsel likely will continue to be underpaid in relation to their counterparts in the private bar. Expert's fees, investigations, and other disbursements likely will continue to be circumscribed.[151] As a result, decisions with respect to circumstances, cost, and the allocation of resources will continue to be a matter for the legislators. However, the criminal justice system would not only be made to live up to its promise of fairness, it could, in fact, result in being more fair.

Over 30 years ago the United States Supreme Court grappled with the question of a constitutional right to state-funded transcripts for indigent appellants. In the landmark case of *Griffin* v. *Illinois*[152] the Court found such a right to exist under the due process and equal protection clauses of the *Bill of Rights*. Mr. Justice Frankfurter recognized that, even by so holding, the State of Illinois still could screen out frivolous appeals: [153]

> The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process.

In the final analysis, the Alberta Court of Appeal's unconditional support of the *status quo*, in the face of an unjustifiably vague and unequal process, is disquieting in its self-satisfaction.

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151. For constitutional rights to these see Michelman, *supra*, note 131, Note, "A First Amendment Right of Access to the Courts for Indigents" (1973) 82 Yale L.J. 1055, and David Medine, "The Constitutional Right to Expert Assistance for Indigents in Civil Cases" (1990) 41 Hastings L. J. 281.

152. *Supra*, note 13.

153. *Ibid.* at 23-24.