



SUPREME COURT OF CANADA

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

DATE: 20070525
DOCKET: 31324

BETWEEN:

Attorney General of British Columbia
Appellant / Respondent on cross-appeal

and

Dugald E. Christie

Respondent / Appellant on cross-appeal

- and -

**Attorney General of Canada, Attorney General of Ontario,
Attorney General of Quebec, Attorney General of New Brunswick,
Attorney General of Manitoba, Attorney General of
Prince Edward Island, Attorney General for Saskatchewan,
Canadian Bar Association and Law Society of British Columbia**
Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: The Court
(paras. 1 to 30)

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british columbia (a.g.) v. christie

Attorney General of British Columbia

*Appellant/Respondent
on cross-appeal*

v.

Dugald E. Christie

*Respondent/Appellant
on cross-appeal*

and

**Attorney General of Canada, Attorney General of Ontario,
Attorney General of Quebec, Attorney General of New Brunswick,
Attorney General of Manitoba, Attorney General of
Prince Edward Island, Attorney General for Saskatchewan,
Canadian Bar Association and Law Society of British Columbia**

Interveners

Indexed as: British Columbia (Attorney General) v. Christie

Neutral citation: 2007 SCC 21.

File No.: 31324.

2007: March 21; 2007: May 25.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella,
Charron and Rothstein JJ.

on appeal from the court of appeal for british columbia

Constitutional law — Access to justice — Rule of law — Provincial tax on legal services — Whether tax unconstitutional because it infringes right to access to justice of low-income persons — Whether there is a general constitutional right to counsel in court or tribunal proceedings dealing with a person's legal rights and obligations — Social Service Tax Amendment Act (No. 2), 1993, S.B.C. 1993, c. 24.

British Columbia's *Social Service Tax Amendment Act (No. 2), 1993* imposed a 7 % tax on the purchase price of legal services ostensibly to fund legal aid in the province. C, a litigation lawyer, challenged the constitutionality of the legal service tax, claiming that the net effect of the tax was to make it impossible for some of his low-income clients to retain him to pursue their claims. The chambers judge found that the tax breached a fundamental constitutional right to access to justice for low-income persons and declared it unconstitutional to that extent. The majority of the Court of Appeal upheld the decision.

Held: The appeal should be allowed and the cross-appeal dismissed.

The impugned provincial legislation is constitutional. While the text of the Constitution, the jurisprudence and the historical understanding of the rule of law do not foreclose the possibility that a right to counsel may be recognized in specific and varied situations, they do not support the conclusion that there is a general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations. The right to access the courts is not absolute and a legislature has the power under s. 92(14) of the *Constitution Act, 1867* to impose at least some conditions on how and when people have a right to access the courts. General access to legal services is also not a currently recognized aspect of, or a precondition to, the

rule of law. If the reference to the rule of law implied the right to counsel in relation to all proceedings where rights and obligations are at stake, then s. 10(b) of the *Canadian Charter of Rights and Freedoms*, which provides for a right to retain and instruct counsel and to be informed of that right “on arrest or detention”, would be redundant. The fact that s. 10(b) does not exclude a finding of a constitutional right to legal assistance in other situations, notably under s. 7 of the *Charter*, does not support a general right to legal assistance whenever a matter of rights and obligations is before a court or tribunal. The right to counsel outside the s. 10(b) context is a case-specific multi-factored enquiry. [17] [21] [24-25] [27]

Cases Cited

Considered: *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; **referred to:** *John Carten Personal Law Corp. v. British Columbia (Attorney General)* (1997), 40 B.C.L.R. (3d) 181, leave to appeal denied [1998] 2 S.C.R. viii; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235; *Fortin v. Chrétien*, [2001] 2 S.C.R. 500, 2001 SCC 45; *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61; *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *R. v. Edward Books and Art Ltd.*,

[1986] 2 S.C.R. 713; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 1.

Constitution Act, 1867, s. 92(14).

Constitution Act, 1982, preamble.

Social Service Tax Amendment Act (No. 2), 1993, S.B.C. 1993, c. 24.

Social Service Tax Amendment Act, 1992, S.B.C. 1992, c. 22.

Authors Cited

Comment. “An Historical Argument for the Right to Counsel During Police Interrogation” (1964), 73 *Yale L.J.* 1000.

Finkelstein, Marie. *The Right to Counsel*. Toronto: Butterworths, 1988.

Tarnopolsky, W. S. “The Lacuna in North American Civil Liberties — The Right to Counsel in Canada” (1967), 17 *Buff. L. Rev.* 145.

APPEAL from a judgment of the British Columbia Court of Appeal (Southin, Prowse, Donald, Newbury and Thackray JJ.A.) (2005), 262 D.L.R. (4th) 51, 48 B.C.L.R. (4th) 267, 136 C.R.R. (2d) 323, [2006] 2 W.W.R. 610, [2005] B.C.J. No. 2745 (QL), 2005 BCCA 631, upholding a decision of Koenigsberg J. (2005), 250 D.L.R. (4th) 728, 39 B.C.L.R. (4th) 17, 127 C.R.R. (2d) 141, [2005] 7 W.W.R. 169, [2005] B.C.J. No. 217 (QL), 2005 BCSC 122. Appeal allowed and cross-appeal dismissed.

George H. Copley, Q.C., and Jonathan Penner, for the appellant/respondent on cross-appeal.

Darrell W. Roberts, Q.C., Robin D. Bajer and Linda H. Nguyen, for the respondent/appellant on cross-appeal.

Graham R. Garton, Q.C., and David Jacyk, for the intervener the Attorney General of Canada.

Janet E. Minor and Shannon Chase-Hall, for the intervener the Attorney General of Ontario.

Brigitte Bussières and Gilles Laporte, for the intervener the Attorney General of Quebec.

Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

Diana M. Cameron, for the intervener the Attorney General of Manitoba.

Written submissions only by *Ruth M. DeMone* for the intervener the Attorney General of Prince Edward Island.

Graeme G. Mitchell, Q.C., for the intervener the Attorney General for Saskatchewan.

J. J. Camp, Q.C., and *Melina Buckley*, for the intervener Canadian Bar Association.

Josiah Wood, Q.C., and *Joanne R. Lysyk*, for the intervener Law Society of British Columbia.

The following is the judgment delivered by

BY THE COURT —

I. Background

1 In 1993, British Columbia enacted the *Social Service Tax Amendment Act (No. 2)*, 1993, S.B.C. 1993, c. 24, imposing a 7 percent tax on the purchase price of legal services. The purpose of the tax was said to be to fund legal aid in the province. However, the tax collected is put into general revenue, and it is difficult to ascertain how much (if any) of the tax collected is put towards legal aid, or other initiatives aimed at increasing access to justice. The legal profession is the only profession in British Columbia whose services are taxed in this way.

2 This case is the latest in a series of challenges to the tax and its predecessor, the *Social Service Tax Amendment Act, 1992*, S.B.C. 1992, c. 22. It was brought by Mr. Dugald Christie, a litigation lawyer who worked with poor and low income people in Vancouver. Mr. Christie was consumed by a passion to provide

legal services to those at the margins of society. It was a passion that ultimately took his life; last year, on a cross-Canada bicycle trip to raise funds for the cause, he was struck and killed on a stretch of highway near Sault Ste. Marie, Ontario.

3 Mr. Christie's action to have the legal services tax declared unconstitutional was rooted in his experience of the effects of the tax on his practice. Mr. Christie charged low fees. His net income in the years 1991 to 1999 did not exceed \$30,000 per year. Often his clients were not able to pay the bills he rendered for legal services, either on time or at all. Yet the Act required him to submit the tax to government even though the fees on which it had been levied had not been paid. Mr. Christie's small income made this difficult. On March 10, 1997, the government sent Mr. Christie a demand notice. A few days later, without ascertaining the reason for non-payment or attempting to work out a payment schedule, the province seized \$972.11 from Mr. Christie's bank account. It seized a further \$5,349.64 in December 1997. Mr. Christie stopped practising law and did not resume the practice until July 2000.

4 In addition to problems associated with paying the tax, Mr. Christie asserted that the need to set up an accounting system to administer the tax added to the cost and effort of maintaining his practice and providing services to his poor and low income clients.

5 Mr. Christie claimed that the net effect of the tax was to make it impossible for some of his clients to retain him to pursue their claims. He filed affidavits from these clients and himself so stating. The chambers judge found that this had been proved on a balance of probabilities:

Mr. Christie deposes and I find as a fact, based on all of the evidence presented, that some of Mr. Christie's clients could not obtain needed legal services if Mr. Christie did not act for them. Further, I find as a fact that if Mr. Christie were to charge them his hourly rate plus the social services tax, they could not pay him. I also find that if Mr. Christie is not paid the minimum amount which he charges, in most of his cases he could not continue to practice law, thus denying those individuals access to justice.

As a result, I infer that the imposition of the social service tax, does in fact deny access to justice in some cases of low income clients.

((2005), 250 D.L.R. (4th) 728, at paras. 82-83 (emphasis in original deleted))

6 The chambers judge held, following the decision of the British Columbia Court of Appeal in *John Carten Personal Law Corp. v. British Columbia (Attorney General)* (1997), 40 B.C.L.R. (3d) 181 (C.A.), leave to appeal denied [1998] 2 S.C.R. viii, that there was a fundamental constitutional right to access to justice. She found the legal services tax breached that right for low-income persons and that the breach was not justified under s. 1 of the *Canadian Charter of Rights and Freedoms*. Accordingly, she declared that the Act was *ultra vires* the province to the extent that it applies to legal services provided for low income persons, as defined by the Family Duty Counsel Program.

7 The majority of the Court of Appeal, *per* Newbury J.A., accepted the chambers judge's findings as well as her legal conclusion that there is a fundamental constitutional right to core aspects of access to justice: (2005), 262 D.L.R. (4th) 51, 2005 BCCA 631. It defined the protected core as follows:

... I propose as a working definition the meaning which in my opinion represents the most basic, or core, aspects of access to justice as a constitutional principle – i.e. reasonable and effective access to courts of law and the opportunity to obtain legal services from qualified professionals, that are related to the determination and interpretation of legal rights and obligations by courts of law or other independent tribunals. [Emphasis added; para. 30.]

On this basis, the majority upheld the chambers judge’s conclusion that the legal services tax breached this right and was unconstitutional.

8 The dissent, *per* Southin J.A., rejected the majority’s conclusion that there is a general constitutional right to legal services in determining and interpreting legal rights before courts and tribunals. No such right can be deduced from the phrase “rule of law” in the preamble to the *Constitution Act, 1982*, nor from any other feature of the Constitution. The tax was a valid exercise of the province’s taxation power and the courts, in the dissent’s view, had no power to declare it unconstitutional.

9 The province of British Columbia appeals from the decision of the majority of the Court of Appeal and asks that this Court set aside the order declaring the legal services tax to be unconstitutional.

II. Analysis

10 The respondent’s claim is for effective access to the courts which, he states, necessitates legal services. This is asserted not on a case-by-case basis, but as a general right. What is sought is the constitutionalization of *a particular type of* access to justice — access aided by a lawyer where rights and obligations are at stake

before a court or tribunal (para. 30). In order to succeed, the respondent must show that the Canadian constitution mandates this particular form or quality of access. The question is whether he has done so. In our view, he has not.

11 We take as our starting point the definition of the alleged constitutional principle offered by the majority of the Court of Appeal (para. 30) — the right to be represented by a lawyer in court or tribunal proceedings where a person’s legal rights and obligations are at stake, in order to have effective access to the courts or tribunal proceedings.

12 We will first discuss what the proposed right entails. We will then ask whether the right, thus described, is prescribed by the constitution.

13 This general right to be represented by a lawyer in a court or tribunal proceedings where legal rights or obligations are at stake is a broad right. It would cover almost all — if not all — cases that come before courts or tribunals where individuals are involved. Arguably, corporate rights and obligations would be included since corporations function as vehicles for individual interests. Moreover, it would cover not only actual court proceedings, but also related legal advice, services and disbursements. Although the respondent attempted to argue otherwise, the logical result would be a constitutionally mandated legal aid scheme for virtually all legal proceedings, except where the state could show this is not necessary for effective access to justice.

14 This Court is not in a position to assess the cost to the public that the right would entail. No evidence was led as to how many people might require state-funded

legal services, or what the cost of those services would be. However, we do know that many people presently represent themselves in court proceedings. We also may assume that guaranteed legal services would lead people to bring claims before courts and tribunals who would not otherwise do so. Many would applaud these results. However, the fiscal implications of the right sought cannot be denied. What is being sought is not a small, incremental change in the delivery of legal services. It is a huge change that would alter the legal landscape and impose a not inconsiderable burden on taxpayers.

15 The next question is whether the constitution supports the right contended for. In support of this contention, two arguments are made.

16 First, it is argued that access to justice is a fundamental constitutional right that embraces the right to have a lawyer in relation to court and tribunal proceedings. This argument is based on *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, where this Court affirmed a constitutional right to access the courts, which was breached by pickets impeding access. It is argued that a tax on legal services, like pickets, prevents people from accessing the courts. It follows, the argument concludes, that a tax on legal services also violates the right to access the courts and justice.

17 The right affirmed in *B.C.G.E.U.* is not absolute. The legislature has the power to pass laws in relation to the administration of justice in the province under s. 92(14) of the *Constitution Act, 1867*. This implies the power of the province to impose at least some conditions on how and when people have a right to access the courts.

Therefore *B.C.G.E.U.* cannot stand for the proposition that every limit on access to the courts is automatically unconstitutional.

18 A second argument is that the right to have a lawyer in cases before courts and tribunals dealing with rights and obligations is constitutionally protected, either as an aspect of the rule of law, or a precondition to it.

19 The rule of law is a foundational principle. This Court has described it as “a fundamental postulate of our constitutional structure” (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142) that “lie[s] at the root of our system of government” (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70). It is explicitly recognized in the preamble to the *Constitution Act, 1982*, and implicitly recognized in s. 1 of the *Charter*, which provides that the rights and freedoms set out in the *Charter* are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. And, as this Court recognized in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 750, it is implicit in the very concept of a constitution.

20 The rule of law embraces at least three principles. The first principle is that the “law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power”: *Reference re Manitoba Language Rights*, at p. 748. The second principle “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order”: *Reference re Manitoba Language Rights*, at p. 749. The third principle requires that “the relationship between the state and the individual . . . be regulated by law”: *Reference re Secession of Quebec*, at para. 71.

(See also *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49, at para. 58; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, at para. 134.)

21 It is clear from a review of these principles that general access to legal services is not a currently recognized aspect of the rule of law. However, in *Imperial Tobacco*, this Court left open the possibility that the rule of law may include additional principles. It is therefore necessary to determine whether general access to legal services in relation to court and tribunal proceedings dealing with rights and obligations is a fundamental aspect of the rule of law.

22 Before examining this question, it is important to note that this Court has repeatedly emphasized the important role that lawyers play in ensuring access to justice and upholding the rule of law: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 187; *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at p. 1265; *Fortin v. Chretien*, [2001] 2 S.C.R. 500, 2001 SCC 45, at para. 49; *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67, at para. 43; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, at paras. 64-68, *per* LeBel J. (dissenting in part but not on this point). This is only fitting. Lawyers are a vital conduit through which citizens access the courts, and the law. They help maintain the rule of law by working to ensure that unlawful private and unlawful state action in particular do not go unaddressed. The role that lawyers play in this regard is so important that the right to counsel in some situations has been given constitutional status.

23 The issue, however, is whether *general* access to legal services in relation to court and tribunal proceedings dealing with rights and obligations is a fundamental aspect of the rule of law. In our view, it is not. Access to legal services is fundamentally important in any free and democratic society. In some cases, it has been found essential to due process and a fair trial. But a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent's contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law.

24 The text of the *Charter* negates the postulate of the general constitutional right to legal assistance contended for here. It provides for a right to legal services in one specific situation. Section 10(b) of the *Charter* provides that everyone has the right to retain and instruct counsel, and to be informed of that right "on arrest or detention". If the reference to the rule of law implied the right to counsel in relation to all proceedings where rights and obligations are at stake, s. 10(b) would be redundant.

25 Section 10(b) does not exclude a finding of a constitutional right to legal assistance in other situations. Section 7 of the *Charter*, for example, has been held to imply a right to counsel as an aspect of procedural fairness where life, liberty and security of the person are affected: see *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, at p. 1077; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46. But this does not support a general right to legal assistance whenever a matter of rights and obligations is before a court or tribunal. Thus in *New Brunswick*, the Court was at pains to state

that the right to counsel outside of the s. 10(b) context is a case-specific multi-factored enquiry (see para. 86).

26 Nor has the rule of law historically been understood to encompass a general right to have a lawyer in court or tribunal proceedings affecting rights and obligations. The right to counsel was historically understood to be a limited right that extended only, if at all, to representation in the criminal context: M. Finkelstein, *The Right to Counsel* (1988), at pp. 1-4 — 1-6; W. S. Tarnopolsky, “The Lacuna in North American Civil Liberties — The Right to Counsel in Canada” (1967), 17 *Buff. L. Rev.* 145; Comment, “An Historical Argument for the Right to Counsel During Police Interrogation” (1964), 73 *Yale L.J.* 1000, at p. 1018.

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

28 This conclusion makes it unnecessary to inquire into the sufficiency of the evidentiary basis on which the plaintiff bases his claim. However, a comment on the adequacy of the record may not be amiss, in view of the magnitude of what is being sought — the striking out of an otherwise constitutional provincial tax. Counsel for Mr. Christie argued before us that the state cannot constitutionally add a cost to the expense of acquiring counsel to obtain access to justice when that cost serves no purpose in furthering justice. This assumes that there is a direct and inevitable causal link between any increase in the cost of legal services and retaining a lawyer and

obtaining access to justice. However, as the Attorney General points out, the economics of legal services may be affected by a complex array of factors, suggesting the need for expert economic evidence to establish that the tax will in fact adversely affect access to justice. Without getting into the adequacy of the record in this case, we note that this Court has cautioned against deciding constitutional cases without an adequate evidentiary record: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 762 and 767-68, *per* Dickson C.J.; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at p. 361; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099.

III. Conclusion

29 Notwithstanding our sympathy for Mr. Christie's cause, we are compelled to the conclusion that the material presented does not establish the major premise on which the case depends — proof of a constitutional entitlement to legal services in relation to proceedings in courts and tribunals dealing with rights and obligations.

30 We would allow the appeal and dismiss the cross-appeal, without costs.

Appeal allowed and cross-appeal dismissed.

Solicitor for the appellant/respondent on cross-appeal: Attorney General of British Columbia, Victoria.

Solicitors for the respondent/appellant on cross-appeal: Miller Thomson, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of Prince Edward Island: Attorney General of Prince Edward Island, Charlottetown.

*Solicitor for the intervener the Attorney General for Saskatchewan:
Attorney General for Saskatchewan, Regina.*

*Solicitors for the intervener Canadian Bar Association: Camp Fiorante
Matthews, Vancouver.*

*Solicitors for the intervener Law Society of British Columbia: Blake,
Cassels & Graydon, Vancouver.*