

ARTICLE

# EXPANDING THE CONSTITUTIONAL RIGHT TO STATE-FUNDED LEGAL COUNSEL TO ADDRESS THE BRITISH COLUMBIA HOUSING CRISIS

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## ABSTRACT

During the 2017 British Columbia provincial election campaign, the housing affordability crisis emerged as one of the top issues for voters. The housing crisis represents a much larger issue of affordability in British Columbia. The civil justice system is another realm in which the gap is widening between the “haves” and the “have nots” in the province. This paper focuses on the inadequate provision of civil legal aid, which is a specific component of the access to justice issue. The Supreme Court of Canada has recognized a constitutional right to state-funded civil legal counsel in certain circumstances based on the right to security of the person, as enshrined in section 7 of the Canadian *Charter of Rights and Freedoms*. This paper argues that the courts could extend the constitutional right to state-funded counsel to a tenant who is being evicted from their public housing unit by the British Columbia Housing Management Commission. Due to the lack of affordable housing options, eviction could jeopardize the tenant’s section 7 right to security of the person. Consequently, the tenant could require legal representation in order to ensure a fair hearing. Furthermore, the tenant’s eviction proceeding would likely be triggered by the state.

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## INTRODUCTION

During the 2017 British Columbia (“BC”) provincial election campaign, the housing affordability crisis emerged as one of the top issues on the minds of voters, particularly in large, urban centres such as Vancouver. Ultimately, the BC Liberal Party’s lack of action on housing concerns was a primary reason its government was ousted from power in a historic vote of non-confidence on June 29, 2017.<sup>1</sup> The housing crisis represents a much larger issue of affordability in British Columbia. Even with a steady paycheque, many residents find themselves “drowning in daily costs,” unable to get ahead.<sup>2</sup>

The civil justice system is another realm in which the gap is widening between the “haves” and the “have nots” in the province. Due primarily to the rising cost of legal services, access to a lawyer is out of reach for most British Columbians. Those with legal problems must choose to either leave their problems unresolved or attempt to resolve them without the assistance of a lawyer.

This paper focuses on the inadequate provision of civil legal aid in the province, which is a specific component of the access to justice issue. The Supreme Court of Canada has rejected a broad constitutional right to state-funded legal counsel in civil cases.<sup>3</sup> However, the Court has recognized a constitutional right to state-funded civil legal counsel in some circumstances based on the right to security of the person, as enshrined in section 7 of the *Canadian Charter of Rights and Freedoms* (“Charter”).<sup>4</sup> This paper argues that Canadian courts could expand this set of circumstances to provide for state-funded legal counsel in cases where the state is evicting a tenant from public housing, and the tenant does not have legal counsel to dispute the eviction. In doing so, the courts would afford better protection to individuals and families who, due to British Columbia’s housing affordability crisis, likely have nowhere else to go.

Part I of this paper provides a summary of the access to justice issue, including the indicators of the issue, the barriers that litigants face in accessing justice, as well as the impacts of the issue on the well-being of society. Part II gives a brief history of legal aid, with an emphasis on how objectives and funding for legal aid in British Columbia have shifted over the past two decades. Part III provides an overview of how the Supreme Court of Canada came to recognize a constitutional right to state-funded legal counsel through section 7 of the *Charter*. The focus of this part is on the decision in *New Brunswick (Minister of Health and Community Services) v G(J)* (“*NB v G(J)*”),<sup>5</sup> in which the Court first recognized that the right to state-funded legal counsel could extend to the civil arena. Part IV argues that a court could apply the principles in *NB v G(J)* to find a constitutional right to state-funded legal counsel in cases where a public housing recipient is being evicted by the British Columbia Housing Management Commission (“BC Housing”) and wants to dispute the decision. This paper concludes by presenting opportunities for further research in this area.

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1 Rob Shaw & Richard Zussman, *Matter of Confidence: The Inside Story of the Political Battle for BC* (Toronto: Heritage House Publishing Company Ltd, 2018) at 233.

2 *Ibid.*

3 *Christie v British Columbia (Attorney General)*, 2007 SCC 21, 2007 CarswellBC 1117 [*Christie*].

4 *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, s 7.

5 *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 1999 CarswellNB 305 [*NB v G(J)*].

## I. THE ACCESS TO JUSTICE ISSUE

### A. Defining Access to Justice

Access to justice has become a heightened concern for Canadian courts and the legal profession. In 2008, then Chief Justice of Canada, Beverley McLachlin, established the national Action Committee on Access to Justice in Civil and Family Matters, which provides research and pursues reforms related to civil and family justice.<sup>6</sup> In 2012, the Canadian Bar Association launched its Equal Justice Initiative, which studies access to justice issues and advocates for their improvement.<sup>7</sup> Despite these initiatives toward access to justice, a consensus has not yet emerged on how this term should be defined. As Jerry McHale writes, “there is a broad consensus that access to justice is a good thing and that we need more of it [...] there may be less consensus, or at least clarity, over what this term actually means.”<sup>8</sup> For the purposes of this paper, Gerard Kennedy and Lorne Sossin’s definition of access to justice has been applied due to its breadth: “access to justice [is] the matrix of personal, situational, and institutional and systemic factors which make certain matters and certain litigants less likely to be heard in court.”<sup>9</sup>

### B. Indicators of the Access to Justice Issue

One indicator of the access to justice issue is that many individuals in our society will face a justiciable problem that will go unresolved. A study by the Action Committee on Access to Justice in Civil and Family Matters found that nearly 12 million Canadians experience at least one justiciable problem, which the study refers to as an “everyday legal problem,” within a three-year period.<sup>10</sup> Approximately 20 percent of these individuals take no meaningful action to solve their problem, while approximately 65 percent believe that nothing can be done, do not know their rights, think that it will take too much time or money, or fear taking action.<sup>11</sup> Individuals in marginalized groups, including those with low incomes, mental and physical disabilities, or drug and alcohol addictions are more likely to have legal problems than members in more secure groups.<sup>12</sup> Once an individual experiences one kind of legal problem, there is a greater likelihood that they will experience others. As a result, legal problems tend to cluster within marginalized groups.<sup>13</sup>

Another indicator of the access to justice issue is that a significant number of individuals who do attempt to resolve their legal problems will have to navigate the justice system without counsel.<sup>14</sup> In 2013, the National Self-Represented Litigants Project released a

6 Canadian Forum on Civil Justice, “Action Committee” (Accessed 13 July 2018), online: <<http://www.cfcj-fcjc.org/action-committee>> archived at <<https://perma.cc/9J79-AJ5M>>.

7 Canadian Bar Association, “Access to Justice Subcommittee” (Accessed 13 July 2018), online: <<https://www.cba.org/Sections/CBA-Access-to-Justice-Committee>> archived at <<https://perma.cc/UF35-HW2N>>.

8 M Jerry McHale, “What Does “Access to Justice” Mean?”, *University of Victoria Access to Justice Centre for Excellence* (blog) (2 February 2016), online: <<http://www.uvicace.com/blog/2016/2/2/what-does-access-to-justice-mean>> archived at <<https://perma.cc/XP92-UD29>>.

9 Gerard J Kennedy and Lorne Sossin, “Justiciability, Access to Justice and the Development of Constitutional Law in Canada” (2017) 45:4 *Fed L Rev* 707 at 710.

10 Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013) at 2, online: <[http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)> archived at <<https://perma.cc/35UE-C2FD>>.

11 *Ibid.*

12 *Ibid.*

13 *Ibid* at 3.

14 Canadian Bar Association, *Reaching Equal Justice Report: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, 2013) at 44, online: <[http://www.cba.org/CBAMediaLibrary/cba\\_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf](http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf)> archived at <<https://perma.cc/P78X-ZANH>>.

ground-breaking study on the rise of self-represented litigants in three Canadian provinces: British Columbia, Alberta, and Ontario. At the time of the study, self-represented litigants accounted for approximately 80 percent of litigants in the British Columbia Small Claims Court and 21 percent of general civil litigants in the British Columbia Supreme Court.<sup>15</sup> Of the self-represented litigant sample, over 50 percent had been represented by counsel in the earlier stages of their action. Three-quarters of these litigants were previously represented by private counsel, while the rest had been assigned legal aid that was subsequently discontinued.<sup>16</sup>

### C. Barriers to Accessing Justice

The findings in the National Self-Represented Litigants Project align with other studies that identify the cost of legal services as a primary barrier to accessing justice. The National Self-Represented Litigants Project discovered that litigants do not decide to represent themselves because they *refuse* the help of a lawyer; instead, litigants decide to represent themselves because they cannot *afford* the help of a lawyer. Indeed, almost all self-represented litigants in the study referred to financial reasons for representing themselves in court.<sup>17</sup> As Mary Eberts describes, the costs problem affects litigants of both the lower and middle classes:

For many potential clients, the cost problem is absolute: they are without means to provide themselves with adequate food or shelter, let alone legal services. For others [...] the costs problem is a relative one: faced with a choice about how to deploy their modest resources, these potential clients would prefer to purchase a house, save for retirement, or help their children attend university. The alternatives that compete with legal services for the dollars of these modest consumers may vary, but the costs issue for them is, at least initially, relative and not absolute. However, at some stage, as costs elevate with lengthening proceedings or increased complexity, the relative cost problem becomes an absolute one. The plaintiff or defendant simply runs out of money.<sup>18</sup>

Canadian Lawyer's 2018 Legal Fees Survey indicates that the average hourly rate of a lawyer with 11 to 20 years of experience in Canada is currently \$357.<sup>19</sup> Hourly rates do vary based on geography, the lawyer's years of experience, the size of a legal practice, and the practice area.<sup>20</sup> However, at \$357 per hour, the cost of legal representation is undoubtedly prohibitive for many Canadians.

There are several other barriers to accessing justice that deserve attention. The complexity and delay involved in civil litigation are closely related to the issue of prohibitive costs.<sup>21</sup> At the start of a civil proceeding, parties spend significant amounts of time and money

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15 Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants" (Law Foundation of Ontario, Law Foundation of Alberta, Law Foundation of BC & Law Society of BC, 2013) at 34, online: <<https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>> archived at <<https://perma.cc/9FEC-A5TJ>>.

16 *Ibid.*

17 *Ibid* at 39.

18 Mary Eberts, "Lawyers Feed the Hungry: Access to Justice, the Rule of Law, and the Private Practice of Law" (2013) 76:1 Sask L Rev 115 at 125.

19 Marg Bruineman, "The right price: Canadian Lawyer's 2018 Legal Fees Survey shows some bright spots for law firms despite a highly competitive market", *Canadian Lawyer Magazine* (April 2018), online: <[https://www.canadianlawyermag.com/staticcontent/AttachedDocs/CL\\_Apr\\_18\\_LegalFeesSurvey.pdf](https://www.canadianlawyermag.com/staticcontent/AttachedDocs/CL_Apr_18_LegalFeesSurvey.pdf)> archived at <<https://perma.cc/JJJ3-RADW>>.

20 *Ibid.*

21 Shannon Salter & Darin Thompson, "Public-Centred Justice Redesign: a case study of the BC Civil Resolution Tribunal" (2016-2017) 3 MJDR 113 at 120.

to characterize the dispute in terms that support their argument. After the preparation of pleadings, service of notice, and exchange of documents, the parties engage in a lengthy period of discovery activities.<sup>22</sup> Only two percent of all claims make it to the end of the civil litigation process, which culminates in a costly and time-consuming trial.<sup>23</sup> Although some of the claims that do not make it to trial are settled consensually by the parties, many are abandoned due to the cost of navigating the justice system.<sup>24</sup> While the cost, complexity, and delay involved in legal proceedings are recognized as the main barriers to resolving civil legal problems, others include the following: lack of knowledge about the legal system; fear of becoming involved in the legal system; concerns about damaging relationships; stress in addressing legal problems; and embarrassment of having a legal problem.<sup>25</sup>

#### D. Impacts of the Access to Justice Issue

The access to justice issue has a damaging impact on the socioeconomic well-being of Canadian society. A recent study by the Canadian Forum on Civil Justice indicates that everyday legal problems, particularly those that go unresolved, may cause individuals to experience loss of housing, loss of employment, strain on relationships, and emotional and physical health problems.<sup>26</sup> The study found that over a three-year period, unresolved legal problems resulted in an estimated \$248 million in additional social assistance costs,<sup>27</sup> \$458 million in additional employment insurance costs,<sup>28</sup> and \$40 million in additional health care costs to the Canadian taxpayer<sup>29</sup>.

The access to justice issue also threatens the rule of law in Canadian society. In multiple judgments, the Supreme Court of Canada has acknowledged the importance of access to justice in maintaining the rule of law. In *BCGEU v British Columbia (Attorney General)*, the Court considered the validity of an order restraining union picketing activities outside of courthouses. In finding a constitutional right of physical access to the courts, the Court stated that “there cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.”<sup>30</sup> In *Christie v British Columbia (Attorney General)* (“*Christie*”), the Court considered the validity of a tax on legal services to the extent that it applied to low-income persons. Although the Court rejected a broad right to legal counsel as an aspect of the rule of law, it acknowledged that lawyers help maintain the rule of law by “working to ensure that unlawful private and unlawful state action in particular do not go unaddressed.”<sup>31</sup>

22 *Ibid.*

23 *Ibid.*

24 *Ibid* at 117.

25 Canadian Bar Association, *supra* note 14 at 36.

26 Lisa Moore et al, *The Cost of Experiencing Everyday Legal Problems Related to Social Assistance* (Toronto: Canadian Forum on Civil Justice, 2017) at 8, online: <<http://www.cfcj-fcjc.org/sites/default/files//docs/The%20Cost%20of%20Experiencing%20Everyday%20Legal%20Problems%20Related%20to%20Social%20Assistance.pdf>> archived at <<https://perma.cc/QNZ4-PTCU>>.

27 *Ibid* at 3.

28 Lisa Moore et al, *The Cost of Experiencing Everyday Legal Problems Related to Employment and Loss of Housing* (Toronto: Canadian Forum on Civil Justice, 2017) at 8, online: <<http://www.cfcj-fcjc.org/sites/default/files//docs/The%20Cost%20of%20Experiencing%20Everyday%20Legal%20Problems%20Related%20to%20Loss%20of%20Employment%20and%20Loss%20of%20Housing.pdf>> archived at <<https://perma.cc/AJK8-6UAP>>.

29 Lisa Moore et al, *The Cost of Experiencing Everyday Legal Problems Related to Physical and Mental Health* (Toronto: Canadian Forum on Civil Justice, 2017) at 13, online: <<http://www.cfcj-fcjc.org/sites/default/files//docs/The%20Cost%20of%20Experiencing%20Everyday%20Legal%20Problems%20Related%20to%20Physical%20and%20Mental%20Health.pdf>> archived at <<https://perma.cc/57C8-V8KY>>.

30 *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214, 1988 CarswellBC 363 at para 31.

31 *Christie*, *supra* note 3 at para 22.

More recently, the Court in *Hryniak v Mauldin* (“*Hryniak*”) recognized the direct impact of the access to justice issue on the rule of law while considering the appropriateness of a case for summary judgment:

Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.<sup>32</sup>

The Court’s findings in *Hryniak* align with studies indicating that Canadians are losing confidence in the justice system due to the perception that it is “only for people with money, arbitrary, difficult to navigate and inaccessible to ordinary people.”<sup>33</sup> For the rule of law to be promoted in Canadian society, people must have the ability to assert their rights within the justice system on a relatively equal footing, regardless of socioeconomic status.

## II. LEGAL AID: FROM THE 1920s TO THE PRESENT

### A. The Development of Legal Aid in the West

Legal aid programs developed in Western countries as a crucial means of accessing justice. These programs were established to help individuals navigate increasingly complex justice systems by providing them with legal advice, assistance, and representation at little or no cost.<sup>34</sup> The concept of legal aid emerged out of social democratic and labour regimes, first in Germany in the early 1920s, followed by England in the late 1940s.<sup>35</sup> The early legal aid schemes in both countries recognized the value in compensating private attorneys when they provided legal services to the poor. Though the services were limited, they included both legal advice and assistance in litigation.<sup>36</sup> In 1948, the United Nations General Assembly proclaimed the Universal Declaration of Human Rights (“Declaration”), the first international instrument to provide that all persons were entitled to equal protection of the law and the right to a fair trial.<sup>37</sup> The Declaration prompted the United Nations to develop further instruments related to equal access to justice for all, with a particular focus on protecting marginalized and vulnerable groups.<sup>38</sup> These instruments included the 1966 United Nations International Covenant on Civil and Political Rights, which affirms the right of individuals facing criminal charges to be assigned free legal assistance if they have insufficient funds, and justice requires that they be represented.<sup>39</sup> Legal aid reforms took place throughout the world in the 1960s and 1970s, including in Canada, where the provinces were fashioning their own publicly-funded legal aid programs.<sup>40</sup>

32 *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at para 1 [*Hryniak*].

33 Canadian Bar Association, *supra* note 14 at 16.

34 United Nations Office on Drugs and Crime & United Nations Development Programme, *Global Study on Legal Aid* (New York: United Nations, 2016) at 8, online: <[https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid\\_Report01.pdf](https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid_Report01.pdf)> archived at <<https://perma.cc/HL9A-VW8V>>.

35 Bryant G Garth & Mauro Cappelletti, “Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective” (1978) 27 *Buff L Rev* 181 at 198.

36 *Ibid.*

37 United Nations Office on Drugs and Crime & United Nations Development Programme, *supra* note 34 at 14.

38 *Ibid.*

39 *Ibid* at 15.

40 Garth & Cappelletti, *supra* note 35 at 198-199.

## B. Legal Aid in Canada

The responsibility for the provision of legal aid in Canada shifted from the private to the public sphere in the middle of the twentieth century. Previously, religious groups and other organizations, such as the Canadian Bar Association, provided legal advice and representation to criminal defendants. However, these organizations began to view legal aid as a governmental responsibility, which prompted them to lobby for a publicly-funded legal aid program.<sup>41</sup> In 1951, the Ontario government implemented Canada's first institutionalized legal aid program. This program was administered by the Law Society of Upper Canada with funding from the provincial government. Legal aid remained a voluntary activity for lawyers as they were only paid their expenses and other administrative costs.<sup>42</sup> This changed when the Ontario government introduced the *Legal Aid Act*<sup>43</sup> in 1967. The *Legal Aid Act* provided eligible clients with a statutory right to publicly-funded legal aid and allowed lawyers to claim counsel fees for the provision of legal aid services.<sup>44</sup> Other provinces followed suit in the 1960s and 1970s,<sup>45</sup> with British Columbia enacting the *Legal Services Society Act*<sup>46</sup> in 1979.

Initially, the federal government resisted involving itself in the provision of legal aid as it believed that legal aid was part of the administration of justice, and thus fell under provincial jurisdiction.<sup>47</sup> In the late 1960s, however, the federal government began to view legal aid as part of a larger strategy to address poverty, crime, and disorder.<sup>48</sup> Greater cooperation between the federal and provincial governments on this issue led to the Federal-Provincial Agreement on Legal Aid in Criminal Matters in 1972. This agreement provided that the federal government would contribute up to 50 cents per person per province for the provision of criminal legal aid.<sup>49</sup>

The federal government currently delivers criminal legal aid funding to the provinces through the Legal Aid Program, which is administered by the Department of Justice.<sup>50</sup> The collaborative approach to the funding of criminal legal aid is based on the federal and provincial governments' shared responsibility for criminal justice: the federal government has jurisdiction over criminal law, while the provincial governments have jurisdiction over the administration of justice.<sup>51</sup> The federal government initially contributed as much as 50 percent of the cost of criminal legal aid programs. However, it began to reduce funding in

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41 Karen Hindle & Philip Rosen, *Legal Aid in Canada* (Ottawa: Library of Parliament, 2004) at 2, online: <<http://publications.gc.ca/collections/Collection-R/LoPBdP/PRB-e/PRB0438-e.pdf>> archived at <<https://perma.cc/96Q8-E7FG>>.

42 *Ibid* at 2-3.

43 *Legal Aid Act*, SO 1966, c 80.

44 Hindle & Rosen, *supra* note 41 at 3.

45 *Ibid*.

46 *Legal Services Society Act*, RSBC 1979, c 227.

47 Hindle & Rosen, *supra* note 41 at 3.

48 *Ibid* at 4.

49 *Ibid*.

50 Department of Justice Canada, "Legal Aid Program" (22 March 2017), online: <<http://www.justice.gc.ca/eng/fund-fina/gov-gouv/aid-aide.html>> archived at <<https://perma.cc/V3LD-KFPZ>>.

51 *Ibid*.



the 1990s, and now contributes between 20 and 30 percent of the cost.<sup>52</sup> In the 2018-2019 budget, the federal government projects it will spend \$122.5 million on contributions to the provinces for criminal legal aid.<sup>53</sup>

The federal government currently provides funding for civil legal aid to the provinces through the Canada Social Transfer. Besides funding civil legal aid, the Canada Social Transfer supports the provision of post-secondary education, social assistance, social services, early childhood development, and childcare in the provinces.<sup>54</sup> The Canada Social Transfer is allocated on an equal per capita basis across all provinces and grows automatically by three percent per year. It is delivered as a block transfer, so the provinces are left to decide how to spend the money.<sup>55</sup> In the 2018-2019 budget, the federal government projects it will spend \$13.75 billion on the Canada Social Transfer.<sup>56</sup>

### C. Legal Aid in British Columbia

British Columbia's legal aid program has changed substantially since its inception in 1979. With the passage of the *Legal Services Society Act*,<sup>57</sup> the Legal Services Society ("Society") was formed to administer legal aid programs in the province.<sup>58</sup> However, as the Society describes, it currently operates under a "different set of circumstances" than it did in 1979.<sup>59</sup> The stated objects and purpose of the Society were altered substantially by the repeal and replacement of the *Legal Services Society Act* in 2002.<sup>60</sup> As described by M. Anne Rowles and Connor Bildfell, the 2002 *Legal Services Society Act* "purports to grant the Society broad flexibility in determining what services to provide while at the same time enabling government to severely limit services through the extent of the funding it provides."<sup>61</sup> The reforms decreased the Society's budget by 40 percent over three years, which had a significant impact on the provision of legal aid services. Poverty representation was eliminated, and family law representation was restricted to child protection and emergency services for domestic violence cases.<sup>62</sup>

Due to underfunding by the provincial government, the mandate of the Society is limited in scope. The Society provides civil legal aid for low-income individuals in the following circumstances: high-risk family law cases, child apprehension cases, some mental health-related cases, refugee cases, and immigration cases if an individual is at

52 Canadian Bar Association Access to Justice Committee, *Study on Access to the Justice System—Legal Aid* (Ottawa: Canadian Bar Association, 2017) at 9, online: <<https://www.cba.org/CMSPages/GetFile.aspx?guid=8b0c4d64-cb3f-460f-9733-1aaff164ef6a>> archived at <<https://perma.cc/Z2B8-4A9K>>.

53 Government of Canada, *2018-19 Estimates* (Ottawa: Treasury Board of Canada, 2018) at II-116, online: <<https://www.canada.ca/content/dam/tbs-sct/documents/planned-government-spending/main-estimates/2018-19/me-bpd-eng.pdf>> archived at <<https://perma.cc/75U8-V34X>>.

54 Hindle & Rosen, *supra* note 41 at 6.

55 Office of the Parliamentary Budget Officer, *Federal Financial Support to Provinces and Territories: A Long-term Scenario Analysis* (Ottawa: Office of the Parliamentary Budget Officer, 2018), online: <[http://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2018/Fed%20Transfers/Fed\\_Transfers\\_Prov\\_Territories\\_EN.pdf](http://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2018/Fed%20Transfers/Fed_Transfers_Prov_Territories_EN.pdf)> archived at <<https://perma.cc/PR6V-A5CK>>.

56 Government of Canada, *supra* note 53 at I-7.

57 *Legal Services Society Act*, *supra* note 46.

58 M Anne Rowles & Connor Bildfell, "Case for Replacing the 2002 Legal Services Society Act, Part I: Tracking the Trajectory of Legal Aid in British Columbia" (2016) 74:3 *Advocate* (Vancouver, BC) 355 at 355.

59 Legal Services Society, "A Brief History of LSS" (Accessed 1 June 2018), online: <<http://www.lss.bc.ca/Media/LSS35thanniversaryLegalaidBC.php>> archived at <<https://perma.cc/W5ER-F332>>.

60 The *Legal Services Society Act*, RSBC 1996, c 256 was repealed and replaced by the *Legal Services Society Act*, SBC 2002, c 30.

61 Rowles & Bildfell, *supra* note 58 at 365.

62 *Ibid.*

risk of deportation.<sup>63</sup> As indicated by Rowles and Bildfell, the provincial government has seemingly embraced the position that “only those services that have been identified by the courts as being required under the *Charter* should be covered through legal aid.”<sup>64</sup> After the election of a new provincial government in 2017, funding for justice services (which includes the provision of legal aid, human rights, and other publicly-funded legal counsel services) increased from \$113 million in the 2017-2018 fiscal year<sup>65</sup> to \$126 million in the 2018-2019 fiscal year<sup>66</sup>. However, this increase in funding will fall short of restoring British Columbia’s legal aid system to its pre-2002 position.

### III. THE DEVELOPMENT OF THE CONSTITUTIONAL RIGHT TO STATE-FUNDED LEGAL COUNSEL

#### A. The Criminal Context

The right to state-funded legal counsel in Canada first emerged in the criminal law context. Before the *Charter* was enacted, Canadian courts held that state-funded legal counsel may be provided to an accused if necessary to protect the accused’s right to a fair trial. In *R v Ewing*, the British Columbia Supreme Court found that while the common law did not require that every accused be represented by counsel, it did require that every accused be afforded a fair trial.<sup>67</sup> This decision was affirmed by a majority of the British Columbia Court of Appeal.<sup>68</sup> In a concurring majority judgment, Justice Seaton found that a judge may assign state-funded counsel to an accused if counsel is “essential to a fair trial.”<sup>69</sup> In *R v White*, the Alberta Supreme Court held that in deciding whether state-funded counsel is essential to a fair trial, a judge should take into account all relevant considerations, including (1) the financial position of the accused; (2) whether the accused has access to legal aid under the circumstances; (3) the education level of the accused and other reasons that would prevent the accused from defending himself or herself without counsel; (4) the complexity of the trial and whether there are questions raised which would put the accused at a disadvantage if unrepresented; (5) the difficulty of organizing relevant evidence without counsel; and (6) whether a guilty verdict would lead to the imprisonment of the accused.<sup>70</sup>

After the *Charter* was enacted, the Ontario Court of Appeal in *R v Rowbotham* recognized a constitutional right for an accused to state-funded legal counsel.<sup>71</sup> The Court found that section 10(b) of the *Charter*, which provides an accused with the right to retain counsel, does not by itself give an accused the automatic right to state-funded legal counsel.<sup>72</sup> However, the Court held that a right to state-funded legal counsel exists under sections 7 and 11(d) of the *Charter*, which together “guarantee an accused a fair trial in accordance

63 Alison Brewin & Kasari Govender, *Rights-Based Legal Aid: Rebuilding BC’s Broken System* (Vancouver: Canadian Centre for Policy Alternatives & West Coast LEAF, 2010) at 4, online: <[https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2010/11/CCPA\\_Legal\\_Aid\\_web.pdf](https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2010/11/CCPA_Legal_Aid_web.pdf)> archived at <<https://perma.cc/8XFW-VDJ8>>.

64 Rowles & Bildfell, *supra* note 58 at 366.

65 Province of British Columbia, *Estimates: Fiscal Year Ending March 31, 2018* (Victoria: Ministry of Finance, 2017) at 133, online: <[http://bcbudget.gov.bc.ca/2017/estimates/2017\\_Estimates.pdf](http://bcbudget.gov.bc.ca/2017/estimates/2017_Estimates.pdf)> archived at <<https://perma.cc/ADW6-VJL3>>.

66 Province of British Columbia, *Estimates: Fiscal Year Ending March 31, 2019* (Victoria: Ministry of Finance, 2018) at 45, online: <[http://bcbudget.gov.bc.ca/2018/estimates/2018\\_Estimates.pdf](http://bcbudget.gov.bc.ca/2018/estimates/2018_Estimates.pdf)> archived at <<https://perma.cc/Z8UR-B533>>.

67 *R v Ewing* (1973), 1973 CarswellBC 195, [1974] 1 WWR 57 (SC) at para 18.

68 *R v Ewing*, 1974 CarswellBC 158, [1974] 5 WWR 232 (CA).

69 *Ibid* at para 45.

70 *R v White*, 1976 CarswellAlta 35, [1976] AJ No 574 (SC) at paras 37-44.

71 *R v Rowbotham*, [1988] OJ No 271, 1988 CanLII 147 (CA).

72 *Ibid* at para 156.

with the principles of fundamental justice.<sup>73</sup> In cases not falling within provincial legal aid plans, sections 7 and 11(d) will require the provision of state-funded legal counsel “if the accused wishes counsel but cannot pay a lawyer, and the representation of the accused is essential to a fair trial.”<sup>74</sup> To determine if a trial requires representation in order to be fair, a court may consider the seriousness of the offences,<sup>75</sup> the complexity of the proceedings, the accused’s lack of competence, or other circumstances<sup>76</sup>. If legal representation is indeed essential to a fair trial, a judge has the power to issue an order to stay the criminal proceeding until the accused is provided with counsel.<sup>77</sup>

## B. The Civil Context

### i. Expansion of the Constitutional Right to State-Funded Legal Counsel to the Civil Arena

The Supreme Court of Canada extended the constitutional right to state-funded legal counsel to the civil arena in *N(B) v G(J)*.<sup>78</sup> In this case, the Minister of Health and Community Services applied to extend a temporary Crown wardship of three children for an additional six months. The mother of the children did not have the means to retain private counsel. She was also not entitled to receive state-funded counsel because New Brunswick’s legal aid program only covered situations in which a child was being permanently removed from their parent’s care. The issue was whether an indigent parent has a constitutional right to state-funded legal counsel when the state seeks a judicial order to suspend the parent’s custody of their children.<sup>79</sup>

The Court first examined whether suspension of custody would restrict a parent’s section 7 right to security of the person. The Court held that there was “little doubt that state removal of a child from parental custody pursuant to the state’s *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent.”<sup>80</sup> It recognized that the parental interest in raising and caring for a child is a fundamental individual interest in our society; thus, direct state interference with the parent-child relationship would be a “gross intrusion into a private and intimate sphere.”<sup>81</sup> The Court further held that an individual’s status as a parent is fundamental to personal identity. Therefore, it is a serious consequence of the state’s conduct to stigmatize a parent as “unfit” through child protection proceedings.<sup>82</sup>

The Court then assessed whether a failure to provide a parent with legal aid in a child apprehension proceeding would infringe the principles of fundamental justice. The Court held that to adhere to the principles of fundamental justice, the state can only remove a child from parental custody “when it is necessary to protect the best interests of the child, provided that there is a fair procedure for making this determination.”<sup>83</sup> A fair procedure requires that the parent be given a fair hearing such that they have an opportunity to present their case to the court.<sup>84</sup> The Court found that in deciding whether a parent’s right to a fair hearing requires the parent to have legal representation, a court should

73 *Ibid.*

74 *Ibid.*

75 *Ibid* at paras 158-9.

76 *Ibid* at para 169.

77 *Ibid* at para 167.

78 *NB v G(J)*, *supra* note 5.

79 *Ibid* at para 1.

80 *Ibid* at para 61.

81 *Ibid.*

82 *Ibid.*

83 *Ibid* at para 70.

84 *Ibid* at para 73.

consider the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent.<sup>85</sup> In this case, the Court found that the mother required state-funded counsel to ensure a fair hearing for the following reasons: (1) the custody hearing could have a serious impact on the lives of the mother and children involved;<sup>86</sup> (2) the hearing was sufficiently complex due to the adversarial nature of the proceeding, the likelihood that difficult evidentiary issues would be raised, and the fact that the mother would be navigating a foreign environment under significant emotional strain;<sup>87</sup> and (3) the mother did not possess superior intelligence or education, communication skills, composure, and familiarity with the legal system in order to present her case in such a serious and complex proceeding.<sup>88</sup> To deny state-funded counsel therefore violated the mother's section 7 right.<sup>89</sup>

The Court held that the infringement of the mother's section 7 right could not be saved by the reasonable limits clause in section 1 of the *Charter*. Section 1 may only uphold an infringement of section 7 in exceptional circumstances.<sup>90</sup> In this case, the mother's right to a fair hearing outweighed the additional costs that would be incurred by the legal aid system in providing state-funded counsel.<sup>91</sup>

## ii. The Constitutional Right to State-Funded Civil Legal Counsel After *NB v G(J)*

Canadian courts have declined to extend the constitutional right to state-funded civil legal counsel to private disputes. In *D(P) v British Columbia*, the British Columbia Supreme Court dismissed the plaintiff's claim that the Province of British Columbia and the Legal Services Society infringed her section 7 right to security of the person due to their failure to provide her with state-funded legal counsel.<sup>92</sup> The plaintiff sought state-funded legal counsel for assistance in a family law proceeding initiated by her husband, who wanted a separation. The proceeding was therefore a purely private dispute. The Court held that there is "no authority which supports a right to state-funded counsel in private disputes."<sup>93</sup>

Canadian courts have also refused to recognize a broad right to state-funded civil legal counsel. In *Christie*, a solicitor who served low-income clients sought a declaration that legislation which imposed a tax on legal services was unconstitutional to the extent it applied to low-income persons. The Supreme Court of Canada rejected the argument that general access to legal services is an aspect of the rule of law.<sup>94</sup> Instead, the Court maintained its position in *NB v G(J)* that a right to counsel may only be recognized in "specific and varied situations."<sup>95</sup> In 2005, the Canadian Bar Association launched a test case to assert a broad constitutional right to civil legal aid. The test case was dismissed by the British Columbia Supreme Court after the Court found that the Canadian Bar Association lacked public interest standing to bring the action. Further, the Court found that the Canadian Bar Association's statement of claim failed to disclose a reasonable cause of action in relation to the alleged *Charter* breaches.<sup>96</sup> An appeal by the Canadian Bar

85 *Ibid* at para 75.

86 *Ibid* at para 76.

87 *Ibid* at para 79.

88 *Ibid* at para 80.

89 *Ibid* at para 91.

90 *Ibid* at para 99.

91 *Ibid* at para 100.

92 *D(P) v British Columbia*, 2010 BCSC 290, 2010 CarswellBC 571.

93 *Ibid* at para 145.

94 *Christie*, *supra* note 3 at para 23.

95 *Ibid* at para 27.

96 *Canadian Bar Assn v British Columbia*, 2006 BCSC 1342, 2006 CarswellBC 2193 at para 3.

Association was dismissed by the British Columbia Court of Appeal, which agreed with the trial judge that there was failure to disclose a reasonable cause of action.<sup>97</sup> An application for leave to appeal was subsequently dismissed by the Supreme Court of Canada.<sup>98</sup>

Given the reluctance of courts to broaden the constitutional right to state-funded civil legal counsel, an individual would likely need to demonstrate that they meet the requirements identified in *NB v G(J)* to be afforded this right. The Court in *NB v G(J)* found that “when government action triggers a hearing in which the interests protected by section 7 of the *Charter* are engaged, it is under an obligation to do whatever is required to ensure that the hearing be fair.”<sup>99</sup> Based on this finding, prominent constitutional litigator Joseph Arvay argues that an individual who invokes section 7 to obtain state-funded legal counsel should succeed if (1) the individual’s section 7 rights are in jeopardy; (2) the individual requires legal representation for the hearing to be fair; and (3) government action “triggered” the hearing.<sup>100</sup> As per my reading of *NB v G(J)*, I believe Arvay’s three-part test is consistent with the law. It will therefore be used as a framework to examine how a tenant, who is disputing their eviction from a public housing unit, could invoke a section 7 right to obtain state-funded legal counsel.

#### IV. PROVIDING TENANTS IN PUBLIC HOUSING WITH A CONSTITUTIONAL RIGHT TO STATE-FUNDED LEGAL COUNSEL

Shortly after the Supreme Court of Canada’s ruling in *NB v G(J)*, Margaret McCallum wrote that “proceedings in which the state compels the appearance of an individual before an administrative tribunal offer the most promise for extending the rule in *NB v G(J)*.”<sup>101</sup> McCallum indicated that one type of proceeding which fits this description is an application to “evict tenants from public housing.”<sup>102</sup> Almost twenty years later, Canadian courts have yet to find a constitutional right to state-funded legal counsel for a tenant who is being evicted from their public housing unit and is disputing the eviction.

Based on the principles established in *NB v G(J)*, a court could recognize a constitutional right to state-funded legal counsel for some tenants in this situation. Certain tenants could be able to satisfy the three-part test articulated by Arvay: (1) that the tenant’s section 7 rights are in jeopardy; (2) that the tenant requires legal representation for the hearing to be fair; and (3) that the government, acting through BC Housing, “triggered” the hearing by initiating the eviction process.<sup>103</sup> This part first provides an overview of the housing affordability crisis and the provision of subsidized and public housing in British Columbia. It then examines how a tenant invoking section 7 to obtain state-funded legal counsel could satisfy each element of the three-part test articulated by Arvay.

97 *Canadian Bar Assn v British Columbia*, 2008 BCCA 92, 2008 CarswellBC 379 at para 14.

98 *Canadian Bar Assn v British Columbia*, [2008] SCCA No 185, 2008 CarswellBC 1610.

99 *NB v G(J)*, *supra* note 5 at para 2.

100 Joseph J Arvay, “Constitutional Right to Legal Aid” in Vicki Schmolka, ed, *Making the Case: The Right to Publicly-Funded Legal Representation in Canada* (Ottawa: Canadian Bar Association, 2002) 35E at 37E.

101 Margaret McCallum, “Is There a Constitutionally-Protected Right to Legal Aid in Canada” in Vicki Schmolka, ed, *Making the Case: The Right to Publicly-Funded Legal Representation in Canada* (Ottawa: Canadian Bar Association, 2002) 134E at 142E.

102 *Ibid.*

103 Arvay, *supra* note 100.

## A. British Columbia's Housing Crisis

It is not often that an issue in British Columbia becomes international news. However, on June 2, 2018, the housing affordability crisis in Vancouver made headlines in the *New York Times* in an article entitled “In Vancouver, a Housing Frenzy That Even Owners Want to End”.<sup>104</sup> The article detailed how “punishing” housing costs have caused many residents to move out of Vancouver, particularly young adults who cannot afford to rent.<sup>105</sup> As noted by the article, what makes matters worse is that Vancouver residents have relatively low salaries in comparison with residents of other cities in the world that experience high housing costs, such as London, New York, and San Francisco. In Vancouver’s bid for Amazon’s second headquarters, city officials even “boasted about having ‘the lowest wages of all North American tech hubs.’”<sup>106</sup>

Housing affordability is clearly on the minds of many in Vancouver and across British Columbia. This pre-occupation was evident in the 2017 provincial election, which, as the *New York Times* article describes, “was almost entirely about housing costs.”<sup>107</sup> Indeed, the BC Liberal Party’s lack of action on this issue was a significant reason why voters supported candidates from the BC New Democratic Party, which campaigned on a platform of making life more affordable for families.<sup>108</sup> Since coming into power, the BC New Democratic Party has attempted to cool the housing market by raising the province’s foreign buyer tax from 15 to 20 percent of a home’s purchase price.<sup>109</sup> Among other measures to stabilize the housing market, the party has increased property transfer taxes on homes valued over \$3 million, and has introduced a speculation tax to target out-of-province property owners who leave homes vacant in certain parts of British Columbia.<sup>110</sup> Whether these changes will have their intended effect of making housing more affordable for the average renter in British Columbia, and particularly in Vancouver, remains to be seen.

## B. Subsidized and Public Housing in British Columbia

The British Columbia government provides some affordable housing for low-income individuals and families. In 1967, the government established BC Housing, a Crown corporation that works in partnership with private and non-profit sectors, community groups, provincial health authorities, and other levels of government to develop subsidized housing units.<sup>111</sup> The units are limited in number, and competition is fierce. Applicants to subsidized housing must meet certain criteria, including being a permanent resident of British Columbia at the time of their application, being able to live independently, and having a gross household income below the Housing Income Limits established by BC Housing.<sup>112</sup> The income limits correlate with the income required to pay the average rent in the private rental market. For example, Housing Income Limits in Vancouver are

104 Conor Dougherty, “In Vancouver, a Housing Frenzy That Even Owners Want to End”, *The New York Times* (2 June 2018), online: <<https://www.nytimes.com/2018/06/02/business/economy/vancouver-housing.html>>.

105 *Ibid.*

106 *Ibid.*

107 *Ibid.*

108 Shaw & Zussman, *supra* note 1.

109 Province of British Columbia, “Homes for B.C.: A 30-Point Plan for Housing Affordability in British Columbia” (Accessed 7 January 2019), online: <[https://www.bcbudget.gov.bc.ca/2018/homesbc/2018\\_homes\\_for\\_bc.pdf](https://www.bcbudget.gov.bc.ca/2018/homesbc/2018_homes_for_bc.pdf)> archived at <<https://perma.cc/44ZG-JQJP>>.

110 *Ibid.*

111 BC Housing, “Our Organization” (Accessed 4 June 2018), online: <<https://www.bchousing.org/about/our-organization>> archived at <<https://perma.cc/A78M-LA7H>>.

112 BC Housing, “Subsidized Housing” (Accessed 4 June 2018), online: <<https://www.bchousing.org/housing-assistance/rental-housing/subsidized-housing>> archived at <<https://perma.cc/27D8-WBGJ>>.

currently \$38,500 for a bachelor unit, \$42,500 for a one-bedroom unit, \$52,000 for a two-bedroom unit, and \$64,500 for a three-bedroom unit.<sup>113</sup> An unsatisfactory tenancy history may exclude an applicant from consideration for subsidized housing. This tenancy history may be based on references from previous landlords, receipt of notices to end tenancies, or a review of past tenancies in subsidized housing.<sup>114</sup>

BC Housing also directly manages some subsidized housing properties, referred to as “public housing,”<sup>115</sup> in the province itself.<sup>116</sup> When BC Housing places an individual in a public housing unit, a tenant-landlord relationship begins between BC Housing and that individual.<sup>117</sup> Under sections 46, 47, 48, and 49.1 of the *Residential Tenancy Act* (“Act”),<sup>118</sup> BC Housing, as a landlord, can end the tenancy if the tenant has not paid rent or is repeatedly late in paying rent; the tenant has an unreasonable number of people living in the unit; the tenant has caused extraordinary damage or put the property at significant risk; the tenant has seriously risked the health, safety, or rights of the landlord or other occupants; the tenant has engaged in illegal activity that affected the quiet enjoyment, safety, or physical well-being of the landlord or other occupants; the landlord plans to use the property in good faith; the tenant no longer qualifies for subsidized housing; or the landlord wants to demolish or renovate the rental unit.<sup>119</sup>

Under the aforementioned sections of the Act, a tenant can dispute a landlord’s Notice to End Tenancy by applying to have the matter heard by an arbitrator at the Residential Tenancy Branch.<sup>120</sup> As prescribed by section 58 of the Act, this body is the authority to hear disputes between landlords and tenants that arise through the Act.<sup>121</sup> Although an arbitrator will issue a final and binding decision, a landlord or tenant may request to have an arbitrator review an original decision if there is new and relevant evidence that was not available at the original hearing, if one of the parties could not attend the original hearing due to circumstances outside of their control, or if there is evidence that the original decision was obtained by fraud.<sup>122</sup> A landlord or tenant may also apply to the British Columbia Supreme Court in order to set aside an arbitrator’s decision if the decision contains an error of fact or law, or if the hearing was conducted in a procedurally unfair manner.<sup>123</sup> Procedural fairness errors may be found if a party did not receive proper notice of the hearing; a party was unable to attend the hearing because of circumstances out of their control; a party did not receive the opportunity to see all the evidence that the Residential Tenancy Branch used to reach its decision; a party did not receive an

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113 *Ibid.*

114 *Ibid.*

115 Tenant Resource & Advisory Council, “Subsidized Housing” (Accessed 27 January 2019), online: <<http://tenants.bc.ca/subsidized-housing/>> archived at <<https://perma.cc/MF7Y-YG2S>>.

116 BC Housing, “Directly Managed Properties” (Accessed 27 January 2019), online: <<https://www.bchousing.org/housing-assistance/tenant-programs-resources/directly-managed-properties>> archived at <<https://perma.cc/3GBF-JP86>>.

117 *Ibid.*

118 *Residential Tenancy Act*, SBC 2002, c 78.

119 Province of British Columbia, “Landlord Notice to End Tenancy” (17 May 2018), online: <<https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/ending-a-tenancy/landlord-notice>> archived at <<https://perma.cc/TP5V-9DGH>>.

120 *Ibid.*

121 Province of British Columbia, “Dispute Resolution” (23 September 2017), online: <<https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/solving-problems/dispute-resolution>> archived at <<https://perma.cc/E797-MJQ7>>.

122 Province of British Columbia, “Review, Clarify or Correct a Decision” (23 September 2017), online: <<https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/solving-problems/dispute-resolution/after-the-hearing/review-clarify-or-correct-a-decision>> archived at <<https://perma.cc/CZH4-D7DT>>.

123 *Ibid.*

opportunity to make their case; a party was not allowed to have someone represent or assist them at the hearing; or a party did not receive the opportunity to test the other side's evidence.<sup>124</sup>

### C. Step One: Section 7 Rights in Jeopardy

#### i. The Right to Security of the Person

The first step of the three-part test articulated by Arvay is determining whether an individual's section 7 right to life, liberty or security of the person is in jeopardy.<sup>125</sup> In *R v Morgentaler* ("*Morgentaler*"), the Supreme Court of Canada determined that the right to security of the person protects an individual from both state interference with bodily integrity and serious state-imposed psychological stress.<sup>126</sup> In this case, a majority of the Court held that a provision in the *Criminal Code* which prohibited abortion, except where the life or health of a woman was endangered, violated a woman's right to security of the person.<sup>127</sup>

In *NB v G(J)*, the Supreme Court of Canada determined that the security of the person interest identified in *Morgentaler* could also be engaged in civil proceedings.<sup>128</sup> The Court specifically focused on the right to be protected from serious state-imposed psychological stress as being part of the security of the person interest. The Court found that individuals are not protected from "the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action."<sup>129</sup> Instead, a restriction of the security of the person interest will be found when state action has "a serious and profound effect on a person's psychological integrity."<sup>130</sup> However, the Court held that the effect on a person's psychological integrity will not be required to rise to the level of nervous shock or psychiatric illness.<sup>131</sup>

In *Blencoe v British Columbia (Human Rights Commission)* ("*Blencoe*"), the Supreme Court of Canada reviewed the comments made in *NB v G(J)* about the security of the person interest. Through this review, the Court identified two requirements that must be satisfied to successfully invoke the security of the person interest when an individual claims to have suffered serious state-imposed psychological stress: (1) the individual's psychological harm must result from state action, and (2) the psychological prejudice must be serious.<sup>132</sup> The Court noted that the security of the person interest "would not easily include the type of stress, anxiety, and stigma that result from administrative or civil proceedings."<sup>133</sup>

#### ii. Homelessness and the Right to Security of the Person

Over the past decade, British Columbia courts have come to recognize that the section 7 right to security of the person—as defined by the decisions of the Supreme Court of Canada in *Morgentaler*, *NB v G(J)*, and *Blencoe*—may be engaged when the state interferes

124 Community Legal Assistance Society, "Getting Started on a Judicial Review" (Accessed 15 July 2018), online: < <https://judicialreviewbc.ca/rtb/preparing-court-documents/getting-started-on-a-judicial-review/> > archived at < <https://perma.cc/DV8H-MZWB> >.

125 Arvay, *supra* note 100.

126 *R v Morgentaler*, [1988] 1 SCR 30, 1988 CarswellOnt 45 at para 25 [*Morgentaler*].

127 *Ibid* at para 38.

128 *NB v G(J)*, *supra* note 5 at para 58.

129 *Ibid* at para 59.

130 *Ibid* at para 60.

131 *Ibid*.

132 *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, 2000 CarswellBC 1860 at para 57 [*Blencoe*].

133 *Ibid* at para 83.



with homeless persons' abilities to provide themselves with shelter. Two cases in particular, *Victoria (City) v Adams* ("Adams")<sup>134</sup> and *Abbotsford (City) v Shantz* ("Shantz"),<sup>135</sup> involved section 7 challenges to municipal bylaws which prevented homeless persons from erecting temporary shelters in municipal parks.

In *Adams*, the British Columbia Supreme Court made important factual findings about the issue of homelessness in the city of Victoria. These findings included (1) the number of homeless persons in Victoria had exceeded the available supply of shelter beds; (2) exposure to the elements without adequate shelter, such as a tent tarpaulin or cardboard box, is associated with substantial and potentially fatal health risks, such as hypothermia; and (3) adequate shelter for those sleeping outside in Victoria requires ground insulation and overhead protection.<sup>136</sup> The Court found that because the City of Victoria did not provide sufficient shelter spaces for homeless persons, the municipal bylaws prohibiting the temporary erection of shelter effectively deprived homeless persons of adequate protection from the elements. This deprivation exposed homeless persons to increased risks of serious health issues and death.<sup>137</sup> The bylaws therefore constituted a deprivation of the right to security of the person.<sup>138</sup> The Court went on to find that the prohibition on erecting temporary shelter was both arbitrary and overbroad; therefore, it was not in accordance with the principles of fundamental justice.<sup>139</sup> This violation of section 7 could not be justified as a reasonable limit pursuant to section 1.<sup>140</sup> The Court struck down the bylaws insofar as they prevented homeless persons from erecting temporary shelter contrary to section 7.<sup>141</sup> This decision was subsequently upheld by the British Columbia Court of Appeal.<sup>142</sup>

In *Shantz*, the British Columbia Supreme Court again made important factual findings about the issue of homelessness, this time in the city of Abbotsford. The Court found that the City of Abbotsford did not provide a sufficient number of viable and accessible shelter options for homeless persons.<sup>143</sup> The Court also accepted evidence that the continual displacement of homeless persons exacerbated their already vulnerable positions. This displacement hindered the ability of social service providers to locate and assist homeless persons,<sup>144</sup> caused homeless persons to experience impaired sleep and serious psychological pain and stress, and created a risk to their health<sup>145</sup>. The Court found that the bylaws preventing homeless persons from camping or erecting temporary shelters in public spaces engaged the section 7 security of the person interest as they "had a serious effect on the psychological or physical integrity of the city's homeless."<sup>146</sup> The bylaws were also found to engage the section 7 liberty interest as they interfered with a homeless person's fundamental decision about where to shelter themselves when no practicable alternative shelter is available.<sup>147</sup> The Court ultimately held that the bylaws violated section 7 because they were overbroad<sup>148</sup> and grossly disproportionate to any benefit that the city might get

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134 *Victoria (City) v Adams*, 2008 BCSC 1363, 2008 CarswellBC 2156 [*Adams*].

135 *Abbotsford (City) v Shantz*, 2015 BCSC 1909, 2015 CarswellBC 3020 [*Shantz*].

136 *Adams*, *supra* note 134 at para 69.

137 *Ibid* at para 153.

138 *Ibid* at para 154.

139 *Ibid* at para 194.

140 *Ibid* at para 217.

141 *Ibid* at para 239.

142 *Victoria (City) v Adams*, 2009 BCCA 563, 2009 CarswellBC 3314.

143 *Shantz*, *supra* note 135 at para 222.

144 *Ibid* at para 213.

145 *Ibid* at para 219.

146 *Ibid* at para 209.

147 *Ibid* at para 188.

148 *Ibid* at para 203.

from furthering its objectives<sup>149</sup>. Akin to *Adams*, the Court found that the violation of section 7 could not be justified as a reasonable limit pursuant to section 1.<sup>150</sup>

### iii. Effect of the Tenant's Eviction on the Right to Security of the Person

Applying the reasoning from *NB v G(J)*, *Adams*, and *Shantz*, a court could find that a tenant's right to security of the person is breached if the tenant is able to demonstrate that they would suffer serious state-imposed psychological stress from being evicted from public housing. As indicated in *Blencoe*, the court would consider (1) whether the individual's psychological harm resulted from state action, and (2) whether the psychological prejudice was serious.<sup>151</sup>

In terms of the first consideration, the tenant's psychological harm would likely be a result of state action if the tenant's eviction was from public housing, and therefore initiated by BC Housing acting as the tenant's landlord. BC Housing is a provincial Crown corporation and is deemed an "agent of government" under section 10(2) of the *Ministry of Lands, Parks and Housing Act*.<sup>152</sup> In terms of the second consideration, a tenant faced with a lack of affordable housing options could be able to demonstrate that the eviction from public housing would have a serious and profound effect on their psychological integrity. This conclusion can be inferred from two findings of the Supreme Court of Canada in *NB v G(J)*: (1) that a parent faced with the loss of their child's companionship would suffer serious psychological distress; and (2) that the scrutiny of the parent-child relationship constitutes a gross intrusion into a private and intimate sphere.<sup>153</sup>

First, like a parent faced with the loss of their child's companionship, a tenant could suffer serious psychological distress when faced with the loss of secure housing, particularly in an area with a lack of affordable housing options. While the two situations may not necessarily result in the same degree of trauma, the latter situation could similarly produce "a serious and profound effect on a person's psychological integrity"<sup>154</sup> as a result of state action. In 2016, researchers conducted a systematic review of studies assessing the effect of the threat of eviction on health.<sup>155</sup> Most of the studies that assessed mental health, which primarily came from the United States, found a significant negative association with the threat of eviction. Being faced with the loss of secure housing was found to increase an individual's likelihood of depression, anxiety, psychological distress, and suicide.<sup>156</sup> A tenant could experience further psychological harm if the eviction forced them into homelessness. As accepted by the British Columbia Supreme Court in *Shantz*, homeless persons who are continually displaced often migrate towards more remote, isolated locations where they are less likely to have access to services.<sup>157</sup> This continual displacement experienced by homeless persons poses adverse health and safety risks to them because it causes impaired sleep, and serious psychological pain and stress.<sup>158</sup>

Second, like the scrutiny of a parent and child's relationship, the scrutiny of a tenant's lifestyle could constitute a gross intrusion into a private and intimate sphere. Admittedly, an

149 *Ibid* at para 224.

150 *Ibid* at para 247.

151 *Blencoe*, *supra* note 132 at para 57.

152 *Ministry of Lands, Parks and Housing Act*, RSBC 1996, c 307, s 10(2).

153 *NB v G(J)*, *supra* note 5 at para 61.

154 *Ibid* at para 60.

155 Hugo Vásquez-Vera et al, "The threat of home eviction and its effects on health through the equity lens: A systematic review" (2017) 175 *Soc Sci & Med* 199.

156 *Ibid* at 202.

157 *Shantz*, *supra* note 135 at para 213.

158 *Ibid* at para 219.

individual's status as a parent is more fundamental to personal identity than an individual's status as a tenant. Nevertheless, the state deeming a tenant as "unfit" could have serious consequences, such as the tenant being excluded from future consideration for public housing units and potentially being forced into homelessness.

A court could also find that a tenant's right to security of the person is breached if the tenant is able to demonstrate that their eviction from public housing constitutes state interference with their bodily integrity. Like the state preventing homeless persons from erecting temporary shelter in the absence of shelter spaces (as was the case in *Adams and Shantz*), the state evicting a tenant in the absence of affordable housing could expose the tenant to an increased risk of serious health issues. Low-income tenants faced with a lack of affordable housing options often move into substandard units, which are linked to negative health outcomes,<sup>159</sup> including dampness and mold which may result in respiratory disease; inadequate heating and insulation which may lead to hypothermia or death; indoor air pollution such as radon, which may cause lung cancer; and incorrect installation of heating and cooking appliances which may lead to fatal carbon monoxide poisoning.<sup>160</sup> If the tenant does not accept substandard housing, they will become homeless. As previously discussed, the British Columbia Supreme Court in *Adams and Shantz* accepted that homelessness is linked with substantial health risks. Continual displacement may cause homeless persons to suffer from impaired sleep and may create a risk to their health,<sup>161</sup> while exposure to the elements without adequate shelter may lead to hypothermia or death<sup>162</sup>. Thus, a tenant faced with a lack of affordable housing options could be able to demonstrate that the eviction from public housing would constitute a violation of their section 7 security of the person interest.

## D. Step Two: Whether the Hearing Requires Legal Representation to be Fair

### i. Procedural Fairness as a Principle of Fundamental Justice

The second step of the three-part test articulated by Arvay is determining whether the hearing requires legal representation to be fair.<sup>163</sup> Section 7 of the *Charter* prescribes that an individual can only be deprived of their right to security of the person in accordance with the principles of fundamental justice. In *NB v G(J)*, the Supreme Court of Canada recognized that the principles of fundamental justice required that the mother be given a fair hearing before a neutral and impartial arbiter.<sup>164</sup> The Court held that for the hearing to be fair, the mother must be provided with an opportunity to effectively present her case to the judge.<sup>165</sup> In determining whether state-funded legal counsel was required to ensure that the mother was able to effectively present her case, the Court considered the seriousness of the interests at stake, the complexity of the proceedings, and the mother's capacities.<sup>166</sup> Arvay argues that cases dealing with complex legal issues generally require the presence of counsel to satisfy the requirements of procedural fairness. He observes that an ordinary citizen does not possess the ability to test evidence through skilled cross-examination, which is an "essential aspect of a full and fair hearing."<sup>167</sup>

159 Matthew Desmond & Rachel Tolbert Kimbro, "Eviction's Fallout: Housing, Hardship, and Health" (2015) 94:1 *Social Forces* 295 at 300.

160 Mary Shaw, "Housing and Public Health" (2004) 25 *Ann Rev Pub Health* 397 at 404-405.

161 *Shantz*, *supra* note 135 at para 219.

162 *Adams*, *supra* note 134 at para 69.

163 Arvay, *supra* note 100 at 38E.

164 *NB v G(J)*, *supra* note 5 at para 72.

165 *Ibid* at para 73.

166 *Ibid* at para 75.

167 Arvay, *supra* note 100 at 38E.

## ii. Procedural Fairness in a Tenant's Eviction Hearing

Drawing on the principles in *NB v G(J)*, a court could find that legal representation is necessary to ensure procedural fairness in a hearing where a tenant faces eviction from public housing. Regarding the seriousness of the issues at stake, an eviction hearing could have a serious impact on the lives of the tenant and any dependents. Due to British Columbia's housing crisis, an eviction from public housing could force the tenant into substandard housing conditions or homelessness. Regarding the complexity of the proceedings, an eviction hearing is administrative in nature, and therefore designed to be less formal than a traditional court proceeding.<sup>168</sup> Nevertheless, an eviction hearing is an adversarial process that requires a tenant to make their case and present evidence to an arbitrator. This evidence could include the presentation of documents and photographs, as well as witness testimony.<sup>169</sup> A tenant in an eviction hearing may also have an opportunity to respond to the landlord's evidence by questioning the landlord and their witnesses.<sup>170</sup> Due to the possibility of losing their home, a tenant in an eviction hearing could be under a significant amount of emotional strain and have difficulty navigating this foreign environment alone. In terms of personal capabilities, a tenant would likely need to possess superior intelligence or education, communication abilities, composure, and familiarity with the legal system to participate effectively in the eviction hearing. As indicated by Arvay, an ordinary citizen does not have the capabilities to participate effectively in a hearing that requires them to test evidence.<sup>171</sup> A tenant fitting Arvay's description could therefore require legal representation to ensure that they are provided with a full and fair hearing, in accordance with the principles of fundamental justice.

## E. Step Three: Whether Government Action "Triggered" the Hearing

### i. Section 7 Requirement of State Involvement

The third step of the three-part test articulated by Arvay is determining whether the hearing was "triggered" by government action.<sup>172</sup> Section 7 interests can only be protected in hearings involving the state since the *Charter* applies to governments rather than private individuals or organizations.<sup>173</sup> The Supreme Court of Canada's decision in *D(P) v British Columbia* affirms that the constitutional right to state-funded legal counsel cannot be extended to parties in private disputes.<sup>174</sup> In *Eldridge v British Columbia (Attorney General)*, the Supreme Court of Canada provided the following approach for determining whether the *Charter* applies to an entity:

[T]he *Charter* may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself "government" for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as "government" within the meaning of s.

168 Justice Education Society, "Tribunals vs. Courts" (Accessed 24 January 2019), online: <<https://www.adminlawbc.ca/what-is-admin-law/tribunals-vs-courts>> archived at <<https://perma.cc/T7QR-MPJ5>>.

169 Province of British Columbia, "During the Hearing" (Accessed 13 July 2018), online: <<https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/solving-problems/dispute-resolution/during-the-hearing>> archived at <<https://perma.cc/PE78-LDKE>>.

170 *Ibid.*

171 Arvay, *supra* note 100 at 38E.

172 *Ibid.*

173 Andrea Wong, "The Yellow Brick Road? Establishing a Constitutional Right to State-Funded Counsel for Matters on Civil Law in Canada" (2011) 2 J Pub Pol'y Admin & L 42 at 46.

174 *D(P) v British Columbia*, *supra* note 92 at para 145.

32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as “private”. Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly “governmental” in nature — for example, the implementation of a specific statutory scheme or a government program — the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.<sup>175</sup>

This test was cited by the Supreme Court of Canada in *Greater Vancouver Transportation Authority v Canadian Federation of Students—British Columbia Component* (“*Greater Vancouver Transportation Authority*”).<sup>176</sup> In this case, the Court examined whether British Columbia Transit (“BC Transit”), a provincial Crown corporation, was an entity to which the *Charter* applies. Ultimately, the Court found that the *Charter* does apply to BC Transit as it is “clearly a government entity.”<sup>177</sup> The Court’s conclusion was informed by the following factors: (1) BC Transit is a statutory body designated by legislation as an “agent of the government”, with a board of directors appointed by the Lieutenant Governor in Council; and (2) the Lieutenant Governor in Council has the power to manage BC Transit’s affairs and operations by means of regulation.<sup>178</sup>

## ii. State Involvement in a Tenant’s Eviction Hearing

Following the reasoning in *Greater Vancouver Transportation Authority*, it is likely that a situation in which a tenant is being evicted from their public housing unit by BC Housing meets the requirement of state involvement. BC Housing is a Crown corporation, established and funded by the provincial government to provide low-income individuals and families with affordable housing.<sup>179</sup> There does not appear to be case law on whether BC Housing is an entity to which the *Charter* applies. However, as noted above, section 10(2) of the *Ministry of Lands, Parks and Housing Act* deems BC Housing to be an “agent of government.”<sup>180</sup> Furthermore, section 10(3) of the *Ministry of Lands, Parks and Housing Act* allows the Lieutenant Governor in Council to make regulations respecting the constitution, status, incorporation, and capacity of BC Housing, as well as regulations conferring on BC Housing powers and duties in respect to housing.<sup>181</sup> In light of the Supreme Court of Canada’s decision regarding BC Transit in *Greater Vancouver Transit Authority*, it is likely that BC Housing is also a government entity to which the *Charter* applies. Therefore, like the proceedings in *NB v G(J), Adams*, and *Shantz*, the tenant’s eviction proceeding is “triggered” by the state, which acts through BC Housing to end the tenancy. If this final step of Arvay’s test is met, a court could extend the constitutional right of state-funded legal counsel to a tenant fighting to keep their home.

175 *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 1997 CanLII 327 at para 44.

176 *Greater Vancouver Transportation Authority v Canadian Federation of Students—British Columbia Component*, 2009 SCC 31, [2009] 2 SCC 295 at para 15 [*Greater Vancouver Transportation Authority*].

177 *Ibid* at para 17.

178 *Ibid*.

179 BC Housing, *supra* note 111.

180 *Ministry of Lands, Parks and Housing Act*, *supra* note 152.

181 *Ibid* at s 10(3).

## CONCLUSION: OPPORTUNITIES FOR FURTHER RESEARCH

This paper has argued that the courts could extend the constitutional right to state-funded counsel, in some cases, to a tenant who is being evicted by BC Housing from their public housing unit. An eviction could jeopardize the tenant's section 7 right to security of the person if it was found to constitute serious state-imposed psychological stress or state interference with the tenant's bodily integrity due to the lack of affordable housing options available. Legal representation could be required to ensure a fair hearing if the tenant was deemed to have a serious interest in maintaining secure housing; the nature of the proceedings was determined to be complex; and the tenant was found to be unable to participate effectively in the hearing. Finally, the tenant's eviction proceeding could be triggered by the state if BC Housing was deemed to be a government entity to which the *Charter* applies.

An opportunity for further research in this area is exploring whether the section 7 liberty interest could also form the basis for a tenant's constitutional right to state-funded legal counsel. This paper focused solely on the section 7 security of the person interest, but *Shantz* indicates that the section 7 liberty interest may be engaged when the state interferes with a person's decision about where to shelter themselves when no practicable alternative shelter is available.<sup>182</sup>

Another opportunity for further research in this area is comparing the costs between expanding the constitutional right to state-funded civil legal counsel on a case-by-case basis, and creating a broad right to state-funded civil legal counsel. Following the ruling in *NB v G(J)*, McCallum noted that evaluating the extent of this right would pose significant costs to the government, "raising concerns about whether the limited resources currently available for legal representation for the indigent are allocated effectively."<sup>183</sup> Thus, comparing these costs would assist in determining how the provincial government can most effectively provide state-funded legal counsel in British Columbia.

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182 *Shantz*, *supra* note 135 at para 188.

183 McCallum, *supra* note 101 at 135E.