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Résumé de l'article

L'autrice soutient que la Charte canadienne des droits et libertés ne saura remplir ses promesses que lorsque ceux et celles à qui elle garantit des droits sont en mesure de contester l'action gouvernementale devant les tribunaux. Cela est également vrai pour la Charte en tant que document constitutionnel et comme instrument de défense des droits de la personne. En conséquence, nous devons nous préoccuper de savoir si les titulaires de ces droits peuvent effectivement les faire valoir devant les tribunaux, d'autant plus qu'une crise de l'accès à la justice sévit depuis longtemps au Canada. Partant du constat que cet accès est souvent hors de portée, l'autrice se penche sur le rôle que le Programme de contestation judiciaire (un organisme à but non lucratif financé par des fonds publics et qui fournit un appui financier à des groupes et personnes désireuses de mener une contestation fondée sur la Charte) peut jouer et joue actuellement dans la réalisation de voies d'accès à la justice liée à la Charte.

The Importance of Effective Access to Justice for *Charter* Violations and the Role of the Court Challenges Program

Marika Giles Samson[*]

This paper argues that the Canadian Charter of Rights and Freedoms *can only deliver on its promises when those who benefit from its guarantees are able to challenge government action in courts. This is true both in considering the* Charter *as a constitutional document and as a human rights instrument. As such, we must be concerned about whether rightsholders have effective access to the courts to bring such cases, particularly given the long-term crisis in access to justice in Canada. Finding that access is often out of reach, the paper then considers the role that the Court Challenges Program, a publicly funded not-for-profit organization that provides funding to groups and individuals seeking to bring* Charter *challenges, can and does play in creating pathways for accessing* Charter *justice.*

L'autrice soutient que la Charte canadienne des droits et libertés *ne saura remplir ses promesses que lorsque ceux et celles à qui elle garantit des droits sont en mesure de contester l'action gouvernementale devant les tribunaux. Cela est également vrai pour la* Charte *en tant que document constitutionnel et comme instrument de défense des droits de la personne. En conséquence, nous devons nous préoccuper de savoir si les titulaires de ces droits peuvent effectivement les faire valoir devant les tribunaux, d'autant plus qu'une crise de l'accès à la justice sévit depuis longtemps au Canada. Partant du constat que cet accès est souvent hors de portée, l'autrice se penche sur le rôle que le Programme de contestation judiciaire (un organisme à but non lucratif financé par des fonds publics et qui fournit un appui financier à des groupes et personnes désireuses de mener une contestation fondée sur la* Charte*) peut jouer et joue actuellement dans la réalisation de voies d'accès à la justice liée à la* Charte.

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I. INTRODUCTION

The *Canadian Charter of Rights and Freedoms*[1] [*Charter*] guarantees certain rights to everyone in Canada. These rights include civil rights (section 2)[2], democratic rights (sections 3 to 5), mobility rights (section 6), legal rights (sections 7 to 14)[3], equality rights (section 15), and official language rights (sections 16 to 23). As part of the Canadian Constitution, the *Charter* is the supreme law of Canada, and government action cannot abrogate *Charter* rights.[4] Put another way, the *Charter* enshrines a foundational commitment that governments will not violate *Charter* rights in the exercise of their public functions. Where, despite this commitment, a violation occurs, responsibility for the enforcement of the *Charter* and the determination of an appropriate remedy is delegated to the judicial branch of government by virtue of section 24 of the *Charter*, subsection (1) of which reads as follows:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

To be clear, this remedial provision assumes that a violation has occurred; it does not relieve governments from their primary responsibility of not infringing the *Charter* in the first place. Indeed, governments should, and sometimes do, conduct an analysis to ensure constitutional conformity before legislation or policy is enacted.[5] Nonetheless, there can be misunderstandings about what the *Charter* requires, particularly as it is written in broad terms. Tensions often arise in situations of constrained resources or competing priorities. Or violations can occur when agents of the state act in a *Charter*-infringing manner. It falls upon the courts to resolve those misunderstandings, tensions, and operational mistakes and to provide appropriate remedies. Remedies can include the exclusion of evidence obtained in violation of

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 (UK) [*Constitution Act, 1982*].

2 Freedom of conscience and religion (s. 2(a)); freedom of thought, belief, opinion and expression (s. 2(b)); freedom of peaceful assembly (s. 2(c)); and freedom of association (s. 2(d)).

3 These include the right to life, liberty and security of the person (s. 7), as well as protections against unreasonable search and seizure (s. 8), arbitrary detention (s. 9), cruel and unusual treatment or punishment (s. 12) and self-incrimination (s. 13). It also imposes positive obligations on the state when a person is detained, arrested or charged (ss. 10-11) and to provide an interpreter, where needed, for participants in judicial proceedings (s. 14).

4 Section 52, *Constitution Act, 1982*, *supra* note 1.

5 See for e.g., the current federal government's policy on the use of *Charter* Statements and some examples; "Charter Statements" (last modified 12 December 2023), online: *Department of Justice Canada* <www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/index.html>. Indeed, such an analysis is required pursuant to section 4.1(1) of the *Department of Justice Act*, RSC 1985, c J-2, although the requirement in that section that the Minister report any inconsistency with the *Charter* in government Bills or regulations to the House of Commons has not been respected: Emmett Macfarlane, Janet Hiebert & Anna Drake, *Legislating Under the Charter: Parliament, Executive Power, and Rights* (Toronto: University of Toronto Press, 2023) at 42-43. Indeed, see Chapter 2 of Macfarlane, Hiebert & Drake generally about the vetting of legislation for *Charter* compliance.

Charter rights (section 24(2)) and even a declaration that a law is of no force and effect (section 52 of the *Constitution Act, 1982*), as well as a host of other remedies that have been established by the courts over the years.[6]

The tension that lies at the heart of this paper is between the simplicity of this model, in which someone whose *Charter* rights have been violated need only "apply to a court of competent jurisdiction" for relief, and the reality that for most Canadians access to justice through the courts is widely recognized to be out of reach. This paper seeks to articulate the dynamics underlying this tension, including its stakes, and thereby justify pathways to more effective access to *Charter* justice.

In the second part of the article, I will put the *Charter* in its legal and jurisprudential context. I will argue that, as a constitutional document, respect for the *Charter* is a rule of law issue: if constitutional law, like any law, is to have force, it must realistically be enforceable. As other commentators have noted, courts effectively act as the auditors of constitutional compliance.[7] But courts, by their nature, cannot exercise this jurisdiction to audit in the absence of a case being brought before them. As such, ensuring access to the courts to bring such cases is foundational to the constitutional rule of law in Canada.[8] I will also put the *Charter* in context as a human rights instrument, one that was enacted contemporaneously with a swath of international human rights instruments. Responding to the atrocities of the Second World War, these declarations, covenants, and conventions served to elevate those who had been historically marginalized, while recognizing their inherent political vulnerability by guaranteeing a right to an effective remedy for the violation of rights.[9] Thus, both as a matter of constitutional significance and as part of an interconnected and interdependent web of human rights obligations, Canada has a duty to ensure that those whose rights are protected by the *Charter* have effective access to the courts to vindicate their rights. This is particularly true for people who are politically and economically disempowered, the very people that the *Charter* was adopted to protect.

In the third part of the paper, the obligation to provide effective access to a judicial remedy for *Charter* violations is situated in the context of the access to justice crisis in Canada. While the widespread lack of access to the courts for the resolution of disputes in Canada is well-documented, it is becoming increasingly profound, as people cease to even consider seeking legal or judicial assistance to resolve their legal problems, lose faith in such mechanisms to be able to effectively assist them, and increasingly rarely even see their problems as "legal" at all. As such, the access to justice crisis has broad implications not only on individual people's lives, but on social cohesion and trust in public institutions. Without diminishing the importance of individual misery, these latter impacts can also be democratically

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6 See generally, Kent Roach, "Charter Remedies" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 673-694. It is worth noting, however, that section 33 of the *Charter* is a notwithstanding clause that effectively allows a government in Canada to override section 52 and maintain the operation of a law that violates section 2 or 7 to 15 of the *Charter*.

7 See e.g. Shannon Salter, *Rights Without Remedies: The Court Party Theory and the Demise of the Court Challenges Program* (Masters of Law Thesis, University of Toronto, 2011) [unpublished]

8 Carissima Mathen, "Access to *Charter* Justice" (2008/2009) 25 NJCL 191 at 191.

9 The relevant provisions of some of the most significant international human rights instruments are cited at note 34 below.

devastating; an inability to access justice for breaches of *Charter* rights inevitably leaves the impression that those rights are illusory, and that governments and others with greater power are not bound by the rule of law.

In the final part of the paper, I explain the modest role that the Court Challenges Program [CCP] has played and continues to play in bridging the gap and making real the promise of *Charter* rights. The CCP provides public funding for groups and individuals who seek to bring constitutional challenges to government action before the courts alleging violations of protected official language rights or human rights. CCP funding provides recipients with (much of) the money that they need to effectively access the judicial process. While only addressing a very small piece of the overall access to justice puzzle, I argue that CCP funding has several important positive impacts. Firstly, and most immediately, it allows individual access to judicial review as guaranteed by section 24 of the *Charter*. Secondly, a ruling in a test case can be expected to have a legal effect that could affirm the rights of other similarly situated people, many of whom might never have a realistic opportunity to file a case in court. And far more broadly, by verifying constitutional compliance and clarifying the meaning and scope of the human and official language rights guaranteed by of the *Charter*, CCP funding can contribute to the creation of a rights-respecting political culture in which most people shouldn't need to resort to the courts to enforce their rights after they have been violated. Thus, by providing a meaningful opportunity to access *Charter* justice, the CCP can contribute to the realization of the *Charter*'s promises.

II. THE DUAL LEGAL SIGNIFICANCE OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

The *Charter* is a document of dual legal significance: it is both a constitutional document and a human rights instrument. Both dimensions of the *Charter* create obligations on governments in Canada to act in conformity with its provisions. But the provisions of the *Charter* are expressed in broad terms and, as a result, the precise scope and meaning of those obligations is not always clear, nor is there always consensus on what they mean. Constitutional challenges brought on the basis of an alleged *Charter* violation thus offer an opportunity for courts to clarify the scope and meaning of *Charter* protections.

A. The *Charter* As A Constitutional Document

As Part I of Schedule B to the *Constitution Act, 1982*, the *Charter* is a constitutional document. As such, it is an expression of our collective national values and a guarantee that those values will structure and discipline government action. This idea of constitutional norms constraining government action was not new in 1982, but prior to the adoption of the *Charter*, constitutional constraint was predominantly understood as being based on the division of powers between the federal government and the provinces, as delineated by sections 91 and 92 of the *Constitution Act*, 1867,[10] rather than human rights. Where

[10] See e.g. *RJR-Macdonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199; *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401; *Reference re Firearms Act (Can.)*, 2000 SCC 31.

disputes arose, courts interpreted the Constitution to decide whether a particular government had acted *intra vires* (within its power) or *ultra vires* (beyond its power).

This idea that government action is constrained by other normative limits had found some expression, most notably in the case of *Roncarelli v Duplessis,*[11] in which a majority of the Supreme Court held that the Premier of Québec had exceeded his official power in cancelling the liquor license for Roncarelli's restaurant because Roncarelli had been posting bail for Jehovah's Witnesses perceived as seditious by the Premier.[12] The case was not decided based on human rights norms *per se*, but rather limits on the Premier's jurisdiction, using the same kind of constitutional logic as the division of powers cases. A similar logic can be applied to *Charter* cases as well: just as the federal government acts *ultra vires* when it legislates in an area of exclusive provincial jurisdiction (or *vice-versa*), so too does a government exceed its constitutionally-defined powers when it acts in violation of *Charter* rights. Legislating in a manner inconsistent with any part of Constitution, including the *Charter*, is simply invalid pursuant to section 52 of the *Constitution Act, 1982*, which reads:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The question at the heart of every constitutional challenge is whether the law (or policy, or government action) is inconsistent with the provisions of the Constitution and therefore not legally sound. Of course, one would hope that a government does not intentionally enact constitutionally invalid legislation and so the unconstitutionality of government action is almost always a matter of some contestation, and the locus for that contestation is the courts.[13] Indeed, the possibility of this contestation is foundational of the rule of law in a constitutional democracy, which requires that government action is constrained by the terms of the Constitution, and so requires a mechanism for enforcing that constraint.

Where the constitutional division of powers is the issue, the playing field for the contestation is relatively level: usually the question is pursued by one level of government challenging the allegedly overstepping level of government in the courts, as happened most recently in the Greenhouse Gas

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11 *Roncarelli v Duplessis*, [1959] SCR 121.

12 Indeed, the precise issue before the Court was whether Duplessis had been exercising his official powers as Premier at all, in which case he would be immune from any liability that resulted from his actions. The majority of the Court held that Duplessis had not and, as such, could be held personally liable for the damages suffered by Roncarelli.

13 See generally Debra M McAllister, "Charter Remedies and the Jurisdiction to Grant Them: The Evolution of Section 24(1) and Section 52(1)", (2004) 25 SCLR (2d) 1, and, on the court's role in "Charter vetting", see Macfarlane, Hiebert & Drake, *supra* note 5 at 44.

Reference[14] and the Reference re Indigenous Child Welfare.[15] When a dispute arises as to whether a particular law, policy or practice violates the *Charter*, the remedy prescribed by section 24(1) is recourse to the courts, but unlike division of powers cases, when ordinary Canadians challenge government action based on an alleged *Charter* violation, the playing field is decidedly uneven. An individual or organization that seeks to prove that a law, policy or practice violates the *Charter* must, in effect, sue the government in question, with all of the cost, procedural complications, and delay that any lawsuit entails, but against a government with virtually unlimited financial and legal resources at their disposal. As Kennedy and Sossin put it:

> All applicants who raise Charter challenges, by definition, engage the Crown as a party, and will be at a disadvantage against the Crown in terms of resources and patience. People grow old and die but the Crown does not. People can run out of money, but the Crown cannot…[16]

Compounding the problem is that the claimant in a *Charter* case may, quite often, already be politically marginalized in some way, whether they are a prisoner or a refugee or a person with a disability or a member of a historically disadvantaged group. This disadvantage can itself create obstacles for a claimant to prosecute their claims and access legal resources, such as financial, physical, mental, cognitive or linguistic barriers, among others.[17] And, in some cases, the *Charter* violations themselves may have caused the claimant economic harm, such as in the *Little Sisters* case, in which inbound inventory for a small LGBTQ+ bookstore in Vancouver was blocked by Canada Customs due to a discriminatory application of obscenity provisions.[18]

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[14] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11. This case arose from references filed by the Governments of Saskatchewan, Ontario and Alberta regarding the federal *Greenhouse Gas Pollution Pricing Act*, SC 2018, c. 12. Indeed, the path for governments to engage the courts in determining whether another level of government has acted constitutionally is made somewhat smoother by their capacity to file a reference – essentially a request for a legal opinion from the court - rather than waiting for a live dispute to arise. On the other hand, the opinions issued in response to a reference are not technically binding law, although many have proved highly persuasive, including the *Reference re Same Sex Marriage*, 2004 SCC 79 and the *Reference re Secession of Québec* [1998] 2 SCR 217.

[15] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5. This was a case that arose from a reference initiated by the Government of Québec arguing that the federal government exceeded its jurisdiction by legislating in the area of child welfare.

[16] Gerard Kennedy & Lorne Sossin in "Justiciability, Access to Justice and Summary Procedures in Public Interest Litigation" in Cheryl Milne & Kent Roach, eds, *Public Interest Litigation in Canada* (Toronto: LexisNexis, 2019) at 119. Kennedy and Sossin discuss the extent and consequences of this power imbalance at some length, ultimately arguing in favour of a Crown duty of constraint when they act as defendants in *Charter* cases.

[17] Observed by, among many others, the *Reaching Equal Justice Report: An Invitation to Envision and Act* (November 2013), online (pdf): *Canadian Bar Association* <www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf> at 17 [*Equal Justice Report*]. This report is discussed in greater detail in Part 2 below.

[18] *Little Sisters Book and Art Emporium v Canada* (*Minister of Justice*), 2000 SCC 69 [*Little Sisters*].

In addition to any pre-existing obstacles, once a claimant in a *Charter* case gets to court they will then bear the legal burden of proving that a violation occurred, for example, that a particular policy is discriminatory (violates section 15) or infringes on their right to freedom of expression (section 2(b)), on the basis of admissible evidence and in accordance with legal tests. These legal tests are not set out in the *Charter* but rather established in judicial decisions and continue to evolve over time.[19] Making the task even more complex is the fact that virtually all *Charter* cases involve a second level of analysis, grounded in the balanced conception of rights foundational to the Canadian *Charter* and as expressed in section 1:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

At this second stage, once a violation is established, the government in question has the opportunity to defend its action by establishing that the law or policy in question constitutes a "reasonable limit" that can be "demonstrably justified" on the basis of another multi-part legal test.[20] While the government bears the burden of proof at this stage, it usually takes a significant amount of work for a claimant to respond to the government's evidence and arguments if the initial finding of a *Charter* violation is to survive.

As one can imagine, all of this requires a considerable amount of legal expertise, and the task of mounting a challenge can be daunting in terms of time, money, and energy. And yet, it is constitutionally essential if we are to have confidence that government action conforms to the limits established by the *Charter* and to the constitution. Carissima Mathen has argued that "it is vital … that there is some mechanism by which the constitutionality of law and actions can be judged" and that a society that fails to provide such a mechanism "is little better than a society unbound by constitutional limits – and at risk of losing a key determinant of the rule of law."[21] Faisal Bhabha has similarly argued that "access to justice forms an integral part of the rule of law in constitutional democracies."[22]And Shannon Salter has described

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[19] For example, the test for establishing a violation of section 15 of the *Charter* was, for a long time, considered to be as set out in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, then was refined considerably in *Law v Canada* [1999] 1 SCR 497, and then again in *Fraser v Canada*, 2020 SCC 28 and called into some question in the recent case of *R v Sharma*, 2022 SCC 39, to name just a few of the key cases in this area of the law. Given that a plaintiff would be expected to be able to engage with the latest jurisprudence while establishing their claim of a section 15 violation, establishing a violation becomes a rather complicated legal task

[20] This test, the so-called "Oakes test", was first established in *R v Oakes*, [1986] 1 SCR 103, and is in four parts: (1) is the goal of the law pressing and substantial, in other words sufficiently important to justify a limiting of *Charter* rights? (2) is the means used to achieve that goal proportional, which is to say (a) is there a rational connection between the goal and the means; (b) do the means used infringe the rights as little as possible (often termed "minimal impairment"); and (c) has an appropriate balance been struck between the positive and negative effects of the law or policy? Interestingly, the *Oakes* test itself has remained largely the same since it was first articulated in 1986.

[21] Mathen, *supra* note 8 at 191.

[22] Faisal Bhabha, "Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions" (2007) 33(1) Queen's LJ 139 at 140.

the court's role in reviewing the constitutionality of government action as akin to a "constitutional audit",[23] although unlike other forms of public audit, the courts are not able to initiate such "audits" on their own – they need people to bring cases in order to consider possible constitutional violations. As Salter writes: The courts rely on individuals to bring constitutional challenges to legislation when there is an alleged violation of the Charter. Without litigants willing to expend the time, money and effort necessary to enforce their rights in court, the SCC's auditing function would be nullified and the legislatures would be free to pass unconstitutional legislation unimpeded by Charter challenges.[24]

This framing of *Charter* challenges as constitutional audits is useful in terms of appreciating the importance of access to justice for such cases not just for the claimants themselves, but as a rule of law issue.[25] To have force, constitutional law must be enforceable, requiring that there be an available pathway for ensuring that the Constitution is respected. Moreover, the rule of law is not just a legal phenomenon, it is a social force: if a society is to be governed by the rule of law, it must "feel" salient and binding to both citizens and governments alike.[26] Thus, for the *Charter* to be constitutionally meaningful, people must believe that they have access to *Charter* justice. However, as discussed in the next section, access to remedies for *Charter* violations is not just a constitutional issue, it is a human rights issue.

B. The *Charter* As A Human Rights Instrument

The *Charter* was not adopted at or near the time of Canada's original constitution in 1867, but rather in 1982, 115 years after confederation. This timing not only coincided with a significant round of constitutional reflection associated with the repatriation of the Canadian Constitution, it also coincided with the ascendancy of international human rights in the post-World War II era. This section will focus

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[23] See generally Salter, *supra* note 7 at Chapter 3, Part 3. A deeply thoughtful commentator, Shannon Salter went on to serve as Chair of British Columbia's Civil Resolution Tribunal, as well as act as Deputy Attorney-General of British Columbia, among other roles.

[24] *Ibid* at 80.

[25] The framing of access to justice as a rule of law problem has been the subject of significant critique, the most thoroughgoing perhaps being Andrew Pilliar, "Filling the Normative Hole at the Centre of Access to Justice: Towards a Person-Centred Conception, (2022) 55(1) UBC L Rev 149. As Pilliar argues (at 155), while the rule of law framing has been popular with the courts, "grounding a conception of access to justice in the rule of law confines that conception to relatively barren soil", particularly given that "the rule of law is itself a difficult concept to pin down". Similarly, Christian Morey notes how there are both thin (formal) and thick (substantive) understandings of the rule of law, and that the implications for access to justice can vary quite widely as a result: Christian Morey, "A Matter of Integrity: Rule of Law, the Remuneration Reference and Access to Justice", (2016) 49(1) UBC L Rev 275.

[26] As the Supreme Court of Canada put it in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 [*TLABC*] at para 40: "[i]f people cannot challenge government actions in court, individuals cannot hold the state to account - the government will be, or be seen to be, above the law." See also Gillian K Hadfield, Jens Meierhenrich & Barry R Weingast, "A Positive Theory of the Rule of Law", in Jens Meierhenrich & Martin Loughlin, eds, *The Cambridge Companion to the Rule of Law* (Cambridge: Cambridge University Press, 2021) at 237-258, in which the authors highlight the importance of "shared mental models" as a key "microfoundation" of the rule of law.

on the *Charter*'s place in this larger international human rights context, providing another useful lens through which to consider the obligation to provide meaningful access to *Charter* justice.

The atrocities in Europe committed during the period leading up to and during the Second World War led to a broad post-war consensus that the sovereignty of states could not be absolute: it had to be tempered by respect for fundamental human rights, natural rights that all people possessed just by virtue of being human. Whereas international law had traditionally been concerned with the interactions and relationships between nations, after 1945 it added the idea that the international community might have something to say about the way in which nations treated their own citizens. Basic international norms around human rights crystallized in 1948, finding expression in the United Nations Declaration of Human Rights[27] [*UNDHR*], which opens with the following words:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,
>
> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law…

The *UNDHR* then goes on to recognize that "all human beings are born free and equal in dignity and rights" (Article 1) and that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without [discrimination]" (Article 2).

While normatively significant, the *UNDHR* was understood to have no international legal force *per se*: for the declared rights to be enforceable, they would need to be contained in an international treaty, which states would ratify and, by doing so, consent to be bound by its obligations. In the next twenty years, two treaties would be drafted that together are often known as the International Bill of Rights, the *International Covenant on Civil and Political Rights*[28] [*ICCPR*] and the *International Covenant on Economic, Social*

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27 *Universal Declaration of Human Rights* (1948), online (pdf): *United Nations* <www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf> [*UNDHR*].

28 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].

and Cultural Rights[29] [*ICESCR*], both of which Canada ratified in 1976.[30] Significant regional human rights conventions were also drafted during this period: the *European Convention on Human Rights* [*ECHR*] in 1950[31], the *American Convention on Human Rights* (for the Americas) [*ACHR*] in 1969[32], and the *African Charter on Human and Peoples' Rights* [*ACHPR*] in 1981.[33]

It is worth emphasizing the animating and abiding concern of these instruments for the rights of minorities. By affirming that there was a basic level of dignity and respect to which all human beings were entitled regardless of their political circumstances, these instruments elevated those who had been historically marginalized, including women, religious minorities, racialized people, political opponents, prisoners, and the dispossessed. Such people were now recognized to have rights and those rights were declared to be inviolable – beyond the reach of state sovereignty or ordinary political debate. However, these instruments also recognized the inherent political vulnerability of many of these rightsholders, and so the *UNDHR*, the *ICCPR*, the *ECHR* and the *ACHR* all contain within them an explicit state obligation to provide an effective remedy for violations of human rights.[34]

During this same period, in 1960, Canada enacted the *Canadian Bill of Rights*,[35] a sort of proto-*Charter* that was the first attempt to statutorily enshrine human rights in Canada. In debates surrounding the enactment of the *Bill of Rights*, then-Prime Minister John Diefenbaker was explicit about the connection between the statute and Canada's commitment to international human rights law:

> The measure that I introduce is the first step on the part of Canada to carry out the acceptance either of the international declaration of human rights or of the principles that activated that noble document.[36]

The *Bill of Rights* is very short, with only two substantive sections, and six (6) specifically enumerated rights.[37] It is indicative of Canada's partiality for civil and political rights: it is focused on the equality,

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29 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976, accession by Canada 19 August 1976) [*ICESCR*].

30 See "UN Treaty Body database", online: *Office of the High Commissioner for Human Rights* <tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx>. There are other significant United Nations human rights treaties, but it is beyond the scope of this paper to discuss them all. The first UN human rights treaty ratified by Canada was the *International Convention on the Elimination of All Forms of Racial Discrimination*, in 1970.

31 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221.

32 *American Convention on Human Rights*, 22 November 1969, 52:1 ILM 99.

33 *African Charter on Human and People's Rights*, 21 October 1986, 1520 UNTS 217.

34 UNDHR at art 8; ICCPR at art 2(3)(a); ECHR at art 13; and ACHR at art 25.

35 *Canadian Bill of Rights*, SC 1960, c 44 [*Bill of Rights*].

36 "Bill C-79, Measure providing for the Recognition and Protection of Human Rights and Fundamental Freedoms", 2nd Reading, *House of Commons Debates*, 24-3, Vol 5 (1 July 1960) at 5644.

37 Section 1 reads: "It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, (a) the right of the individual to life, liberty, security of the person and enjoyment of

civil liberties and legal rights of the individual, but offers nothing in the way of the labour, social security, education, health and cultural rights embodied in the *ICESCR* (a pattern that would be replicated in the adoption of the *Charter* two decades later). However, as an ordinary statute, it became clear that the *Bill of Rights* did not offer a level of human rights protection that would meet the historical moment.[38] While other federal statutes were supposed to be interpreted in conformity with the *Bill of Rights*, such rights were often narrowly interpreted, with decisions rendered applying the *Bill of Rights* marked by judicial restraint.[39] Indeed, there was sense that the *Bill of Rights* was enacted not to provide the judiciary with more power to hold the government to account, but to strengthen the role of Parliament as "custodian of civil liberties".[40] Crucially, laws that conflicted with the *Bill of Rights* remained valid, and so non-conformity had few legal consequences.

Thus having ratified the *ICCPR* in 1976, and given the experience of the *Bill of Rights*, it was reasonable for the government to ask itself how it intended to ensure the performance of Canada's international human rights treaty obligations. It is in this international and domestic human rights context that the *Charter* is enacted as a constitutional document in 1982, with supremacy over other laws. And in that context, section 24(1) of the *Charter* can reasonably be read as Canada's effort to provide for a right to an effective remedy for the violation of human rights, as required by article 2(3) of the *ICCPR*. Notably, however, in international human rights law, an "effective remedy" is one that is, among other things, accessible.[41] Thus the next part will explore whether and to what extent the effective remedy provided by section 24(1) is accessible.

III. ACCESS TO *CHARTER* JUSTICE IN CANADA

Having established that access to *Charter* justice is important both to the constitutional rule of law and as an effective remedy for the violation of human rights, it is worth considering whether and to what extent such a remedy is available to *Charter* claimants. Research in this specific area being limited, it is useful to consider, as a threshold issue, existing barriers to access to justice in Canada, following which I will turn to the specificities and implications of a lack of effective and equal access to constitutional justice.

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property, and the right not to be deprived thereof except by due process of law; (b) the right of the individual to equality before the law and the protection of the law; (c) freedom of religion; (d) freedom of speech; (e) freedom of assembly and association; and (f) freedom of the press." Section 2 is an interpretive clause, although it also contains protections against arbitrary detention, cruel and unusual treatment or punishment, self-incrimination and provides for other rights within the legal process.

38 See generally Carissima Mathen & Patrick Macklem, eds, *Canadian Constitutional Law, Fifth Edition* (Toronto: Emond, 2022) at 727-732.

39 Berend Hovius, "The Legacy of the Supreme Court of Canada's Approach to the Canadian Bill of Rights: Prospects for the Charter" (1982) 28(1) McGill LJ 31, generally.

40 Macfarlane, Hiebert & Drake, *supra* note 5 at 40.

41 See generally Dinah Shelton, *Remedies in International Human Rights Law*, 3rd ed (Oxford: Oxford University Press, 2016), Chapter 4.

A. The Crisis of Access to Justice in Canada

There is no question that there is a significant problem with access to justice in Canada. Over the last two decades, multiple studies have shown the degree to which the judicial system has become inaccessible to most Canadians. As discussed below, there is a broad consensus among judges, lawyers and scholars that we are currently living through a crisis in access to justice.[42]

In 2005, an excerpt of a speech given by then Chief Justice (and former Attorney-General) of Ontario Roy McMurtry titled "We Are Not All Equal Before the Law" was published in the *Globe & Mail*.[43] The speech talked about the importance of the rule of law – the notion that everyone was subject to the same rules and the same consequences for breaking them – and how foundational the rule of law was for a well-functioning democracy, before turning to the already-apparent problem of access to justice:

> There are, of course, many significant, continuing challenges related to the administration of justice. One of our major and continuing concerns is the issue of access to justice. By this, I mean the challenge of assuring legal representation and access to our courts for the less affluent, the poor and disadvantaged.
>
> The challenges related to access to justice, however, go well beyond the problems faced by the poor. In fact, the current high cost of civil litigation is increasingly preventing almost all but the very affluent from pursuing a legal remedy through a trial.[44]

These problems were apparent to any lawyer practicing civil litigation, and even more poignantly so to those requiring their services. The resolution of everyday legal problems – whether family law issues, or contractual disputes, or personal injury claims – through recourse to the courts was becoming increasingly unrealistic. Justice McMurtry observed that: "[i]n my view, a just society is one that enables each of its members to have access to the kind of legal assistance that is essential for the understanding and assertion of their individual rights, obligations and freedoms under the law."[45] Indeed, with the advent of the *Charter*, it can reasonably be argued that the obligation to ensure equality of access to justice has become constitutionalized.[46]

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42 That being said, Pilliar argues that characterizing the situation as a crisis is misleading, at least to the extent that "[a] crisis denotes a 'turning point'" and "there has been little indication in recent decades that this situation is poised to change systemically"; *supra* note 25 at 152.

43 R Roy McMurty, "We are not all equal under the law", *The Globe and Mail* (10 November 2005), online: <www.theglobeandmail.com> [perma.cc/3243-ADXZ].

44 *Ibid.*

45 *Ibid.*

46 Indeed, many commentators argue that it has been constitutionalized, albeit only quite recently, in the *TLABC* case, *supra* note 26. In that case, the Supreme Court of Canada struck down court hearing fees on the basis that they denied access to the courts. This is, admittedly, a rather thin and negative rights driven conception of access to justice, preventing the imposition of positive barriers. In this respect, it is similar in reasoning to the *BCGEU* case, in which an

In 2013, two significant reports were published in Canada on the issue of access to justice. The first, *Access to Civil & Family Justice: A Roadmap for Change*[47] [*Roadmap Report*] was released by the National Action Committee on Civil and Family Justice, chaired by then-Supreme Court of Canada Justice Thomas Cromwell. In the Roadmap Report's Foreword, then-Chief Justice of Canada Beverley McLachlin described the situation that led to the National Action Committee's work in the following terms:

> Let me start by saying that the problem of access to justice is not a new one. As long as justice has existed, there have been those who struggled to access it. But as Canadians celebrated the new millennium, it became clear that we were increasingly failing in our responsibility to provide a justice system that was accessible, responsive and citizen-focused. Reports told us that cost, delays, long trials, complex procedures and other barriers were making it impossible for more and more Canadians to exercise their legal rights.[48]

The Roadmap Report found that the two main factors negatively impacting access to justice in Canada were the high costs of legal representation and the long duration of many civil cases,[49] which increased the expense of legal action far beyond what the majority of Canadians could afford to pay out of pocket.[50] The lack of access to affordable legal advice resulted in over 50% of people representing themselves in judicial proceedings,[51] often with markedly poorer outcomes.[52] Particularly troubling was the indication in the Roadmap Report that over 65% of people confronted with legal problems think that "nothing can be done, are uncertain about their rights, do not know what to do, think it will take too much time, cost too much money or are simply afraid."[53]

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injunction was justified against legal picketers who blocked physical access to the courthouse: *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214. More expansive conceptions of access to justice, such as a positive right of access to legal services, have not been recognized: see, for example, *British Columbia v Christie*, 2007 SCC 21.

47 Action Committee on Access to Justice in Civil and Family Justice, "Access to Civil & Family Justice: A Roadmap for Change" (October 2013), online (pdf): *Canadian Forum on Civil Justice* <www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf> [Roadmap Report].

48 *Ibid* at i.

49 *Ibid*.

50 In 2013, for instance, the estimate for legal fees for a simple two-day trial ranged from $13,561 to $37,229 (*ibid* at 4), with costs rising substantially as the length and complexity of the resulting trial increases: $23,083-$79,750 for a civil action up to trial (5 days), $38,296-$124,574 for a civil action up to trial (7 days), and $12,333-$36,750 for a civil action appeal. Around this time, median annual income in Canada was calculated to be approximately $39,500: "Income of individuals by age group, sex and income source, Canada, provinces and selected census metropolitan areas" (8 July 2016), online: *Statistics Canada* <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110023901>. The Roadmap Report, *supra* note 47 details, at 3, that legal aid is not available for most people and most problems.

51 Roadmap Report, *supra* note 47 at 4.

52 *Ibid.* The Roadmap Report indicated that those who received legal assistance were between 17% and 1,380% more likely to receive better results.

53 *Ibid*.

The second 2013 report was published by the Canadian Bar Association. The *Reaching Equal Justice Report: An Invitation to Envision and Act*,[54] [*Equal Justice Report*] was particularly focused on public perceptions. It opens with the following observation: "[p]ublic confidence in the justice system is declining",[55] and deduces that there is "a perception that justice is inaccessible and even unfair."[56] This sentiment was most marked among people living in marginalized conditions, who did not believe that the rights and protections afforded by the law were honoured or accessible.[57] While the primary barrier to effective access for enforcement of legal rights was a lack of financial resources, other barriers included language and literacy, disabilities, racial discrimination, and education.[58] Marginalized people (defined by the CBA as racialized, Indigenous or disabled folks, or abuse survivors) felt as though their stories were not taken seriously by members of the bench, and there was strong sense that the justice system overall neither recognized nor understood the social and economic realities of life at the margins of society.[59] Marginalized Canadians often also frequently doubted the impartiality of the justice system, believing that whether or not they would be treated fairly and compassionately was entirely dependent on the "luck of the draw."[60]

Subsequent empirical studies have confirmed and expanded on these findings. For example, statistics compiled by Professor Trevor Farrow and his team in 2016's *Everyday Legal Problems and the Cost of Justice in Canada* [*Everyday Legal Problems Report*][61] made it abundantly clear that the majority of citizens' legal needs go unmet in Canada.[62] Notably, the *Everyday Legal Problems Report* sought not only to describe the high financial cost of effective access to legal justice (finding it to be out of reach for most Canadians) but the significant social cost of ineffective access to justice. These included compounding and cascading legal problems, particularly among those who had the fewest resources to address them,[63]

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54 *Equal Justice Report*, *supra* note 17.

55 *Ibid* at 16.

56 *Ibid*.

57 *Ibid* at 17. Indeed, most participants in the consultations stated that "they did not feel they had any legal rights."

58 *Ibid* at 17.

59 *Ibid* at 18.

60 *Ibid* at 20.

61 Trevor CW Farrow et al, "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report" (2016), online (pdf): *Canadian Forum on Civil Justice* <www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf> [Everyday Legal Problems Report]. This report was largely based on a 2014 survey of over 3000 respondents.

62 Some key findings include: while 48.4% of adult Canadians will experience at least one serious civil or family legal problem over any given three-year period (at 6), very few Canadians will be able to afford to resolve those problems through the formal justice system (at 7). Only about 7% of people confronted with everyday legal problems turn to the courts, and only 19% consult with a lawyer (at 9). And of those surveyed, nearly one-third indicated that their legal problem had not been resolved, and of those whose problem had been resolved, almost half (46%) believed that the resolution was unfair (at 11).

63 *Ibid* at 16.

and significant resulting costs to the state in social assistance, employment insurance, health care, and housing.[64]

These reports make clear that meaningful access to justice feels out of reach of most Canadians: in another study by Farrow *et al*, there was a common view expressed that "[p]eople with money have more access than people without".[65] But "people with money" might be, the evidence indicates, a small minority: even the middle class often find themselves too well-off to rely on legal aid, but nowhere near wealthy enough to afford counsel.[66] The fact that the impacts are so widespread might offer some hope that the system is ripe for transformation, and indeed, many projects are underway to try to address the problem.[67] But, in the meantime, according to Farrow, it is not objective inequality and unfairness, but rather perception that determines public confidence in the court system.[68] Indeed, when members of marginalized groups were interviewed for the Equal Justice Report and asked if "the law would protect them from abuses of power, or hold a person in authority accountable for breaking the rules", the response most frequently heard was "to *laugh out loud*."[69]

B. The Particular Problem of Access to Constitutional Justice

In the previous section, the access to justice problem was described in broad strokes; none of the cited reports focused on the particular problem of access to constitutional justice. However, there is every reason to believe that the difficulties that most Canadians experience with everyday legal problems are significantly more profound when it comes to launching a *Charter* challenge.

Given the complexity of such cases, all of the factors that deter people from seeking recourse for everyday legal problems in the courts would be equally present and, indeed, more acute. Complex *Charter* cases with the government as the defendant is difficult.[70] Evidence needs to be marshalled both to prove the violation of rights and to rebut the government's section 1 (policy justification) arguments, usually through the use of costly expert evidence. In addition, the applicable law in such cases is jurisprudentially

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64 *Ibid* at 16-19. See also Trevor Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957 at 965.

65 *Ibid* at 972.

66 See generally Michael Trebilcock et al, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).

67 In this respect, it is worth noting that some scholars warned that some access to justice initiatives may not benefit those facing the most significant barriers to accessing justice: Patricia Hughes, "Advancing Access to Justice through Generic Solutions: the Risk of Perpetuating Exclusion", (2013) 31 Windsor YB Access Just 1.

68 Farrow, *supra* note 64, at 974.

69 *Equal Justice Report*, *supra* note 17 at 18 (emphasis in original).

70 This is particularly true given governments' extensive experience in constitutional litigation, which makes them particularly sophisticated litigants. Indeed, a 2007 study found that the federal government, for example, succeeded in 73.2% of *Charter* cases: Matthew A Hennigar, "Why does the Federal Government Appeal to the Supreme Court of Canada in Charter of Rights Cases? A Strategic Explanation" (2007) 41 Law & Soc'y Rev 225 at 239. For an analysis of the reasons why governments are so successful in court, see Lori Hausseger, Matthew Hennigar & Troy Riddell, *Canadian Courts: Law, Politics, and Process* (Don Mills: Oxford University Pres, 2009) at 266-267. For a general discussion of the imbalance of power in *Charter* cases, see Kennedy & Sossin, *supra* note 16.

complex. In this context, legal advice is for all practical purposes essential, and it is the most significant driver of the significant cost of such cases.

A 2016 Department of Justice report on the cost of *Charter* litigation reviewed the available literature and found that a consensus had emerged that most people could not afford to mount a constitutional challenge to vindicate violations of *Charter* rights.[71] This is particularly so because a *Charter* challenge may well go through several levels of court: success for a rights claimant at trial will often be subject to appeal by the government. Indeed, the report found that the cost of mounting a *Charter* challenge could range from $50,000 to over a $1,000,000 in cases where there is extensive legislative fact evidence.[72] This has led to a perception that *Charter* rights are available only to the lucky few who have the financial means to access them.[73]

While there are some alternatives available to these costs being personally borne by the litigants, many of these are themselves difficult to access. Cuts to legal aid across the country have narrowed eligibility criteria both to the point where only the poorest can realistically access legal aid services,[74] and such service offerings rarely include *Charter* litigation, due to the significant resource implications of such cases. Some litigants are lucky enough to connect with *pro bono* counsel, lawyers who agree to take on cases for free or at a deeply discounted rate. However, significant concerns have been expressed about the consignment of meaningful access to legal remedies to private charity, which "does nothing to ensure that there is a healthy public commitment" to access to justice.[75] The *Equal Justice Report* quotes from Mary Eberts, herself a well-known constitutional scholar and human rights lawyer:

> A distinguished Ontario practitioner, well known for his contributions of low-rate or pro bono services, likened pro bono work to a sort of legal food bank: pro bono services alleviate hunger for some on a daily or monthly basis, but it absorbs the energy of those who provide these so that they have little energy left for changing the underlying conditions that create the hunger.[76]

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71 Alan Young, "The Costs of Charter Litigation" (3 May 2016) at 2, online (pdf): *Department of Justice, Research and Statistics Division* <www.justice.gc.ca/eng/rp-pr/jr/ccl-clc/ccl-clc.pdf>, citing Benjamin L Berger, "Putting a Price on Dignity: The Problem of Costs in Charter Litigation" (2002) 26 Adv Q at 235; Robert J Sharpe, "Access to Charter Justice" (2013) 63 SCLR (2d) at 3; and Joseph J Arvay & Alison Latimer, "Cost Strategies for Litigants: The Significance of R. v. Caron" (2011) 54 SCLR (2d) at 427, 448-449, among others.

72 Young, *ibid* at 3-4. Legislative fact evidence pertains to the purpose and background of legislation and will most often be offered (and need to be rebutted) in the course of the section 1 analysis.

73 *Ibid* at 3, citing, among others, journalists Tracey Tyler, "The Charter's challenges" *Toronto Star* (7 April 2007); and Kirk Makin, "Charting a course in the age of judicial review" *The Globe and Mail* (11 April 2007).

74 In Ontario, for example, the thresholds for an individual obtaining legal aid in Ontario are a gross annual income of $22,720 for duty counsel or legal clinic ("entity") services and $18,795 for "certificate" services: s. 12 of the *Legal Aid Services Rules*, made under the *Legal Aid Services Act, 2020*, SO 2020, c-11, Schedule 15, online: <www.legalaid.on.ca/wp-content/uploads/Legal-Aid-Services-Act-2020_Rules-EN.pdf>.

75 *Equal Justice Report*, *supra* note 17 at 43.

76 *Ibid* at 43, citing Mary Eberts, "Lawyers Feed the Hungry: Access to Justice, the Rule of Law, and the Private Practice of Law" (2013) 76:1 Sas L Rev 91.

On rare occasions, courts have themselves recognized the significant imbalance of power in constitutional cases and have awarded "interim" or "advanced" costs, in which the government party is ordered to pay a substantial sum towards a claimant's legal costs in order for them to be able to pursue an ongoing case. Most notably, such costs were awarded in the *Okanagan Indian Band* case, in which four Bands pursuing an aboriginal rights claim under s. 35 of the *Constitution Act* were unable to fund the costs of a trial themselves. The courts found that, given the public interest in the proper resolution of the issues, interim costs should be paid by the government to allow the case to proceed.[77] Similarly, in an official language rights case, the Supreme Court of Canada upheld an award of interim costs to a defendant who, mid-trial, was confronted by a "mountain" of historical evidence presented by the government that he did not have the means to rebut.[78] However, as the courts emphasize, such orders will be "highly exceptional"[79]

Thus the obstacles to mounting a *Charter* challenge remain as high, if not substantially higher, than the obstacles to access to justice more generally. But so too are the stakes of failing to make the remedies promised by section 24(1) of the *Charter* meaningfully accessible, given the constitutional and human rights stakes outlined earlier in this paper. Without the social cohesion that comes from faith in our shared constitutional commitments and our institutional capacity to enforce those commitments, we are left with a citizenry who do not believe that they are the beneficiaries of the rights and freedoms guaranteed to them by the *Charter*. As McMurtry observed in his 2005 address: "… the poor and vulnerable may live in a free country but that it is often difficult for them to feel free. It follows that they are not truly free until they are able to assert the legal rights and remedies which are available to them."[80] And as subsequent reports have confirmed, the "poor and vulnerable" demonstrably do not feel free, given the pervasive belief, particularly among marginalized communities, that the law is no protection from abuses of power.[81]

In the next section, I will discuss the role of the Court Challenges Program in making the enforcement of Canada's constitutional and human rights commitments available to more Canadians.

IV. THE COURT CHALLENGES PROGRAM'S ROLE IN ENABLING EFFECTIVE ACCESS TO *CHARTER* JUSTICE

The Court Challenges Program [CCP] is a publicly funded not-for-profit organization that provides funding for groups and individuals who seek to bring constitutional challenges to government action

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77 *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2001 BCCA 647, upheld by the Supreme Court of Canada in 2003 SCC 71.

78 *R v Caron*, 2011 SCC 5.

79 *Ibid* at para 5. See also *Little Sisters*, *supra* note 18 at para 102, in which advanced costs were denied. With respect to the Supreme Court of Canada's approach to the awarding of advanced costs, see also Emmanuelle Richez & Erin Crandall, "Judicial Discretion as Political Choice: The Supreme Court of Canada's Costs Awarding Power" (2018) 51:4 Can J Pol Sci 929 at 934-935.

80 McMurtry, *supra* note 43.

81 *Equal Justice Report*, *supra* note 17 at 18.

before the courts. Funded by the federal government's Department of Canadian Heritage, it currently operates on a budget of $5 million per year,[82] and has two branches: one that funds challenges on the basis of alleged violations of official language rights, including a number of constitutional rights and some covered by the *Official Languages Act*;[83] and a branch that funds challenges to federal laws, policies or practices on the basis of alleged violations of particular *Charter* rights.[84] Applications for funding are assessed by one of two seven-member Expert Panels, one for each branch of the Program. Given that it selects cases in which the government will almost always be the defendant, since its inception the CCP has operated at arm's length from government in order to preserve the independence of its decision-making.[85]

The stated purpose of the CCP is to provide financial support to enable Canadians to bring "test cases of national importance". This mandate has two dimensions: (i) it enables meaningful access to constitutional justice for the particular claimant, who would not otherwise be able to prosecute their case;[86] and (ii) it provides courts with the opportunity to interpret, clarify, and indeed, enforce the rights in question. The "test cases" funded by the CCP are ones that can expect to advance or clarify some element within the jurisprudence; some good examples are the cases in the late 1990s and early 2000s that asked whether section 15 equality rights protect members of the 2SLGBTQ+ community from discrimination, given that sexual orientation was not a ground explicitly enumerated in the text of section 15. Or a test case might probe the boundaries of a particular right, for example, whether and under what circumstances section 23 rights impose positive obligations on a government to build or expand official language minority schools. Test cases also naturally lend themselves to systemic claims, in which the case advanced by a particular claimant is indicative of a broader problem. Given that the judicial decisions in test cases are expected to have a jurisprudential impact beyond the immediate parties or even the immediate community, the CCP's investment in test cases can be expected to provide a significant constitutional return.

As for the nature of that investment, funding is offered for cases at all stages, including at their most embryonic, through grants for "test case development".[87] This level of funding permits beneficiaries to

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82 Although in Budget 2023, the federal government announced a doubling of the CCP's budget, online: <www.budget.canada.ca/2023/pdf/budget-2023-en.pdf> at 139.

83 For a full list of rights covered by the Official Language Rights branch of the CCP, see: <pcj-ccp.ca/rights-official-language-rights/>.

84 For a list of *Charter* rights covered by the Human Rights branch, see: <pcj-ccp.ca/rights-human-rights/>. While not all *Charter* rights are covered, the CCP's scope has expanded considerably in its most recent incarnation. In 1985, the CCP only covered cases brought under "equality rights", namely ss. 15, 27 and 28, whereas it can now also fund challenges brought pursuant to ss. 2, 3 and 7.

85 For e.g., it has, since 2018, been hosted by the University of Ottawa, pursuant to a Contribution Agreement between Canadian Heritage and the University.

86 While litigants are permitted to seek additional sources of funding, there is a requirement of "financial need" in order to access CCP funding, which is understood to mean that CCP resources are required in order for the case to be able to be pursued.

87 Up to $20,000 is currently available for test case development.

seek legal advice, marshal evidence and, in some cases, consult with stakeholders before initiating legal action. The result of such grants tends to be a report assessing the prospects for the proposed test case so that claimants can determine the scope and focus of their case and make an informed decision about whether they are prepared to tackle the significant challenges that lay ahead. If they are, the CCP offers support through each level of tribunal or court, with the largest grants being made at the trial level, when the evidentiary record is being assembled.[88] The CCP also offers funding to intervenors, individuals or organizations who seek to make arguments before the courts in cases in which they are not parties, but who can offer a particular perspective on the legal questions at issue and illuminate the potential impacts of the options available to the judges, particularly where those could be far-reaching.

But the CCP's assistance is limited in some significant ways. In many instances, as is evident from *The Costs of Charter Litigation* cited above, it will not cover the full cost of a particularly complex case. The CCP does not offer funding with respect to all *Charter* rights (notably the legal rights in sections 8 to 14). The Human Rights branch of the CCP cannot fund cases brought exclusively against provincial governments.[89] And many of the non-financial barriers to access to *Charter* justice more generally remain upstream barriers to accessing the Program's funding, such as limited public understanding about the complexities of the *Charter* and the fairly widespread lack of faith in the legal system's potential to deliver just outcomes. It is also worth noting that the CCP's emphasis on "test cases of national significance" means that it is not necessarily a program that is open to everyone with a *Charter* concern: to be eligible for funding, a case must generally have a potentially broad impact or a systemic dimension. Mounting a case with systemic implications almost always involves a significant measure of complexity and collaborating with expert legal counsel and a significant proportion of CCP funding on any given case usually goes to legal fees. As such, the CCP is not transformative *per se*: it accepts the premise that constitutional litigation is expensive and provides the financial resources to operate within existing parameters.

Nonetheless, funding provided by the CCP undoubtedly enables constitutional challenges that would not otherwise be able to get off the ground, and many of those cases are legally transformative. Between its reinstatement in 2018 and March 2023, the CCP funded 275 files,[90] cases brought by individuals and

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88 Maximum levels of funding are set by the Expert Panels for each branch of the CCP and vary by level of court. For example, up to $200,000 is available for a trial-level test case under the Human Rights branch, with the maximum trial funding under the Official Language Rights branch currently set at $150,000. For a current list of funding maximums by category, see the Funding Guidelines for each branch of the CCP online (pdf): *Human Rights Funding Guidelines* <pcj-ccp.ca/wp-content/uploads/2023/01/Funding-Guidelines-HRDP-current-as-of-1-January-2023.pdf>; and *Official Language Rights Funding Guidelines* <pcj-ccp.ca/wp-content/uploads/2024/06/Funding-Guidelines-OLO-Final_June-2024.pdf>.

89 Due to the nature of the rights covered under the Official Language Rights branch, some areas of provincial jurisdiction are eligible for funding under that branch, notably minority language education rights under section 23 of the *Charter*.

90 See Director's Message, *Court Challenges Program 2022-2023 Annual Report*, online: <pcj-ccp.ca/wp-content/uploads/2023/12/CCP-Annual-Report-2022-2023.pdf> at 3. Due to the rights of funding recipients to legal privilege, the CCP does not disclose who or what cases it funds, although it does publish, with the consent of the recipients in question, anonymized summaries of some of the funded files in its Annual Report every year.

organizations, often pursued in whole or in part "in the public interest". Indeed, it is worth noting that the availability of public interest standing, in which organizations are able to bring constitutional cases on behalf of marginalized individuals who might face significant challenges in pursuing cases in their own right, has been considerably enhanced in the last decade through court decisions such as the 2012 *DTES*[91] and 2022 *CCD*[92] cases.[93] CCP funding can therefore assist claimants in capitalizing on these jurisprudential gains and, as such, be seen as part of a broader enabling environment for the vindication of constitutional rights.

Also transformative has been the role that the CCP has been able to play in supporting the rights of minorities. Indeed, the CCP predates the *Charter*; first established in 1978, it was originally designed to help official language minority groups assert their language rights through the courts. In 1985, when the equality provisions of the *Charter* came into effect, the CCP was expanded to provide funding for equality rights cases[94] and from 1985-2006,[95] the CCP played a significant role in helping equality-seeking groups seek recognition or clarification of their s. 15 rights through the courts, including in such landmark cases as *Egan v.Canada* (LGBTQ+ equality), *Corbiere v. Canada* (an Indigenous person living off-reserve), *McIvor v Canada* (gender discrimination), and *Jodhan v. Canada* (discrimination on the basis of disability).[96] Indeed, when the CCP was evaluated in 2003, the evaluators made it clear that supporting disadvantaged groups was wholly consistent with the mandate of the CCP and, indeed, the *Charter* itself: The criteria included in the Contribution Agreement, to determine who may access CCP funding, imply that the clarification of rights is to be supported by assisting specific groups (official language minority and disadvantaged Canadians) in bringing their perspective to the attention of the courts. In this regard, it is important to note that the *Charter* itself is an unbalanced document, designed to ensure that the rights of the minority are not unduly limited by the actions of the majority. A program that seeks to clarify and advance the rights of minority and disadvantaged groups appears entirely consistent with the Charter.[97]

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91 *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*DTES*].

92 *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 [*CCD*].

93 In the latter case, the Supreme Court commented on the role that public interest standing plays in giving effect to the principle of legality (i.e., the rule of law) and access to justice: *CCD*, at paras. 33-59.

94 For some context in which this expansion of the CCP's mandate occurred see, for example, Jonas Kiedrowski & William T Smale, "Legal and Political Considerations Associated with the Cancellation of the Court Challenges Program of Canada" (2020) 33:9 J Edu Soc'y & Behavioural Sci 1 at 3; and Linda Cardinal, «Le pouvoir exécutif et la judiciarisation de la politique au Canada, Une étude du Programme de contestation judiciaire », (2000) 19:2-3 Politique et société 43 at 57-59.

95 Funding for the CCP was briefly cancelled in 1992, but this cancellation was so controversial that it became a campaign issue in the following federal election, and it was swiftly reinstated in 1994.

96 *Egan v Canada,* [1995] 2 SCR 513; *McIvor v Canada,* 2009 BCCA 153; *Corbiere v Canada,* [1999] 2 SCR 203 and *Jodhan v Canada*, 2012 FCA 161. The fact that the CCP funded these cases is a matter of public record and not information to which the author is privy by virtue of her position.

97 Department of Canadian Heritage, *Summative Evaluation of the Court Challenges Program: Final Report* (Ottawa: Department of Canadian Heritage, 2003) at 48.

However, it was perhaps the CCP's equality-seeking mandate that attracted controversy, for reasons closely tied to a more general critique of the courts' powers of judicial review under the *Charter*. Despite a significant pre-*Charter* history of judicial review for constitutional compliance with respect to the division of powers, the era of *Charter* review heralded new concerns. The debate over rights review is not new, nor was it unanticipated, as it had long raged in the United States.[98] While antagonism to rights review is rooted in a diversity of concerns,[99] when it came to the vindication of the *Charter* rights of minority groups, the primary critique was grounded in a majoritarian conception of democracy, leading to claims that the courts were behaving undemocratically.[100] As Salter summarizes, these critics considered "the judicial review power to be an undemocratic threat to the political order in Canada because it allows unelected judges to strike down legislation enacted by elected representatives."[101] Many of the most vocal critics came to believe that interest groups representing disadvantaged people had formed what these critics termed the "Court Party" to press a rights-expanding agenda undemocratically through the courts.[102]

Of course, the equation of democracy with majoritarian rule does not account particularly well for constitutional limits on the actions of elected officials. Nor does it leave much room for concern for the rights of minorities, which, under a purely majoritarian view of democracy, are justifiably subordinated without any obvious recourse. Indeed, there is an extent to which these critics' real dispute may lie with the supremacy of the *Charter* itself, rather than with its judicial guardians *per se*. However, if one disapproves of *Charter* review, it would be particularly galling to see public funds dedicated to that purpose through the CCP.[103] It was therefore not surprising that, shortly after one of the CCP's most

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98 See e.g. Jeremy Waldron, "The Core of the Case Against Judicial Review", (2006) 115:6 Yale LJ 1346, and the history set out in Jack M Balkin, "Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time" (2019) 98:2 Tex L Rev 215.

99 See generally FL Morton, "The Effects of the Charter and Rights on Canadian Federalism" (1995) 25:3 J Federalism 173; Rosalind Dixon, "The Supreme Court of Canada, Charter Dialogue, and Deference" (2009) 47:2 Osgoode Hall LJ 235; James B Kelly & Matthew A Hennigar, "The Canadian Charter of Rights and the Minister of Justice: Weak-form review within a constitutional Charter of Rights" (2012) 10:1 Int'l J Constitutional L 35.

100 The debate in the Canadian context, at least as it stood in 1999, is ably anthologized in Peter H Russell & Paul Howe, *Judicial Power and Canadian Democracy* (Institute for Public Policy, McGill-Queen's University Press, 2001). Indeed, this debate forms the backdrop of the one of the most influential articles in Canadian constitutional law: Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75.

101 Salter, *supra* note 7 at 1.

102 See e.g. FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000). Salter *supra* note 7 at 1 refers to the most vocal of these critics, including FL Morton, as the "Court Party Theorists".

103 For succinct arguments for and against the CCP, see "Why the Government was Right to cancel the Court Challenges Program" (1 February 2007), online: *Policy Options* <policyoptions.irpp.org/fr/magazines/the-charter-25/why-the-government-was-right-to-cancel-the-court-challenges-program/> and Carissima Mathen & Kyle Kirkup, "Defending the Court Challenges Program" (22 February 2017), online: *Policy Options* <policyoptions.irpp.org/magazines/february-2017/defending-the-court-challenges-program/>.

prominent critics became Prime Minister Stephen Harper's Chief of Staff in 2006, funding for the CCP was eliminated,[104] purportedly for reasons of efficiency.[105]

After the CCP was cancelled in 2006, many groups spoke out against this decision, mainly on access to justice grounds.[106] The Fédération des communautés francophones et acadiennes du Canada (FCFA) challenged the cancellation on *Charter* grounds, resulting in an out-of-court settlement that saw the reinstatement of a smaller program supporting official language rights, the Language Rights Support Program, in 2008.[107] The CCP was not fully reinstated until 2018, at which time its scope was significantly expanded to include, within the Human Rights branch, funding for cases under sections 2, 3 and 7 of the *Charter*, and, within the Official Languages branch, certain provisions of the *Official Languages Act*.[108]

In its 2016 Report to Parliament, the Standing Committee on Justice and Human Rights reported that most witnesses had observed that the CCP was a "key component of strengthening access to justice and upholding Canada's commitment to fairness and respect for the rule of law."[109] It noted that "[b]y levelling the playing field between disadvantaged groups and the government, such a program can also contribute to ensuring that rights 'exist not only on paper, but can result in systemic change for those in society whose voices are often ignored.'"[110] Recommending the CCP's immediate reinstatement, the Committee also recommended that the Program be enshrined in legislation to ensure that any government seeking its cancellation require the approval of Parliament.[111] In June 2023, Bill C-13, an act to modernize the *Official Languages Act*[112] was enacted, including amendments to both the *Official Languages Act*[113] and the

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104 Salter, *supra* note 7 at 3.

105 *Ibid*, at 9. Salter, at some length, disputes the efficiency justification for the CCP's cancellation: *ibid*, at 9-16. See also Kiedrowski & Smale, *supra* note 94 at 8, which concluded that the cancellation of the CCP seems to have been "ideologically driven".

106 See e.g. letters from the Canadian Bar Association dated 16 October 2006 and 2 November 2006, online: *Canadian Bar Association* <www.cba.org/CMSPages/GetFile.aspx?guid=75cfacca-a792-4afd-984d-fcbd427d3eaa>; and "Elimination of the Court Challenges Program" (2006), online: *Women's Legal Education & Action Fund* <www.leaf.ca/submission/elimination-court-challenges-program/>. See also Larissa Kloegman, "A Democratic Defence of the Court Challenges Program" (2007) 16:3 Const Forum Const 107 at 108-109.

107 René Cormier, "The Court Challenges Program is an underestimated tool: Senator Cormier" (26 February 2020), online: *Senate of Canada* <sencanada.ca/en/sencaplus/opinion/the-court-challenges-program-is-an-underestimated-tool-senator-cormier>.

108 For a full list of rights covered by the current incarnation of the CCP, see the Program's website at <pcj-ccp.ca>.

109 House of Commons, Standing Committee on Justice and Human Rights, *Access to Justice, Part 1: Court Challenges Program: Report of the Standing Committee on Justice and Human Rights* (September 2016) (Chair: Anthony Housefather) at 1.

110 *Ibid* at 1-2, quoting a brief submitted by the Canadian Bar Association.

111 *Ibid* at 7.

112 *An Act to amend the Official Languages Act, to enact the Use of French in Federally Regulated Private Businesses Act and to make related amendments to other Acts*, SC 2023, c 15.

113 Paragraph 43(1)(c) of the *Official Languages Act*, RSC 1985, c. 31 (4th Supp.) now reads:

> 43 (1) The Minister of Canadian Heritage shall advance the equality of status and use of English and French in Canadian society, and to that end may take measures to

Department of Canadian Heritage Act[114] to explicitly provide the Minister of Canadian Heritage the power to fund a program like the CCP. In the same session, a private member's bill was introduced to create an obligation on the Minister of Canadian Heritage to maintain the Program.[115]

Meanwhile, the CCP has done its work: as noted above, between March 2019 – when the Expert Panels first met to review applications – and March 2023, the CCP approved over $18 million in funding for 275 files: 107 under the Official Language Rights branch and 168 under the Human Rights branch.[116] Most of these files (with the exception of those granted funding for an intervention) represent a person or organization who believes that their rights have been breached and who, through CCP funding, now has the financial capacity to seek recourse to the courts to challenge that breach. And CCP funding does seem to make an important difference: in a recent survey of applicants to the CCP, a majority (63%) of those funded indicated that they would not have proceeded with their case absent CCP funding.[117] This therefore represents a significant number of Canadians who can now access judicial recourse that would otherwise be out of reach; whose rights no longer feel illusory as their claims receive the focused attention of the state. These are Canadians who can hope to witness the rule of law in action and who have meaningful access to the "effective remedy" contained in s. 24(1) of the *Charter*.

Moreover, it is expected that most of those files will have an impact far broader than the clarification of the rights of that particular litigant. By funding "test cases of national importance", each case funded by the CCP also provides an opportunity for the courts to interpret the right in question, providing clarity for all Canadians about the scope and meaning of *Charter* rights and official language rights. In doing so, these rulings can have a positive impact on similarly disadvantaged people who might never have the opportunity or capacity to bring a case of their own. Moreover, in funding these cases, the CCP provides the courts with the opportunity to audit government action for constitutional compliance, and in doing so,

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> …
> (c) provide funding to an organization, independent of the Government of Canada, responsible for administering a program whose purpose is to provide funding for test cases of national significance to be brought before the courts to clarify and assert constitutional and quasi-constitutional official language rights;

[114] New section 7.1 of the *Department of Canadian Heritage Act*, SC 1995, c 11 reads:

> Funding — test cases
> 7.1 To promote a greater understanding of human rights, fundamental freedoms and related values, the Minister may take measures to provide funding to an organization, independent of the Government of Canada, responsible for administering a program whose purpose is to provide funding for test cases of national significance to be brought before the courts to clarify and assert constitutional human rights.

[115] Bill C-316, *An Act to amend the Department of Canadian Heritage Act (Court Challenges Program)*. 1st Sess, 44th Parl, 2023 (Second Reading completed 22 November 2023).

[116] These statistics are publicly available through the Annual Reports of the CCP, available online at <pcj-ccp.ca/annual-report/>.

[117] Indeed, only 5% of respondents said they would have pursued their case absent CCP funding. However, of those respondents who had not received CCP funding, 36% indicated that they nonetheless pursued their proposed case. (Unpublished May 2023 survey of all applicants for CCP funding since 2018 (whether they received CCP funding or not), on file with the author. Of 469 invitations sent, 118 responses were received, for a response rate of about 25%.).

clarify government obligations. By contributing to a political culture in which constitutional compliance can be expected to be verified with greater regularity and governments held to account for violations, governments are encouraged to be more scrupulous to avoid violating rights. As Salter rather optimistically observes, this can serve to effectively "inoculate all Canadians from government rights violations".[118]

In summary, the funding offered by the CCP provides a pathway to securing the right to an effective remedy guaranteed by s. 24(1) of the *Charter*, particularly in the context of a long-term access to justice crisis in Canada. At least financially, CCP funding goes some way to levelling the playing field between rights claimants and the governments that they take to court. By focusing its funding on test cases of national importance, the CCP endeavours to maximize the return on public investment by supporting cases that can be expected to have the greatest impact. In doing so, it empowers Canadians to provide courts with an opportunity to audit the government's compliance with its constitutional commitments, which in turn supports both the rule of law and respect for human rights in Canada.

V. CONCLUSION

This paper has argued that Canada has a constitutional and human rights imperative to provide effective access to *Charter* justice, and the democratic implications of a failure to do so. I have argued that, while specific research on the subject of access to Charter justice is limited, there is every reason to believe that the problem is at least as grave, if not graver, in this sector of the broader access to justice crisis in Canada. In light of the stakes identified, I have endeavoured to demonstrate the small but significant role that the Court Challenges Program can and has played in supporting an enabling environment for the vindication of *Charter* rights.

Those of us who work in the area of constitutional challenges recognize that, even with CCP funding, the landscape for constitutional justice is far from perfect. In some ways, the CCP is limited: CCP funding often does not cover the full financial cost of pursuing a constitutional test case and there are many important constitutional test cases that are simply ineligible for CCP funding, whether because of jurisdictional issues or because the specific rights alleged to have been breached do not fall within the Program's mandate. Significant gaps in access to *Charter* justice persist.

Seeking the vindication of one's fundamental rights through the courts is never easy nor ideal. By nature, these cases occur after someone's rights have been violated. Mounting such challenges requires enormous expenditures of resources, effort and, perhaps most of all, courage. At its essence, through the somewhat blunt instrument of financial support, the CCP seeks to provide much-needed encouragement for people to seek justice though the courts, and by contrast, combat the evident broad discouragement that *Charte*r rights are illusory and the law cannot help. As Bhabha observes: "[u]ltimately, while the formal justice system may not deliver perfect justice in every instance, it offers the hope of realizing some

[118] Salter, *supra* note 7 at 80.

aspiration of piecemeal and even systemic justice through the entrenchment of rights and effective remedial enforcement."[119]

CCP funding can and does contribute to that "aspiration of piecemeal and even systemic justice". It opens the door to the justice system, one that for too many feels sealed shut. For those people whose cases are funded by the CCP, others whose rights are recognized and vindicated by funded cases, and perhaps even the public at large, there is a chance that the rights guaranteed in the *Canadian Charter of Rights and Freedoms* can feel a bit more real, that the legal system can feel a bit more fair, and that the rule of law can feel a little less abstract. The CCP is only one small piece of a hugely complex Canadian constitutional and access to justice puzzle, but until such time as Canadians have meaningful and equitable access to *Charter* justice without CCP support, it is an important one.

[119] Bhabha, *supra* note 22 at 145.