

ACCESS TO JUSTICE LOOKING FOR A CONSTITUTIONAL HOME: IMPLICATIONS FOR THE ADMINISTRATIVE LEGAL SYSTEM

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Access to justice has long been in the constitutional real estate market, in search of a home within Canada's constitutional framework. To put it differently, access to justice has been couch surfing through the constitutional jurisprudence and appears to be concurrently residing within two different constitutional principles. Access to justice has been referred to as a component of the rule of law. It has also been framed in terms of judicial independence and section 96 of the Constitution Act of 1867. In some cases, the right to access justice has even been construed as a vague combination of both the rule of law and judicial independence. Although these links to constitutional principles elevate the status of access to justice to that of a legal right, the precise source of that right remains unclear.

Yet it is important for access to justice to find a clear and permanent constitutional home. Until access to justice is clearly lodged in the Constitution, any attempt to define its content will remain unsatisfying and will make further jurisprudence in this area increasingly difficult to predict. Indeed, it has become expedient to talk about practical solutions to the access problem, without worrying about whether those solutions are reflective of the underlying legal right itself. The lack of conceptual clarity may be of particular importance for the administrative justice system. This is because access to justice's choice of constitutional home may influence the extent to which that legal right applies within administrative justice.

The authors consider these issues in light of the Supreme Court of Canada's recent decision in BC Trial Lawyers and the Court's earlier jurisprudence linking it to the rule of law. They submit that a shift from the rule of law to section 96 creates the potential for access to justice constitutional obligations to arise for administrative tribunals as well as the courts. However, the access to justice features of the rule of law

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continue to provide important analytical considerations that should not be overshadowed by too narrow a focus on section 96 alone.

Depuis longtemps, on cherche un « chez-soi » pour l'accès à la justice au sein du cadre constitutionnel canadien. Autrement dit, l'accès à la justice n'a pas de « domicile fixe » dans la jurisprudence constitutionnelle et semble résider dans deux principes constitutionnels différents. Certains qualifient l'accès à la justice de composante de la primauté du droit, tandis que pour d'autres, ce principe s'inscrit plutôt dans le cadre de l'indépendance judiciaire et de l'article 96 de la Loi constitutionnelle de 1867. Dans certains cas, le droit d'accéder à la justice a même été interprété comme étant une combinaison floue de la primauté du droit et de l'indépendance judiciaire. Bien que l'établissement de liens entre ces principes constitutionnels et l'accès à la justice ait pour effet de rehausser son statut à celui d'un droit juridique, le fondement exact de ce droit demeure incertain.

Il est néanmoins important de trouver une place, qui soit permanente et bien définie, pour l'accès à la justice au sein du cadre constitutionnel. Faute de quoi, toute tentative visant à préciser cette notion demeurera insatisfaisante et fera en sorte qu'il sera de plus en plus difficile de prédire la jurisprudence à ce sujet. En effet, il est devenu opportun de discuter des solutions pratiques aux problèmes de l'accès à la justice, sans pour autant se préoccuper de savoir si ces solutions reflètent le droit juridique sous-tendant ce principe. Ce manque de clarté à l'échelle conceptuelle toucherait tout particulièrement le système de justice administrative. Cela tient au fait que la place que prendra l'accès à la justice dans le cadre constitutionnel pourrait influencer la mesure dans laquelle ce droit juridique s'appliquera dans le contexte du système de droit administratif.

*Les auteures se penchent sur ces questions à la lumière du récent arrêt de la Cour suprême du Canada dans l'affaire *Trial Lawyers Association of BC c Colombie-Britannique* (PG) et de la jurisprudence antérieure de la Cour établissant des liens avec la primauté du droit. Elles avancent qu'une réorientation vers l'article 96, qui laisserait à l'écart la primauté du droit, aurait pour effet de lier les tribunaux administratifs, aussi bien que les tribunaux judiciaires, par les exigences constitutionnelles connexes à l'accès à la justice. Toutefois, les éléments liant l'accès à la justice à la primauté du droit continuent d'offrir d'importants points d'analyse qui ne doivent pas être éclipsés par une attention trop restreinte portée exclusivement sur l'article 96.*

1. Introduction

Access to justice has long been in the constitutional real estate market, in search of a home within Canada's constitutional framework. While there has been much discussion about the importance of access to justice, there has been relatively little consideration of what "access to justice" means or where it should be housed as a constitutional right. To put it differently, access to justice has been couch surfing through the constitutional jurisprudence and appears to be concurrently residing within two different constitutional principles. Access to justice has been referred to as a component of the rule of law.² It has also been framed in terms of judicial independence and section 96 of the *Constitution Act* of 1867.³ In some cases, the right to access justice has even been construed as a vague combination of both the rule of law and judicial independence.⁴ Although these links to constitutional principles elevate the status of access to justice to that of a legal right, the precise source of that right remains unclear.

Yet it is important for access to justice to find a clear and permanent constitutional home. Until access to justice is clearly lodged in the Constitution, any attempt to define its content will remain unsatisfying and will make further jurisprudence in this area increasingly difficult to predict. Indeed, it has become expedient to talk about practical solutions to the access problem, without worrying about whether those solutions are reflective of the underlying legal right itself. The lack of clarity creates a stumbling block for the development and implementation of practical initiatives for access to justice since there is no consensus as to the nature of the obligation or the entities responsible.⁵ This may be of particular importance for the

² *John Carten Personal Law Corp v British Columbia (AG)* (1997), 153 DLR (4th) 460, [1998] 3 WWR 571 (BCCA) at paras 57–73, McEachern CJA dissenting; *Polewsky v Home Hardware Stores Ltd* (2003), 66 OR (3d) 600, 229 DLR (4th) 308 (SC); *BCGEU v British Columbia (AG)*, [1988] 2 SCR 214 at 229–30, 53 DLR (4th) 1 [*BCGEU*]; Carissima Mathen, "Access to Charter Justice and the Rule of Law" (2008) 25 NJCL 191 [Mathen]; Faisal Bhabha, "Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions" (2007) 33:1 Queen's LJ 139 at 146 [Bhabha]. For example, in a recent case heard before the Supreme Court of Canada, *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59 at para 117, [2014] 3 SCR 31 [*BC Trial Lawyers*]: the Chief Justice posed as a constitutional question whether BC's court hearing fees were unconstitutional on the "basis that they infringe the right of access to justice and thereby offend the rule of law."

³ *Pleau v Nova Scotia (Prothonotary)* (1998), 43 CPC (4th) 201, 581 APR 1 (SC).

⁴ *BC Trial Lawyers*, *supra* note 2 at paras 37–38.

⁵ For example, the rule of law has traditionally been a check only on executive action: See e.g. *Roncarelli v Duplessis*, [1959] SCR 121 at paras 141–42, 156–58, 16 DLR (2d) 689 [Roncarelli]; *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 60, [2005] 2 SCR 473 [*Imperial Tobacco*]. This means that, if access to justice is a constitutional principle derived from the rule of law, it may not constrain legislative action.

administrative justice system. This is because choices about access to justice and its ultimate constitutional home may influence the extent to which that legal right applies within administrative justice. Arguably, conceiving of access to justice as a component to the rule of law creates obligations for all levels of courts and administrative tribunals. It fosters a broad legal culture in which access to justice, as a component of the rule of law, is a fundamental precursor. However, this vision of access to justice may bring with it a limited scope of available remedies. The rule of law has not traditionally been a basis to declare legislative action unconstitutional. This may mean that a rule of law-based right to access to justice will be largely defined by legislative actors, with no constitutional basis to override any statutory measures (including, for example, fees and processes) that limit access to courts or tribunals. Conversely, grounding the legal right to access to justice in judicial independence may lead to a narrower construct of the right. The emphasis may be placed on access to section 96 courts, which in the administrative law context, may be translated narrowly to mean access to judicial review. This vision of the legal right to access to justice may shift concerns away from the administrative law proceedings themselves and focus instead on access to judicial review and the applicable legal standard. Measures, including legislation, that directly or indirectly limit access to superior courts may be deemed unconstitutional. However, unless measures are said to unduly limit access to section 96 courts, there may be scarcely any basis to hold administrative tribunals constitutionally accountable for ensuring that their own processes are accessible.

We consider these issues in light of the Supreme Court of Canada's recent decision in *BC Trial Lawyers* and the Court's earlier jurisprudence linking it to the rule of law. We explore the implications of access to justice and how it is constitutionally housed from the perspective of administrative justice. We submit that the move from the rule of law to section 96 creates the potential for access to justice constitutional obligations to arise for administrative tribunals as well as the courts. However, the access to justice features of the rule of law continue to provide important analytical considerations that should not be overshadowed by too narrow a focus on section 96 alone.

These ideas will be explored in three parts. First, we examine how Canadian jurisprudence has established links between access to justice and the rule of law. Second, we consider the Supreme Court of Canada's more recent focus on access to justice as a component of judicial independence and its inherent jurisdiction under section 96. In these two sections, our objective is to understand how and on what basis access to justice has been linked to these constitutional principles. The third part of this paper considers the possible implications of each theoretical approach as they

may play out before administrative tribunals and supervising courts. As part of this thought experiment, we will explore some questions we see arising from the foregoing analysis, which we hope will stimulate further debate about access to justice and administrative law. Ultimately, does it matter which constitutional principle houses access to justice? From an administrative justice perspective, is the content of the right to access to justice determined by the constitutional principle that is applied? Finally, from the perspective of the administrative justice system, what is meant by a right to access to justice?

2. Access to Justice and the Rule of Law: Laying the Foundation

In recent years, access to justice has been the subject of much discussion, not only among members of the legal community, but also within the jurisprudence and the broader public.⁶ Over time, our notion of “access to justice” has broadened, evolving from a narrow focus on access to traditional legal institutions to a broad movement that encourages access at every stage of the legal process, from the creation and implementation of laws, to dispute resolution processes.⁷ Regardless of how it is defined, however, access to justice is now widely considered to be at crisis levels.⁸ The Canadian legal system is time-consuming, difficult, and expensive to navigate⁹ and, as a result, potential litigants are deterred from engaging

⁶ See e.g. Celia Chandler, “Access to justice crisis: 15 years too long to wait for solutions”, *Rabble* (26 March 2015), online: <www.rabble.ca/>; Nikki Gersh bain, “Law students can help solve Canada’s access-to-justice crisis”, *The Toronto Star* (9 December 2013), online: <www.thestar.com/>; Theresa Amato, “Put Lawyers Where They’re Needed”, *The New York Times* (17 June 2015), online: <www.nytimes.com/>; *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*]; *BC Trial Lawyers*, *supra* note 2.

⁷ Roderick MacDonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, William A Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19; Constance Backhouse, “What is Access to Justice?” in Julia Bass, William A Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 113. See also Bhabha, *supra* note 2 at 141–42.

⁸ Mathen, *supra* note 2 at 191.

⁹ *Hryniak*, *supra* note 6 at para 24, citing The World Justice Project’s finding that Canada ranked ninth among 12 European and North American countries in access to justice. Although Canada scored among the top 10 countries in the world in four rule of law categories (limited government powers, order and security, open government, and effective criminal justice), its lowest scores were in access to civil justice. This ranking is “partially explained by shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases.” See Mark David Agrast, Juan Carlos Botero & Alejandro Ponce, *Rule of Law Index* (Washington, DC: World Justice Project, 2011) at 23; Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013); Paola Loriggio, “Ontario’s legal system too costly and

with the legal system at all and may “simply give up on justice.”¹⁰ For those who do engage, the experience can be punishing.¹¹ Like access to justice, the rule of law is also an amorphous concept, and there is no shortage of philosophical and legal writings examining its content, scope, and role. While Canadian courts and scholars speak of the importance of the rule of law as a constitutional and foundational principle to our democracy, there is little consensus as to its precise meaning and impact. This lack of clarity is problematic because, as Harry Arthurs explained, it leads to a tendency to invoke the rule of law “as a mere rhetorical device, a vague ideal by contrast with which legislation, official action, or the assertion of private power is mysteriously measured and found wanting.”¹²

Our objective is not to resolve the debate concerning the meaning of access to justice or the rule of law. Nor do we propose to engage in a comprehensive review of the rich academic literature on these subjects. Rather, we are concerned with how the rule of law has been used in Canadian constitutional jurisprudence as a theoretical foundation for a right of access to justice. We begin with a brief overview of the concept of the rule of law, with a focus on its treatment within Canadian jurisprudence. As the body of scholarly work illustrates, there are many different ways to conceive the rule of law. Its many dimensions have led to discussions about not only its attributes, but also its limitations, and analytical boundaries.¹³ In terms of the relationship between the rule of law and access to justice, the ongoing debate addresses a number of pertinent issues. These include, for example: whether access to justice has been conceived (by Albert Venn Dicey and others) as a fundamental and inherent component of the rule of law; whether the rule of law concerns substantive rights or whether it relates only to rights that are procedural in nature; whether the rule of law provides a constitutional basis for overriding legislative action or whether it acts only as a check and balance on the exercise of executive or administrative power.¹⁴

complicated, new chief justice says”, *The Globe and Mail* (9 September 2014), online: <www.theglobeandmail.com/>.

¹⁰ *Hryniak*, *supra* note 6 at para 25; Beverley McLachlin, “The Challenges We Face” (Remarks presented at the Empire Club of Canada, Toronto, 8 March 2007), online: <www.scc-csc.ca/> [McLachlin, “The Challenges We Face”].

¹¹ McLachlin, “The Challenges We Face”, *supra* note 10.

¹² HW Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17:1 *Osgoode Hall LJ* 1 at 3.

¹³ See e.g. Anver M Emon, “On Statutory Interpretation and the (Canadian) Rule of Law: Interpretive Presumptions as Boundary Setting” (2015) 3:1 *Theory & Practice Legislation* 45.

¹⁴ Discussions concerning the scope and content of the rule of law are both rich and varied and these are but some of the many examples of debated issues. As we suggest in our discussion of *BCGEU*, *supra* note 2, the rule of law may have multiple dimensions and may

This debate about the rule of law has played out not only in the legal scholarship, but also in Canadian constitutional jurisprudence. Canadian jurisprudence, although referencing rule of law scholarship, including Dicey and others, has developed its own understanding of the rule of law.¹⁵ As the jurisprudence has evolved, there have been some significant reformulations and refinements along the way. Although the precise content of the rule of law has never been fully defined by the Supreme Court of Canada, its status as a Canadian constitutional principle is clear.¹⁶ The rule of law has been described as “a fundamental postulate of our constitutional structure”¹⁷ and as a notion that is “implicit in the very nature of a Constitution.”¹⁸ As the Supreme Court of Canada explained in *Re Manitoba Language Reference*: “The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law.”¹⁹

However, the Supreme Court of Canada has struggled to define the basis and content of the rule of law as a constitutional principle. These difficulties arise in part from the tension between how the concept was historically viewed under England’s unwritten constitutional system²⁰ and how it has been interpreted within Canada’s written constitution. The fact that the rule

not be solely about whether the various branches of government have unduly limited access to justice, but also whether non-governmental actors had a similar constitutional obligation. While we allude to this issue, our piece is principally about the state’s obligation to ensure access to justice.

¹⁵ Although Canadian jurisprudence on the rule of law often relies on Albert Venn Dicey’s foundational text, *Introduction to the Study of the Law of the Constitution*, 10th ed (London, UK: MacMillan & Co, 1959) [Dicey] and his articulation of the concept, Dicey’s three principles of the rule of law have not been used by the Supreme Court of Canada in their entirety. Rather, a truncated view of the concept has emerged in the jurisprudence ostensibly due to the difference between the Canadian written constitution and the British unwritten constitution. For a discussion on how Dicey’s text has been varyingly adopted, altered and rejected by Canadian jurists see Mark D Walters, “Legality as Reason: Dicey, Rand, and the Rule of Law” (2010) 55:3 McGill LJ 563.

¹⁶ Peter W Hogg & Cara F Zweibel, “The Rule of Law in the Supreme Court of Canada” (2005) 55:3 UTLJ 716 at 717 uses the term constitutional value [Hogg & Zweibel].

¹⁷ *Roncarelli*, *supra* note 5 at 142.

¹⁸ *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721 at para 64, 19 DLR (4th) 1 [*Re Manitoba*]; *BCGEU*, *supra* note 2 at para 24.

¹⁹ *Re Manitoba*, *ibid* at para 64. This conclusion is supported by the explicit reference to the rule of law in the Preamble to the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, which states that “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law...” well before the enactment of the *Charter*, however, the rule of law was already part of the unwritten constitution as a result of the Preamble to the *Constitution Act, 1867*, which confirms Canada’s adoption of “a Constitution similar in Principle to that of the United Kingdom” in *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted RSC 1985, App II, No 5.

²⁰ See Dicey, *supra* note 15.

of law is an unwritten constitutional principle means that its definition is particularly important. In adopting expansive or narrow interpretations of the rule of law, courts are effectively framing a constitutional principle and placing limits on the powers of the state. Arguably, these potentially broad implications have inspired a cautious judicial approach to defining the rule of law.²¹

The jurisprudential discussion of the rule of law began with the decision of the Supreme Court of Canada in *Roncarelli v Duplessis*.²² The majority of the Court took a value-based approach to the rule of law finding that, even when legislation is validly enacted, there is no such thing as unfettered executive discretion. *Roncarelli* stands for the proposition that there is one law for all and the law binds public officials as well as private individuals. Fundamentally, *Roncarelli* is about holding the executive accountable to legal authority. According to Liston, “*Roncarelli* still stands as a paradigmatic example of the deeper principled and purposive approach to understanding how the rule of law animates administrative law.”²³

It was not, however, until after the patriation of the Canadian Constitution and the Supreme Court of Canada’s decision in *Re Manitoba* that specific precepts of the rule of law were identified.²⁴ In holding that the laws of Manitoba were invalid because they had not been enacted in English and French (as required by the Constitution), the Supreme Court of Canada identified two key components of the rule of law: first, “the rule of law is supreme over officials of the government as well as private individuals”;²⁵ and second, “the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more

²¹ See Hogg & Zweibel, *supra* note 16 at 727 for their support of a positivist view of the rule of law. The question of whether the rule of law can be an independent basis to invalidate legislation, discussed below, raises a broader concern. If it can, then arguably other unwritten constitutional principles (federalism, respect for minorities, etc.) could be interpreted in this manner as well. This is of concern since allowing all unwritten constitutional principles to be used to invalidate legislation would arguably drastically alter the framework of the written constitution. If such a conclusion is unique to only some unwritten constitutional principles (such as the rule of law and judicial independence) then this arguably creates a conceptual dissonance in their collective role and use in the constitution. For a discussion of these concerns see Robin M Elliot, “British Columbia’s Tobacco Litigation and the Rule of Law” in Patricia Hughes & Patrick A Molinari, eds, *Participatory Justice in a Global Economy: The New Rule of Law* (Montréal: Thémis, 2004) 459 at 459–472.

²² *Roncarelli*, *supra* note 5.

²³ Mary Liston, “Governments in Miniature: The Rule of Law in the Administrative State” in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publications, 2013) 39 at 54 [Liston, “Governments in Miniature”].

²⁴ *Re Manitoba*, *supra* note 18.

²⁵ *Ibid* at 748.

general principle of normative order.”²⁶ The first component is consistent with the thinking of the majority in *Roncarelli* and evokes the notion of legality that underlies the rule of law. By failing to pass legislation in conformity with basic legal requirements, Manitoba had acted as though it was not subject to the law.²⁷ However, the danger in striking out every law in Manitoba pending their re-enactment was obvious. The Court thus created a second feature of the rule of law to avoid creating a legal vacuum. Since the rule of law required the creation and maintenance of an actual order of positive laws, the Supreme Court of Canada suspended its ruling to allow the province of Manitoba to re-enact provincial laws in compliance with its constitutional obligations.

The Supreme Court of Canada confirmed a third component to the definition of the rule of law in the *Reference Re Secession of Quebec*.²⁸ In that case, the Court considered whether Quebec could unilaterally secede from Confederation. The Court found that the rule of law requires that the exercise of public power be based in a legal rule. To put it differently, the rule of law holds that the relationship between the state and the individual must be regulated by law.²⁹ The principles associated with the rule of law identified by the Supreme Court of Canada in the *Secession Reference* were not presented as a closed list and set the stage for rule of law litigation that would eventually make its way once again to the Supreme Court of Canada in *Imperial Tobacco* and *British Columbia (AG) v Christie*.³⁰

In *Imperial Tobacco*, the appellants were challenging a British Columbia statute that made tobacco companies retroactively liable for the costs of healthcare attributable to tobacco-related illnesses. The constitutionality of the law was contested, in part, based on the unwritten constitutional principle of the rule of law. The appellants contended that government compliance with the rule of law required that laws be prospective, of general application,

²⁶ *Ibid* at 749.

²⁷ *Ibid* at 750.

²⁸ [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference*].

²⁹ *Ibid* at para 71. This reference to the third principle would be repeated in *Imperial Tobacco*, *supra* note 5 at para 58. Two years after *Imperial Tobacco*, in *Charkoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 134, [2007] 1 SCR 350, the court would collapse the rule of law back to two principles, noting that while it incorporates “a number of themes” it most fundamentally “requires government officials to exercise their authority according to law, and not arbitrarily” and the creation and maintenance of an actual order of positive laws. Rather than expressly indicate that the relationship between the individual and state be regulated by law (an access to justice concern) the court instead chose to acknowledge the link between the rule of law and judicial independence, suggesting that it is this principle and not the rule of law that ensures access to justice within the Canadian Constitution.

³⁰ *Imperial Tobacco*, *supra* note 5; 2007 SCC 21, [2007] 1 SCR 873 [*Christie*].

and not confer special privileges on the government or deny litigants a fair civil trial.³¹ The Court rejected these arguments.³² Importantly, the Supreme Court of Canada held that the legislative branch is only subject to the rule of law to the extent that it must follow law-making procedures.³³ The Court explained that the principles of the unwritten constitution do not permit what the written constitution precludes.³⁴ It wrote: “in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box.”³⁵

In *Christie*, the Supreme Court of Canada reached a similar conclusion concerning the role of the rule of law. The issue in *Christie* was the constitutional validity of a tax levied on legal services in British Columbia. Mr. Christie argued that the tax made access to the justice system impossible for some of his low-income clients and, as a result, was contrary to the rule of law. A unanimous Court found that the rule of law did not supersede legislation so long as the law itself had been validly enacted. The Court concluded that although the rule of law is meaningfully connected to the notion of access to justice, it does not prescribe how and by what means access to justice is to be achieved:

The issue, however, is whether *general* access to legal services in relation to court and tribunal proceedings dealing with rights and obligations is a fundamental aspect of the rule of law. In our view, it is not. Access to legal services is fundamentally important in any free and democratic society. In some cases, it has been found essential to due process and a fair trial. But a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent’s contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law.³⁶

The aggrieved parties in both *Imperial Tobacco* and *Christie* contended that the government had enacted legislation that was contrary to the rule of law. In both cases, however, a unanimous Court took an arguably positivist

³¹ *Imperial Tobacco*, *supra* note 5 at para 63.

³² *Ibid* at para 60.

³³ Liston, “Governments in Miniature”, *supra* note 23 at 59; *Imperial Tobacco*, *supra* note 5 at para 65.

³⁴ Several authors have noted the inconsistency between this position and the normative weight given to unwritten constitutional principles in *Reference Re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3, 206 AR 1 [*Reference Re Remuneration of Judges*]. See e.g. Mark Carter, “The Rule of Law, Legal Rights in the Charter, and the Supreme Court’s New Positivism” (2008) 33 Queen’s LJ 453 at 467–68 [Carter]; Hogg & Zweibel, *supra* note 16 at 727–28.

³⁵ *Imperial Tobacco*, *supra* note 5 at para 66.

³⁶ *Christie*, *supra* note 30 at para 23.

approach,³⁷ concluding that the rule of law is not a basis to override legislation. As Mark Carter commented, this definition of the rule of law was “procedural enough to support almost any legislative objective, however morally objectionable.”³⁸ These early attempts at addressing access to justice concerns through the rule of law were defeated. Although the Court in *Christie* recognized access to justice as “fundamentally important in any free and democratic society”³⁹ it did not link access to justice and the written or unwritten constitution. This suggested that legislative action, however obstructive to accessible justice, was unassailable except on procedural grounds.

The pendulum began to swing with *BCGEU v British Columbia (AG)*. This case, which involved an injunction, was a first foray into connecting access to justice with constitutional principles. The decision of the majority of the Supreme Court of Canada stands for the proposition that access to the courts is a necessary precondition to the rule of law. In *BCGEU*, the majority explicitly recognized a constitutional right of physical access to courthouses as a component of the rule of law.⁴⁰ It upheld an *ex parte* injunction prohibiting picketers from impeding access to the courthouse because, as the Court explained, “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.”⁴¹ Although this decision followed *Re Manitoba*, which had set out specific principles under the rule of law, the Court in *BCGEU* did not refer to *Re Manitoba* or the principles it sets out. Rather the Court referenced access to the courts as being “under the rule of law,” generally.⁴²

Importantly, in *BCGEU*, the issue was impeded access because of union picketing, not because of any government act or omission. Given the particular facts of the case, the majority’s conclusion in *BCGEU* is not

³⁷ Under a positivist approach the rule of law is narrowly circumscribed and its breach will not lead to invalidity. See e.g. Hogg & Zweibel, *supra* note 16 at 718 commenting that the rule of law is a “constitutional value, an ideal that influences how our laws are made and administered but has no direct force of its own.” Under this view, whether a law is ‘good’ or moral is not an essential condition of the rule of law. Conversely, for other thinkers, the rule of law includes normative concepts like morality, human rights, pluralism and access to justice within the definition of the rule of law. See e.g. Mary Liston, “Willis, ‘Theology,’ and the Rule of Law” (2005) 55:3 UTLJ 767. As we will discuss below, the Supreme Court of Canada’s recent decision in *BC Trial Lawyers*, *supra* note 2 appears to be moving towards a more substantive meaning for the rule of law and access to justice.

³⁸ *Supra* note 34 at 464.

³⁹ *Christie*, *supra* note 30 at para 23.

⁴⁰ *Supra* note 2 at paras 21, 24.

⁴¹ *Ibid* at para 25.

⁴² *Ibid* at para 26.

necessarily inconsistent with its positivist approach to the rule of law and its subsequent findings in *Imperial Tobacco* and *Christie*. While *BCGEU* holds that private parties may not block access to courts, the decision does not impose any obligation on the state or, indeed, the courts and administrative decision-makers themselves, to promote access to justice or even to refrain from impeding access to the legal system.

Following the Supreme Court of Canada's majority decision in *BCGEU*, access to justice finds some constitutional purchase within the meaning of the rule of law. However, like other aspects of the rule of law, access to justice was seen as a check on private and executive action, but it did not impose any obligations or constraints on lawmakers. As we shall see, this conceptual limitation may be what gave rise to a rethinking of the constitutional basis for the right of access to justice. Had the Supreme Court of Canada's access to justice analysis been limited to the rule of law, the Court might have reached a very different conclusion in *BC Trial Lawyers*. Instead, that decision represents a shift towards viewing access to justice as foundational to judicial independence. Access to justice thus became a means of subjecting a broader range of action to constitutional scrutiny.

3. Section 96: Access to Justice Finds Another Constitutional Home?

A number of stars have recently aligned to produce a shift in the Supreme Court of Canada's approach to access to justice and constitutional principles.⁴³ While the earlier focus had been on forging links between access to justice and the rule of law, access to justice is now also being associated with another unwritten constitutional principle: judicial independence. Several factors have contributed to this shift.

First, access to justice is becoming an increasingly acute problem. While cases such as *Christie* dealt with issues concerning impoverished Canadians and their access to the legal system, it has become apparent that access to justice affects almost all levels of Canadian society, including the middle class and even the upper-middle class.⁴⁴ This is not to suggest that it is more important that privileged members of society be able to meaningfully access its legal system, but simply to show how widespread the problem has become. The issue of access to justice has expanded beyond

⁴³ *BC Trial Lawyers*, *supra* note 2; *Hryniak*, *supra* note 6.

⁴⁴ Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants" (2013) online: Representing yourself in a Legal Process <www.representingyourselfcanada.com/>. *BC Trial Lawyers*, *supra* note 2 at paras 58–59.

a legal discussion, and is increasingly being identified as an important and broader social issue.⁴⁵

Second, federal and provincial governments in Canada have not adequately addressed the access to justice crisis. Although not constitutionally obligated to do so, legislatures could have adopted a number of measures that would have improved access to the justice system, including better funding for legal aid and legal clinics, and additional resources for courts and tribunals. Instead, the trend has been the opposite: less funding and fewer resources are being made available to key players within the legal system.⁴⁶ Absent a constitutional requirement, there appears to be little political will to take serious measures to address the fact that justice has become inaccessible in Canada. The level of accessibility has been left solely to the discretion of the government, as expressed in statutory enactments and through the allocation of resources.

Third, the lack of conceptual clarity surrounding the Supreme Court of Canada's rule of law jurisprudence may explain why it elected to invoke a different constitutional principle. Since their rule of law case law is in flux and still evolving, it was perhaps more expedient in *BC Trial Lawyers* to anchor access to justice to a more stable foundation like section 96 than to engage in the quagmire they had created in *Imperial Tobacco* and *Christie*.⁴⁷ Indeed in his dissenting reasons, Justice Rothstein notes that the Court's rule of law case law has resulted in a "vague and fundamentally disputed concept."⁴⁸

⁴⁵ See e.g. the Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Barton: Attorney-General's Department, September 2009) at 4: "Access to justice is not only about accessing institutions to enforce or resolve disputes but also about having the means to improve 'everyday justice'; the justice quality of people's social, civic and economic relations. This means giving people choice and providing an appropriate forum for each dispute, but also facilitating a culture in which fewer disputes need to be resolved."

⁴⁶ See e.g. Ontario Superior Court of Justice, *Prioritizing Children Initiative – Statement of Objectives*, (December 2012) online: <www.ontariocourts.ca/scj/news/publications/prioritizing>. The report notes the deficit in available resources across the province as requiring innovative solutions.

⁴⁷ In *Imperial Tobacco*, *supra* note 5 at paras 58–59 the Court noted that the third element of the rule of law, first discussed in the *Secession Reference*, *supra* note 28 (that the law must regulate the relationship between the state and the individual), overlaps with the first two principles. That state actions be legally founded is arguably already encompassed by the principle that the law is supreme over the state and individual. This comment by the Court that their conceptual framework for the rule of law contains redundancy suggests an acknowledgment that the principle is still evolving and incomplete.

⁴⁸ *BC Trial Lawyers*, *supra* note 2 at para 102.

Fourth, a shift in the Supreme Court of Canada's approach to unwritten constitutional principles has already begun to emerge, albeit in a very different context. In *Reference re Remuneration of Judges*, the majority of the Court demonstrated its willingness to go beyond merely filling gaps in the written constitution, and use unwritten constitutional principles to expand upon written rights.⁴⁹ In this case, the majority of the Supreme Court of Canada found that judicial independence is an unwritten constitutional principle.⁵⁰ Importantly, it also found that legislation interfering with judicial independence is unconstitutional. This was a novel use of unwritten constitutional principles, and the first time they acted as a check on legislative action.⁵¹ *Reference re Remuneration of Judges* has been criticized as overstepping the role of the judiciary and as a misapprehension of the function of unwritten constitutional principles.⁵² As we discuss below, the dissent in *BC Trial Lawyers* voices a similar disagreement as to the evolution and use of access to justice as an unwritten constitutional principle.

Fifth, the shift to section 96 may have been fueled by the perception that issues typically dealt with under section 96 are similar to questions now being raised about court funding. For example, in *Ontario v Criminal Lawyers' Association of Ontario*, which was decided in 2013, a majority of the Supreme Court of Canada found that its core jurisdiction under section 96 did not include the power to set compensation rates for *amicus* in criminal trials.⁵³ The case was an appeal of a number of *amicus* orders made in Ontario criminal trials. The defendants had a history of retaining and

⁴⁹ Prior to the *Reference re Remuneration of Judges*, *supra* note 34, the Supreme Court of Canada in *Secession Reference*, *supra* note 28 at 53 noted that one of the purposes of unwritten constitutional principles was to assist in addressing situations that may arise that “are not expressly dealt with by the text of the Constitution,” thus ensuring the Constitution remains responsive so that it maintains a comprehensive and exhaustive legal system.

⁵⁰ *Reference Re Remuneration of Judges*, *supra* note 34 at para 83: The majority reasoned that judicial independence is an unwritten norm recognized and affirmed in the Preamble to the Constitution, which states “a Constitution similar in Principle to that of the United Kingdom.” The majority thus concluded that sections 96–100 of the Constitution and section 11(d) of the *Charter* are not an exhaustive code for judicial independence. For an analysis of *Reference Re Remuneration of Judges*, see Ed Ratushny & Daphne Gilbert, “The Lamer Legacy for Judicial Independence” in Adam M Dodek & Daniel Jutras, eds, *The Sacred Fire: The Legacy of Antonio Lamer (Chief Justice of Canada)* (Toronto: LexisNexis Canada, 2009) 29; Jean Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002) 27 *Queen’s LJ* 389 [Leclair]; Peter Hogg, “The Bad Idea of Unwritten Constitutional Principles” in Adam M Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 25.

⁵¹ *Reference Re Remuneration of Judges*, *supra* note 34 at para 145.

⁵² See La Forest’s dissent in *Reference Re Remuneration of Judges*, *ibid* at paras 319–20; Leclair, *supra* note 51.

⁵³ 2013 SCC 43 at para 5, [2013] 3 SCR 3 [CLA].

discharging multiple lawyers, and *amicus* were appointed to ensure a fair trial for these self-represented accused who had been denied further legal aid and state-appointed counsel. In *CLA*, a majority of the Court affirmed that its inherent jurisdiction under section 96 was a “narrow one” comprised of only that jurisdiction essential to preserving the foundational role courts play with legal system.⁵⁴ More importantly they found that this inherent jurisdiction was limited by the institutional roles and capacity that emerge out of the constitutional framework, namely the separation of powers.⁵⁵

The majority held that section 96 and the inherent powers of the courts must be interpreted in light of the role of the other two branches of government.⁵⁶ Considered in this context, setting rates for *amicus* falls not within the inherent jurisdiction of the court, but rather within the powers of the legislature since it involves the expenditure of public funds. Thus, while courts can order the payment of ancillary or incidental costs related to the administration of justice (such as a court sitting late in the day incurring extra labour costs for court staff), they cannot order the payment of public monies since this broader power has historically rested with the legislatures.⁵⁷ The majority in this case commented that:

... permitting judges to set rates and to order payment without authority based on a statute or derived from a constitutional challenge takes the judge out of the proper judicial role. A court’s inherent or implied jurisdiction cannot surpass what the Constitution permits. As we have seen, the inherent jurisdiction of the court must respect the constitutional framework and the allocation of responsibility this framework makes. It is for the duly elected members of the legislature to determine what funds are expended on the administration of justice, not the judges.

...

While the rule of law requires an effective justice system with independent and impartial decision makers, it does not exist independently of financial constraints and the financial choices of the executive and legislature. Furthermore, in our system of parliamentary democracy, an inherent and inalienable right to fix a trial participant’s compensation oversteps the responsibilities of the judiciary and blurs the roles and public accountability of the three separate branches of government. In my view, such a state of affairs would imperil the judicial process; judicial orders

⁵⁴ *Ibid* at para 19.

⁵⁵ *Ibid* at paras 24, and 28–29. For a discussion of the rule of law and the separation of powers as giving rise to an institutional dialogue in the Canadian Constitution see Jack Watson, “You Don’t Know What You’ve Got ‘Til It’s Gone: The Rule of Law in Canada—Part II” (2015) 52:4 *Alta L Rev* 949 at 956 [Watson].

⁵⁶ *CLA*, *supra* note 53 at paras 29–30.

⁵⁷ *Ibid* at paras 60, 65–68, 80–83.

fixing the expenditures of public funds put public confidence in the judiciary at risk.⁵⁸

While the Supreme Court of Canada's earlier cases linked access to justice to the rule of law alone, its most recent cases—*BC Trial Lawyers* and *Hryniak*—represent an about-turn of sorts. Although it continues to connect access to justice to the rule of law, recent Supreme Court of Canada jurisprudence now refers to a link between access to justice and the inherent jurisdiction of the courts, pursuant to section 96 of the *Constitution Act, 1867*.⁵⁹ We now turn to a discussion of the rationale for the new approach.

Hryniak and *BC Trial Lawyers* have expanded constitutional protection for access to justice. *Hryniak* involved procedural barriers to a fair and timely dispute-resolution, while *BC Trial Lawyers* involved regulations imposing hearing fees that amounted to a barrier to the access to the courts for some litigants.⁶⁰ In both of these cases, the Supreme Court of Canada links access to justice not just to the rule of law, but also to unwritten constitutional principles that flow from section 96. Arguably, although it does little to clarify the theoretical ambiguity, this recent case law has shifted the constitutional basis for access to justice and creates obligations for both legislators and executive.

Hryniak concerned the application of Ontario's new and more expansive summary judgment rule. The motions judge concluded that a trial was not necessary and disposed of the claim against Mr. Hryniak on summary judgment. The Court of Appeal disagreed, holding that the case was not appropriate for summary judgment because it was factually complex and involved both cross-claims and numerous witnesses.⁶¹

For the Supreme Court of Canada, *Hryniak* was an important opportunity to give guidance as to the use of more expeditious approaches to dispute resolution and, more specifically, to consider when a matter can be dealt with fairly but expeditiously, or when fairness requires a full trial. In its analysis of summary judgment powers, the Court stressed the importance of legal principles that are both fair and proportionate.⁶² Thus, while it is critical that process not compromise on fairness, the Court spoke of a balance that recognizes that a proceeding need not be expensive, time-consuming, and exhaustive in order to fairly and justly resolve the dispute.⁶³ The Court explained:

⁵⁸ *Ibid* at paras 69, 83.

⁵⁹ *Supra* note 19.

⁶⁰ *Hryniak*, *supra* note 6; *BC Trial Lawyers*, *supra* note 2.

⁶¹ *Hryniak*, *supra* note 6 at paras 5, 14, 19.

⁶² *Hryniak*, *supra* note 6 at paras 24–27.

⁶³ *Ibid* at 72.

A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible—proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure. ... If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.⁶⁴

Access to justice considerations played a key role in the Supreme Court of Canada's analysis. The Court commented at length about the difficulties faced by litigants attempting to access the justice system and considered the summary judgment powers in light of the need to create a more accessible legal system. It is noteworthy that the Court began its discussion by stating, "Ensuring access to justice is the greatest challenge to the rule of law in Canada today."⁶⁵ The decision in *Hryniak* reiterates the link between access to justice and the rule of law, which we first saw in *BCGEU*. Although access to justice is not referred to explicitly as a constitutional principle in *Hryniak*, the case suggests that access to justice has an interpretive value akin to that normally attributed to constitutional principles.⁶⁶ In establishing access to justice as an interpretive principle, like *Charter* values or unwritten constitutional principles (such as federalism and respect for minorities),⁶⁷ *Hryniak* suggests that access to justice has become a foundational principle so important that it helps shape our approach to the law.

As we shall see, *Hryniak* is significant as well in that it encourages the use of innovations within legal procedures and suggests that both rule-makers and those who apply them have an important role in improving access to justice. Until recently, the focus of access to justice discussions has been on what lawyers, regulators, academics, legislators, and court and tribunal administrators can do to ameliorate the situation.⁶⁸ Arguably, *Hryniak* shifts that debate and speaks of a role not just for administrators but also for decision-makers in removing unnecessary barriers to accessing justice.

⁶⁴ *Ibid* at paras 28–29.

⁶⁵ *Ibid* at para 1.

⁶⁶ For example, democracy, constitutionalism, federalism, the rule of law and respect for minorities. See The Right Hon Beverley McLachlin, "Unwritten Constitutional Principles: What is Going On?" (2006) 4:2 NZ J Public & Intl L 147 at 156–60.

⁶⁷ *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 at para 22, [2002] 1 SCR 156 stands for the proposition that the common law should develop in a manner consistent with *Charter* values.

⁶⁸ Michelle Flaherty, "Self-Represented Litigants: A Sea Change in Adjudication" in Graham Mayeda & Peter Oliver, eds, *Principles and Pragmatism: Essays in Honour of Louise Charron* (Toronto: LexisNexis Canada, 2014) 323 at 326.

The issue in the second case, *BC Trial Lawyers*, was whether hearing fees that deny some people access to the courts are constitutional. The matter began as a family law action, which concerned family property and the custody of the litigants' children. Neither party was represented by counsel and the hearing of the case stretched over ten days.⁶⁹ The court rules applicable in the Province of British Columbia at the time required that the party who sets a case down for trial (typically the plaintiff) pay hearing fees.⁷⁰ The amount of these fees depend on the estimated duration of the hearing: they range from no fee for the first three days of trial, to five hundred dollars for days four to ten, to eight hundred dollars for each hearing day over ten. At the outset of the hearing, the plaintiff asked the judge to relieve her from paying the hearing fee because she could not afford them. According to Rule 20-5(1) of the *Supreme Court Civil Rules*, hearing fees may be exempted where a person is "impoverished."⁷¹ The plaintiff in this case had limited economic means. Although she was not "impoverished" in the sense of Rule 20-25(1), she was unable to pay the hearing fee.⁷²

A majority of the Supreme Court of Canada held that the province had the constitutional jurisdiction to impose hearing fees, but that this power must be exercised in a way that is consistent with constitutional principles, including the inherent jurisdiction of the superior courts. The majority concluded that section 96 of the *Constitution Act, 1867*, supported by the rule of law, provides a general right to access the courts.⁷³ The majority explained that: "Although the bare words of s. 96 refer to the appointment of judges, its broader import is to guarantee the core jurisdiction of provincial

⁶⁹ *BC Trial Lawyers*, *supra* note 2 at paras 1, 3, 5.

⁷⁰ *Supreme Court Rules*, BC Reg 221/90, Appendix C, Schedule 1, as amended by BC Reg 10/96 and BC Reg 75/98, in place at the time this case began, were enacted as subordinate legislation under the *Court Rules Act*, RSBC 1996, c 80. In 2010, the *Supreme Court Rules* were replaced by the *Supreme Court Civil Rules*, BC Reg 168/2009.

⁷¹ Rule 20-5(1) of the *Supreme Court Civil Rules*, *supra* note 70 states: If the court, on application made in accordance with subrule (3) before or after the start of a proceeding, finds that a person receives benefits under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act* or is otherwise impoverished, the court may order that no fee is payable by the person to the government under Schedule 1 of Appendix C in relation to the proceeding unless the court considers that the claim or defence:

- (a) discloses no reasonable claim or defence, as the case may be,
- (b) is scandalous, frivolous or vexatious, or
- (c) is otherwise an abuse of the process of the court.

⁷² *BC Trial Lawyers*, *supra* note 2 at paras 55–59.

⁷³ In his dissenting reasons, Justice Rothstein summarized the majority decision as follows: "In the majority's view, s. 96 of the *Constitution Act, 1867*, supported by the rule of law, provides a general right to access the courts. They find that this right is undermined by hearing fees that Canadians cannot afford" (*ibid* at para 80).

superior courts[.]”⁷⁴ The Supreme Court of Canada’s jurisprudence has long recognized that the jurisdiction of what are referred to as section 96 courts is constitutionally protected and cannot be removed by either level of government without a constitutional amendment.⁷⁵ By extension, because the heart of courts’ work is to resolve legal disputes, hearing fees that prevent people from accessing the courts infringe on the core jurisdiction of the courts and are unconstitutional.

It is notable that, in *BC Trial Lawyers*, the majority of the Supreme Court of Canada did not make reference to the *CLA* decision despite the fact that it was a recent articulation of the court’s section 96 powers. Moreover, the majority in *BC Trial Lawyers* did not reprise this analysis of framing the boundaries of section 96 (and access to justice) based on the traditional roles and powers of other branches of government. In his dissenting reasons, Justice Rothstein takes issue with the expanded definition of the rule of law, its use to support striking down legislation, as well as the larger role this confers on the courts. He disagrees with the majority’s construction of a constitutional right of general access to the courts, which he says oversteps the role of the judiciary and effectively supplants the written text of the Constitution.⁷⁶ Justice Rothstein, referring to *CLA*, raised the separation of powers issue more broadly by noting that the majority decision in *BC Trial Lawyers* was impermissibly forcing the province to spend money. In his view, the allocation of funds between competing priorities remains a political question within the domain of the legislature and executive.⁷⁷

The majority’s failure to address *CLA* leaves us with many unanswered questions. Can the majority reasons in *BC Trial Lawyers* be reconciled with the *CLA* case? At what point does dispensing with user costs become a decision about the allocation of state resources? As Justice Rothstein ably points out, reducing revenue in one part of the court system (through the removal of hearing fees) may force the government to expend money to

⁷⁴ *Ibid* at para 29.

⁷⁵ *Ibid* at paras 29, 33; *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at paras 1–2, 130 DLR (4th) 385; *Reference Re Residential Tenancies Act (Ontario)*, [1981] 1 SCR 714 at 728–29, 123 DLR (3d) 554.

⁷⁶ *BC Trial Lawyers*, *supra* note 2 at paras 92–94: Justice Rothstein’s dissent takes issue with the expanded definition of the rule of law, its use to support striking down legislation, as well as the larger role this confers on the courts. He disagrees with the majority’s construction of a constitutional right of general access to the courts, which he says had never been fully realized. He interprets *BCGEU* to constitutionally guarantee access to the courts for the purposes of vindicating *Charter* rights only. The majority’s decision, according to this dissent, creates an unsupported generalized right of access to the court for civil remedies—one that undermines the written text of the Constitution by making it redundant.

⁷⁷ *Ibid* at para 87.

make up the shortfall by either reducing the provision of court services, reducing other services, raising taxes or incurring debt.⁷⁸ These are arguably all decisions better made by the legislative or executive branches of government.

The majority's reasons in *BC Trial Lawyers* represents a shift in jurisprudence, not only in terms of the Supreme Court of Canada's approach to access to justice but also in its understanding of its inherent jurisdiction. The Court had previously defined the scope of its inherent jurisdiction under section 96 with reference to the provinces' powers under section 92(14) to administer the justice system. By anchoring it to section 96, access to justice as a legal right is now exposed to the ongoing issue of the constitutional divide between the role of the courts and the legislatures in the administration of justice—an issue of the separation of powers—under the Canadian Constitution. Issues of access will now beg the question of whether they involved a valid act of government policy or a protected requirement of the courts' inherent jurisdiction. This has the potential to create a more focused inquiry on what access to justice means since litigants will have to demonstrate how it can be anchored to a particular aspect of the courts' institutional independence.

While the majority reasons in *BC Trial Lawyers* do not address *CLA*, the majority does consider many of the Court's earlier cases on access to justice and the rule of law. Although it states that it is not required to do so, because the section 96 analysis is sufficient to dispose of the issues raised by the case, the majority goes on to discuss the connection between the rule of law and access to justice.⁷⁹ Arguably, it does so principally in an attempt to reconcile its reasoning with the Supreme Court of Canada's previous decision in *Imperial Tobacco* and to address the issues raised by Justice Rothstein's dissent.⁸⁰ The majority reasons in *BC Trial Lawyers* affirm that the rule of law and access to justice are "interconnected" because "if 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."⁸¹ It declares that its reasoning is consistent with *Imperial Tobacco*, suggesting that although the rule of law and access to justice are connected, they are not one and the same.⁸² This reasoning, at a high level, affirms that

⁷⁸ *Ibid* at para 82.

⁷⁹ *Ibid* at para 38.

⁸⁰ The majority distinguishes *Christie* on the facts, stating in *Christie*, *supra* note 30, that the evidence and arguments did not establish that the tax in question potentially barred litigants with legitimate claims from the courts. According to the majority, *Christie* does not undermine the proposition that access to the courts is fundamental to our constitutional arrangements (*Christie*, *supra* note 30 at paras 41–42).

⁸¹ *Ibid* at paras 39–40.

⁸² *Ibid* at paras 37–38.

access to justice flows not from the rule of law, generally and as suggested in *BCGEU*, but rather from one of its discrete dimensions—the supremacy of the law. It is important to question what purpose is served by maintaining this link between access to justice and the rule of law given that it only obtains its “teeth” as a constitutional principle when linked to the courts’ inherent jurisdiction.

In concluding that the hearing fee scheme is unconstitutional, the majority of the Supreme Court of Canada appears to do two key things. First, it has extended the constitutional right to access superior courts. Previous case law on section 96 had largely focused on the extent to which the government could pare away at the court’s inherent jurisdiction to create administrative law tribunals and statutory courts. Now the concept has been extended to incorporate a right to the removal of barriers to accessing the court’s jurisdiction. In doing so, the majority incorporates access to justice into the broader constitutional principles that flow from section 96 and seems to give access to justice the status of an unwritten constitutional principle. In this way, access to justice (like judicial independence) may become a basis to invalidate legislation in its own right. Second, the majority fundamentally shifts the Supreme Court of Canada’s access to justice rhetoric. Until now, the Court had not addressed access to justice in terms of the inherent jurisdiction of the courts but had focused on the connection between the rule of law and access to justice.

4. Access to Justice, Choice of Constitutional Principles and Implications for Administrative Justice

Although the Supreme Court of Canada now recognizes that access to justice is a constitutional right, its recent decisions leave us with many questions about the content and implications of this emerging right. Many of these questions arise from the fact that the source of the right (a constitutional value, the rule of law, judicial independence, section 96, or all four) is unresolved. This part of the paper explores the administrative law implications that arise based on where access to justice ultimately finds its constitutional home.

In the administrative justice system, improved accessibility has long been an objective at the root of the design of many administrative tribunals.⁸³ While recent jurisprudence has not changed this essential objective, the jurisprudence may have raised administrative decision-makers’ obligations

⁸³ See e.g. *Rasanen v Rosemount Instruments Ltd* (1994), 17 OR (3d) 267 at 279–80, 112 DLR (4th) 683 (CA), Abella J: “Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly.”

to a new and constitutional level. Do recent cases open the door to the accessibility of administrative tribunals being tested under the Constitution? Will administrative tribunals be held to the same access to justice standards as superior courts? Or will administrative proceedings be considered under the more limited lens of judicial review, and whether administrative systems or procedures limit access to superior courts? What is the impact of the right to access to justice on remedial principles? In this section, we raise these questions to help set the stage for further exploration of access to justice as a constitutional principle and its link to administrative law. These are important threshold questions, particularly since the choice of constitutional principle may make a material difference to the content, scope, and implications of any right to access to justice in the administrative justice context.

A) Implications Arising from a Section 96 Right to Access to Justice

A legal right to access to administrative justice is still somewhat speculative. It bears noting, however, that the principles underlying such a right flow naturally from the very *raison d'être* of administrative law. The past several decades have seen a rise in the administrative state. This has led to more administrative tribunals and broader powers for those decision-makers. The current reality is that access to the courts is quite limited, so for many Canadians, administrative tribunals are the principle venue to resolve the most common problems in their lives. Arguably, many administrative tribunals exist as a less costly, more expeditious and expert alternative to the courts, particularly for issues that engage government policy.⁸⁴ The administrative justice system, therefore, walks a fine line: it provides access to justice through increased access to administrative decision-makers, and it limits access to the courts by removing certain disputes from the courts and limiting judicial review of administrative action. Given this dual role, it seems incongruous to hold administrative tribunals to an access to justice standard that equates only to access to superior courts. Rather, as Lorne Sossin explains,

Access to justice is no less imperative in tribunals than courts. Unlike judicial independence, which is an unwritten constitutional principle applying uniquely to courts, access to justice likely has broader application to all adjudicative proceeding in which rights and interests are at stake, and especially to those with jurisdiction over the *Charter*.⁸⁵

⁸⁴ *Ibid*; *Harelkin v University of Regina*, [1979] 2 SCR 561 at 588, 96 DLR (3d) 14 [*Harelkin*].

⁸⁵ Lorne Sossin, "Access to Administrative Justice and Other Worries" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publications, 2013) 211 at 227–28 [Sossin, "Access to Administrative Justice"].

This broad articulation of access to justice is distinct from the constitutional constraint surrounding the rule of law, which we explored in the first part of this paper and it embodies the visceral rationalizing behind the drive towards practical initiatives. Arguably, this more expansive vision of access to justice, one that overarches the executive and judicial branches of government, has the potential to fit more easily within the principle of rule of law rather than within section 96. The rule of law transcends separation of powers and, among other things, concerns itself with the exercise of state power generally. This broad vision of access to justice also corresponds more closely to the role of administrative tribunals, many of which were created for the express purpose of making justice more accessible. The decision in *BC Trials Lawyers*, although based on a specific context, raises broader issues. Although the dispute in that case concerned a family law action in the Superior Court of British Columbia, we need to question whether the result should be any different for a case arising in a statutory family court in Ontario or an administrative tribunal. From the perspective of the litigant, the fee barrier creates the same problem, whether the family dispute is division of property (superior court), custody and access (statutory court) or adoption (administrative tribunal).

If access to justice finds its home in section 96 is the constitutional right then limited to accessing superior courts? This is problematic in that it could preclude a broader vision of access to justice that would include administrative justice directly. In the administrative context, this vision of the constitutional right to access to justice via section 96 suggests a focus on access to judicial review. Will this be in terms of barriers to launching applications for judicial review as well as limiting review due to deference and the availability of alternative remedies? Or can a section 96 framing of the right to access create obligations for administrative tribunals to ensure accessible processes and systems? Arguably, although it has generally been about superior courts,⁸⁶ section 96 can accommodate a more expansive view of access to justice that encompasses the administrative justice system. Given the increasingly prominent role of administrative tribunals, surely access to justice in the administrative context must mean more than access to judicial review and section 96 courts. To conclude otherwise is to diminish not only the role of administrative tribunals, but also what has often been at the very root of their creation: a desire to ensure that legal systems are more accessible. It is perhaps prescient that the Supreme Court of Canada decision in *Hryniak* focused on access to justice in the context of the proportionality principle and summary judgment.⁸⁷ It is a clear indication that expeditious and proportional justice, hallmarks of

⁸⁶ *Reference Re Remuneration of Judges*, *supra* note 34 at para 106: The majority stated that judicial independence has “grown into a principle that now extends to all courts, not just the superior courts of this country.”

⁸⁷ *Hryniak*, *supra* note 6 at para 5.

administrative justice, is the framework through which access to justice can be achieved.

Indeed, measures that have impeded access to an administrative proceeding will, at least indirectly, limit meaningful access to judicial review. Fees that prevent a party from initiating an administrative proceeding will ultimately mean that the dispute is fully withdrawn from the legal system, so neither administrative tribunals nor section 96 courts can exercise jurisdiction (the former arising under their statutes, the latter arising from their constitutional obligation to interpret and apply the law). Similarly, to the extent that other measures make it impossible for parties to meaningfully present their case before the administrative decision-maker, these may also remove any real or meaningful access to superior courts. For example, tight statutory deadlines that tribunals have no power to waive may, in some cases, present a barrier to accessing adjudication before a tribunal. Similarly, if a party is not able to navigate the administrative proceeding and meaningfully present their case to the tribunal, it is unlikely to be in a position to rectify any gaps or errors on judicial review. This is because parties are generally not able to present new evidence or arguments on judicial review and that review is based on the existing record. Judicial review or statutory appeal is also generally only available once parties have exhausted the tribunal's statutory decision-making process including any internal appeal or reconsideration mechanisms.⁸⁸ Thus, inaccessible tribunal processes at these stages can also effectively limit access to the courts.

Arguably, section 96 can accommodate an expansive right to access to justice. Where access to administrative justice is limited, so too is access to a reviewing superior court. In the context of judicial review, section 96 historically fueled a strong view about exercising supervisory jurisdiction over administrative tribunals with a heavy hand in order to maintain the courts' role as the one true interpreter of legislation. This view has fallen out of favour. In *Dunsmuir v New Brunswick*, the Supreme Court of Canada commented on the importance of "rein[ing] in" a "court-centric conception of the rule of law" that relies too heavily on the idea that only courts can decide questions of law.⁸⁹ If the supremacy of the law (a rule of law concern) is no longer the most important driving force in judicial review, it is reasonable to expect that access to justice concerns will be raised via different avenues in administrative law.

Importantly, *BC Trial Lawyers* does not set out a clear threshold for when a barrier to access will constitute a violation of section 96. We know that in the context of hearing fees, access to the court is "effectively

⁸⁸ *Harelkin*, *supra* note 84.

⁸⁹ *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 30, [2008] 1 SCR 190.

denie[d]” when, even with “reasonable sacrifices”, the fees in question would cause “undue hardship.”⁹⁰ This raises the question of how to use this case as a precedent when the barrier in question prevents access in a non-monetary way. For example, what if legislation attempted to reduce court caseloads by providing an extremely short limitation period for civil wrongs applied retroactively? How would such a measure be viewed through the lens of *BC Trial Lawyers*? Or what if the state reduced civil caseloads by bolstering the rules governing dismissal of actions for delays? At this stage, these questions remain unanswered. However, we can be sure that these issues arising at the court level will likely be mirrored in the administrative justice realm.

B) Implications of a Right to Access to Justice Based in the Rule of Law

A rule of law-based vision of access to justice could also encompass access to administrative justice. However, as noted, the rule of law has not traditionally been a basis to challenge legislative action. This means that a rule of law articulation of the right is subject to limits imposed by statute. Thus, while the content of the right might be broad, its scope appears limited to executive action (or inaction) that unduly limits access to administrative tribunals. In the context of judicial review, it may act to inform how reviewing courts decide issues like deference and standard of review. In addition, it may assist in determining whether to refuse an application for failing to pursue statutory appeals and internal tribunal reviews where that failure stems from inaccessible processes.

Given that the rule of law is an “amorphous concept”, an access to justice right linked to it has the potential to be similarly broad and vague. One concrete avenue of thought to explore, however, is whether access to justice as a constitutional principle will have the same function as the rule of law. In this regard, it is useful to consider two specific examples: access to remedy and access to the courts.

First, discourse on access to justice and the rule of law are intimately linked to ideas of remedy. It is this attribute of the rule of law that should not be forgotten in the move to section 96 and is of particular importance to the administrative justice system. In *BC Trial Lawyers*, the majority of the Supreme Court of Canada still references the rule of law in relation to access to justice, possibly because access to justice is hard to conceptualize without this link to remedy. Remedy is the tool through which the supremacy of the law is upheld. An example of the importance of remedy to the rule of law is seen in Dicey’s commentary. For Dicey, access to the courts was fundamental to the rule of law because of the importance of individual

⁹⁰ *BC Trial Lawyers*, *supra* note 2 at paras 40, 46.

remedy. In his view, one of the dangers of written constitutions is the absence of meaningful remedies for the rights they espouse.⁹¹ In this regard Dicey's concern is prescient of the problem that Mr. Roncarelli faced, who, although able to ultimately sue for damages, could not use the law to get his liquor license reinstated.⁹² For this reason Dicey argued rights could only be protected through an unwritten constitution created by independent judges providing individual remedies for private and public wrongs. Although the majority does not reference Dicey in their decision in *BC Trial Lawyers*, this line of thinking is evident in their decision:

The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.⁹³

What of the importance of accessing remedies under section 96? In *BC Trial Lawyers*, Justice Rothstein in dissent states that the majority decision improperly constitutionalizes access to the superior court for civil disputes. He reaches this conclusion on the basis that there is nothing in the written text of the Constitution guaranteeing a right of access for specific remedies other than remedies under section 24 of the *Charter*.⁹⁴ The majority's decision, according to this dissent, creates an unsupported generalized right of access to the court for civil remedies, one that undermines the written text by making it redundant. The majority does not respond to this critique, however, we can infer that given the link between the rule of law and access to justice, access to remedies broader than *Charter* remedies is a fundamental idea driving the reason behind the creation of the new access to justice right.

⁹¹ Dicey, *supra* note 15.

⁹² Although touted as a seminal case upholding the rule of law, Mary Liston notes that plaintiff Roncarelli faced a number of challenges in accessing justice. The relevant liquor control statute at the time only permitted a court action with leave of the Chief Justice of the provincial court, which was denied without reasons, along with an appeal to the Attorney General. Mr. Roncarelli was left to sue privately for damages after being unable to pursue judicial review of the government decision that affected him, leaving him without a public law remedy (the reinstatement of his license), see Mary Liston, "Witnessing Arbitrariness: *Roncarelli v. Duplessis* Fifty Years On" (2010) 55:3 McGill LJ 689 at 699.

⁹³ *BC Trial Lawyers*, *supra* note 2 at para 32.

⁹⁴ *Ibid* at para 92.

It can certainly be argued that Justice Rothstein's dissent is not consistent with current constitutional and administrative law thinking. The conclusion that the only constitutional right to access a court for a remedy is limited to section 24 *Charter* remedies undermines the constitutional status of the common law remedies available on judicial review (e.g., *certiorari*, *mandamus*, etc.). These historic remedies are fundamental to section 96 and have been described as the "arrows in the quiver of the rule of law."⁹⁵ We know from *Crevier v AG (Quebec) et al* that access to these remedies cannot be removed by legislative action, since this would violate the inherent jurisdiction of the court under the *Constitution Act, 1867*.⁹⁶ In sum, it is important to recognize the remedial component of the rule of law and its link to access to justice in administrative law since issues of remedy and access are already being adjudicated, albeit under a different guise.

Turning to a second example, one of the trickier issues facing administrative law is the law of collateral attack and relitigation. The overlap in issues that come before the courts and tribunals have plagued judges and adjudicators trying to parse out when to allow an action to proceed and when to deny it as an abuse of process for relitigation.⁹⁷ In *Penner v Niagara (Regional Police Services Board)*, the majority of the Supreme Court of Canada allowed a civil action to proceed despite a previous ruling made under the *Police Services Act* ("PSA") by an administrative adjudicator.⁹⁸ The majority noted that the inability to obtain a remedy in the previous administrative law proceeding is a strong reason to not apply issue estoppel.⁹⁹ In deciding the case based on issue estoppel, the majority in *Penner* held that the appellant could proceed with his civil suit against the respondent police force for battery despite previous disciplinary proceedings under the *PSA* that had exonerated the defendants. The defendants had argued that relitigating the issue of the officer's conduct in the civil suit would present a collateral attack on the hearing finding. The *PSA* proceeding had been initiated by a complaint made by the appellant, however, the majority was swayed that the result should not bind him in the new proceeding since it would amount to an unfairness. The majority's analysis on unfairness included considerations such as: (1) the nature of the disciplinary proceedings where the appellant was not a party, and (2) the

⁹⁵ Watson, *supra* note 55 at 980.

⁹⁶ [1981] 2 SCR 220, 127 DLR (3d) 1; *Constitution Act, 1867*, *supra* note 19.

⁹⁷ See e.g. *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460; *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422 [Figliola]; *Ontario (Community Safety and Correctional Services) v De Lottinville*, 2015 ONSC 3085, 125 OR (3d) 732 [De Lottinville].

⁹⁸ 2013 SCC 19, [2013] 2 SCR 125 [Penner].

⁹⁹ *Ibid* at paras 42–48, 54, 58. Indeed one of the parties attempted to argue the case on the basis of the rule of law because of these concerns although the majority ultimately decided the issue based on the common law doctrine of issue estoppel (*ibid* at para 32).

remedy, in that the disciplinary proceeding could not provide a remedy to the appellant even if a wrong had been found.¹⁰⁰

Although the Court does not frame *Penner* as a rule of law issue, the unfairness analysis contains language on remedies that may be more coherently analyzed under an access to justice framework referencing *BC Trial Lawyers*. Indeed given a previous court of appeal decision that had considered relitigation from the perspective of the rule of law,¹⁰¹ the majority's silence on the rule of law in *Penner* is bewildering. Perhaps the recent case law on access to justice will make the courts more willing, in the future, to address these issues head on instead of creating conflicting case law on other legal doctrines dealing with relitigation.¹⁰²

C) Implications of Access to Justice as an Interpretive Constitutional Principle

Access to justice may continue to serve as a constitutional value and interpretive principle separate and apart from its link to section 96 or the rule of law. This trend is already seen in lower court decisions following *Hryniak* and may emerge in administrative decision-making as well. For example,

¹⁰⁰ *Ibid* at paras 45, 54: The majority was persuaded that since Mr. Penner, as the complainant in the disciplinary hearing, could not obtain any financial remedy from that proceeding that this would lead to him having “little ... at stake” and “little incentive to participate in it with full vigour.”

¹⁰¹ In *R v Dom*, 31 OR (3d) 540 at 10–12, 17–18, 1996 CanLII 1331 (CA), the Ontario Court of Appeal explicitly referenced the collateral attack principle in relation to the rule of law. In this case, the accused breached a publication ban that had been previously issued in another individual's criminal trial. Instead of challenging the ban in the trial in which it was issued the accused chose to breach the ban and then try to challenge its constitutional validity, based on freedom of expression, in his contempt proceeding. In deciding whether it was permissible to allow the accused to relitigate the issue of the validity of the ban the Court noted that the rule of law encompassed several “interrelated and in some ways countervailing principles,” the main two of which are the “compliance” and the “remedial components” of the rule of law. The Court noted that the supremacy of the law component of the rule of law demands compliance with the law and, in order to “validate this demand”, must provide individuals with “meaningful access to independent courts with the power to enforce the law by granting appropriate and effective remedies to those individuals whose rights have been violated.” For the Ontario Court of Appeal, the “compliance” component of the rule of law gives rise to the collateral attack doctrine; that court orders be respected unless challenged in the appropriate forum, so that individuals are deterred from flouting the law. The Court of Appeal went on to note, however, that the rule of law encompasses a “remedial” component, one which gives rise to the discretion to make exceptions to the collateral attack rule.

¹⁰² See the dispute between the majority and minority in *Penner*, *supra* note 98 at paras 75, 78, 98–100 on the application of *Figliola*, *supra* note 97; see also *De Lottinville*, *supra* note 97 for a recent attempt to reconcile the two approaches in Ontario.

in *Syrodoyev v Ramandi et al*, the Ontario Superior Court considered the application of *Hryniak* to trial management issues and commented:

With the advent of *Hryniak*, 2014 SCC 7, and anticipated efforts to improve trial management processes to speed up trials, one questions whether the bar may not have to consider adjusting how they staff and schedule cases internally. Cases need to be handled more quickly and efficiently through all stages to control costs.¹⁰³

As an interpretive principle, access to justice serves a broader purpose than simply protecting the superior courts' inherent jurisdiction. Freed from section 96, such a principle may return to rule of law centric concerns about ensuring the supremacy of the law, or it could evolve to encompass more general notions of fairness and proportionality. This approach to the rule of law could provide context and guidance on judicial review and inform decision-making at the administrative tribunal level, to the extent that courts continue to be willing to allow tribunals to look to the Constitution, both written and unwritten, in performing their adjudicative functions.¹⁰⁴ In this way, a tribunal interpreting its statute or rules or exercising its discretion, could be guided by access to justice considerations.¹⁰⁵

5. Conclusion

The administrative justice system is connected to the rule of law in two ways. On the one hand, judicial review of administrative action functions as a check on executive power and is an important means of ensuring that government officials are accountable for their actions. On the other hand, the administrative justice system aims to facilitate timely and efficient access to justice, which is itself an important feature of the rule of law. If the courts were to closely scrutinize every administrative decision, government accountability would be more assured but at the expense of efficiency and access. Consequently, the need to balance accountability and efficiency within the administrative justice system is of paramount importance.¹⁰⁶

In addition to mirroring many of the problems that exist in the traditional legal system, administrative law also raises unique access to justice concerns. For applicants with limited resources, a judicial review is a further legal layer, which serves as a reminder of the seemingly limitless

¹⁰³ 2015 ONSC 1125 at para 13, 250 ACWS (3d) 27.

¹⁰⁴ This follows from the Supreme Court of Canada decision in *Doré v Barreau du Québec*, 2012 SCC 12 at para 35, [2012] 1 SCR 395 [*Doré*], where the Court found administrative decision-makers may consider *Charter* values during the course of adjudicating issues within their expertise. See also *Taylor-Baptiste v Ontario Public Service Employees Union*, 2015 ONCA 495 at paras 49–58, 23 CCEL (4th) 235 [*Taylor-Baptiste*].

¹⁰⁵ *Doré*, *supra* note 104; *Taylor-Baptiste*, *supra* note 104.

¹⁰⁶ Sossin, "Access to Administrative Justice", *supra* note 85 at 231.

resources of the state. When this dynamic is at play, “it must be said that the threat to the rule of law ... can only be more grave and more acute.”¹⁰⁷

Despite these very real concerns, the administrative justice system has now become necessary to the rule of law in the modern state, and the administrative justice system’s role in maintaining the rule of law is inextricably bound to access to justice. Chief Justice McLachlin was among the first to note the ‘rule of law as access’ dimension of modern administrative tribunals. In 1999, she wrote that:

[T]he new rule of law allows courts to respect and advance the roles of administrative tribunals. The courts’ role shifts from being a brute guardian of an artificial and restrictive Rule of Law to that of a partner, with tribunals and other civic institutions, in its construction and maintenance.¹⁰⁸

To the extent that more and more individuals are seeking remedies before administrative tribunals to vindicate their rights, the same access to justice concerns arise since individuals must access these bodies prior to being able to access superior courts. Fees and (arguably) other measures that restrict access to administrative tribunals may also run afoul of section 96 in that they limit access to superior courts.

The Supreme Court of Canada’s decision in *Hryniak* suggests that access to justice ought to be the lens through which administrative decision-makers develop their procedures and rules.¹⁰⁹ Many administrative tribunals have already adopted this approach; and many have been designed with access issues in mind and are at the forefront of developing new access to justice strategies.¹¹⁰ This has particularly been the case for tribunals that deal with significant numbers of self-represented litigants. Many are reconsidering whether approaches to adjudication based on complex rules are effective means to resolve the average dispute. This has led to a number of innovations in terms of adjudicative methods,¹¹¹ rules of procedure,¹¹²

¹⁰⁷ 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.

¹⁰⁸ Madam Justice Beverley McLachlin, “The Role of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1999) 12 Can J Admin L & Prac 171 at 175.

¹⁰⁹ See *Hryniak*, *supra* note 6.

¹¹⁰ Sossin, “Access to Administrative Justice”, *supra* note 85 at 213.

¹¹¹ Michelle Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law” (2015) 38:1 Dalhousie LJ 119.

¹¹² Michelle Flaherty, “Ontario and the Direct Access Model to Human Rights” in Shelagh Day, Lucie Lamarche & Ken Norman, eds, *14 Arguments in Favour of Human Rights Institutions* (Toronto: Irwin Law, 2014) 169.

the development of plain language guides to litigation,¹¹³ and innovative ways of communicating with litigants.¹¹⁴

The recent Supreme Court of Canada jurisprudence reinforces and lends momentum to some of these developments. But does it go so far as to create a constitutional requirement to ensure that tribunal processes and procedures are accessible? For example, *BC Trial Lawyers* tells us that fees that amount to barriers to access will be unconstitutional. Could procedures, adjudicative approaches, and complex rules that impede certain litigants' access to adjudication also be considered unconstitutional?

Although *BC Trial Lawyers* suggests that legal processes are open to constitutional challenge on the basis of access to justice, it does not stand for the proposition that any fees—any impediment to access—will be unconstitutional. Only where there is evidence that the fees deny people access to the courts, will there be a finding that the core jurisdiction of the superior courts and has been impermissibly infringed.¹¹⁵ To the extent that this fees-based analysis can also be applied to legal process, the threshold for a finding of unconstitutionality may be high: to successfully challenge a legal process, litigants would have to show that they cannot access adjudication because of the barriers created by the existing legal process. The barriers created by legal process are less tangible than those related to fees. In many cases, the process may be so complex as to make access difficult, but not impossible.¹¹⁶

At a minimum, access to justice is a constitutional value that should inform how we design and interpret administrative procedures. This value should be prioritized as rules and processes are being developed. If *Hryniak* is a harbinger of things to come, access to justice will serve as an interpretive principle. The Supreme Court of Canada's decision in *Hryniak* suggests that as individual adjudicators apply rules and follow procedures, they must consider how their application in the circumstances will impact the litigants' ability to access justice. Arguably, the Supreme Court of Canada's recent decisions reviewed above lend constitutional weight to much of the work that is already being done by administrative tribunals. It may also

¹¹³ See e.g. the Human Rights Tribunal of Ontario's plain language guide "Information on the Process for Resolving Human Rights Applications before the Human Rights Tribunal of Ontario" (Toronto: Queen's Printer, 2008), online: <www.sjto.gov.on.ca/>; Community Living Ontario also offers plain language resources for various tribunals, see Administrative Justice Support Network, online: <www.asjn.communitylivingontario.ca/>.

¹¹⁴ See e.g. the Human Rights Tribunal of Ontario's illustrated user booklet: "A Guide to Mediation at the Human Rights Tribunal of Ontario" (Toronto: Queen's Printer) online: <www.sjto.gov.on.ca/>.

¹¹⁵ *BC Trial Lawyers*, *supra* note 2 at paras 52, 58–59.

¹¹⁶ *Ibid* at paras 59–60.

encourage them to be more proactive and to consider new strategies and innovations designed to improve accessibility. It remains to be seen whether the unwritten constitutional principle of access to justice will allow litigants to successfully challenge particular legal processes. However, the fact that administrative justice processes may be subject to constitutional scrutiny may be enough to foster innovation and new ways of thinking about access to justice in administrative law.