Overview of Canadian Bar Association and US National Civil Right to Counsel Litigation

CBA Envisioning Equal Justice Summit
Workshop D.4 – Whither the Right to Counsel?

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The Supreme Court of Canada recognized a limited right to counsel in civil matters in 1999 in G. (J.) v. New Brunswick (J.G.). This landmark decision was made in the context of child welfare proceedings. Many individuals and several organizations, including the Canadian Bar Association, have undertaken litigation to broaden the scope of this judicial recognition over the past 14 years, without any major success. The right to counsel movement in the US has grown exponentially during this same period with a greater, although still very limited, degree of success.

This paper provides a brief overview of (1) the CBA test case litigation strategy; (2) the reasoning in J.G. and post- J.G. jurisprudence; and (3) the US right to civil counsel movement. It has been prepared to provide background information for the workshop entitled “Whither the Right to Counsel?” at the CBA Envisioning Equal Justice. A final section poses some discussion questions that could be considered during the workshop.

1. Overview of CBA Test Case Litigation Strategy

The CBA began studying the possibility of litigation after years of advocacy for greater government commitment to adequate legal aid proved unfruitful. In 2002, CBA released the results of a study by eight constitutional experts called Making the Case: the Right to Publicly-Funded Legal Representation in Canada. A resolution of CBA National Council passed at the 2002 Canadian Legal Conference said:

**BE IT RESOLVED THAT** the Canadian Bar Association build coalitions with other organizations committed to social justice to maximize the effectiveness of efforts to lobby for national standards and improvements to the funding and delivery of civil legal aid and, together with such organizations, pursue appropriate test cases where injustice has been suffered as a result of inadequate civil legal aid funding.

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2 Resolution 05-02-A.
After extensive research and the creation of a Test Case Advisory Committee comprised of academics, constitutional litigators and practitioners, the CBA filed a statement of claim in June 2005 against the federal government, the BC government, and the province’s legal aid plan for failing to provide adequate access to justice for poor people in BC when their fundamental interests were at stake, in particular with respect to family law matters, poverty law matters, and immigration and refugee law matters.3

The CBA based its claim on several sections of the Canadian Charter of Rights and Freedoms, unwritten constitutional principles and the rule of law. It chose a broad systemic approach with the CBA acting in the public interest because it determined that no individual could realistically undertake systemic litigation, and no other organization was as well placed to challenge the failure to provide adequate legal aid in BC and the resulting deficit for access to justice.

The CBA concluded that this novel strategy was the most direct route to the desired result of constitutional recognition of a right to counsel for critical civil law matters. In particular, this strategy would avoid the pitfalls inherent in dealing with individual litigants (e.g. the possibility of settlement, or litigation exhaustion, and so on). It could also avoid a result limited to the narrow facts of a particular case, similar to the J.G. case that established a limited right to civil legal aid in narrowly circumscribed child protection cases. The CBA noted that SCC decision had not had broad impact on the availability of publicly-funded counsel outside of child welfare protection proceedings.

This initial strategy did not find favour with the courts. The BC Supreme Court dismissed the action on two grounds: that the CBA should not be granted public interest standing and that the pleadings did not disclose a reasonable cause of action.4 Put very briefly, the decision turned on the judge’s conclusion that constitutional infringements had to be pled on the basis of individual facts. The Court of Appeal left open the issue of standing but affirmed the decision on reasonable cause of action, finding that the pleadings were “simply too general to permit the enquiry sought or the relief contended for”.5 The appellate court also left open the possibility of a different result if the CBA would pursue a similar claim with facts pled on the basis of individual claimants. The Supreme Court of Canada denied leave in 2008.6

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3 As the litigation proceeded the CBA also sought particulars with respect to inadequate legal aid for prison law matters.


6 2008 CanLII 39172 (SCC).
During this period, the CBA public interest litigation strategy extended to intervening in cases that raised more general issues of access to justice: Little Sisters (a case involving advance cost awards); Christie (constitutionality of a provincial tax on legal services); and later, Mowat (on the award of legal costs under the Canadian Human Rights Act). In the result, none of these cases significantly advanced the cause of equal access to justice and the Christie case can be seen as a serious setback (although it did reaffirm the approach taken in J.G.).

Following these setbacks, the CBA took some time to again consider whether litigation should continue to be part of the Association’s strategy for improving access to justice. It decided that it should, and a new Advisory Committee was struck to reformulate the litigation strategy on the basis of further consultations and updated legal research.

Phase 2 of the CBA test case litigation entails identifying and assisting in bringing forward a number of individual right to counsel cases in selected jurisdictions across Canada where there is support by the local CBA Branch. The strategy envisions pro bono counsel having the primary responsibility for carriage of the cases with the CBA paying disbursements and providing legal research and drafting support (where desired by counsel). Sub-Committees in five areas have been working to develop test case criteria and potential test cases. The five areas are: family law, poverty law, refugee law, prison law and reviews of committals under provincial mental health legislation. No case has been launched to date, although work is ongoing on these fronts.

Two members of the original CBA counsel team, Gwen Brodsky and Melina Buckley, also worked closely with the BC Public Interest Advocacy Centre to initiate a case involving right to counsel in a family law matter. The CBA continues to monitor civil right to counsel cases with a view to seeking leave to intervene in appropriate circumstances. The CBA sought leave to intervene in one such case in British Columbia but the Attorney General subsequently abandoned the appeal.

2. J. G. and Post-J.G. Civil Right to Counsel Cases

There is no general or absolute right to state-funded counsel under Canadian law. However, courts have found that state-funded counsel may be required under certain

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11 Attorney General (British Columbia) v. T.L., 2009 BCPC 293; affirmed 2010 BCSC 105. (discussed below)
circumstances to ensure a fair hearing. This approach developed in pre-Charter criminal cases and has largely been continued in jurisprudence under s.7 of the Charter. The process of defining the situations where a right to state-funded counsel exists is proceeding on a case-by-case basis, with an emphasis on trial court discretion rooted in its inherent power to ensure a fair hearing.

In the leading case, J.G., the Supreme Court of Canada found that a parent who was subject to child apprehension proceedings had a right to be represented by counsel in the specific circumstances of that case. Lamer C.J.C., for the majority, founded his decision on the following basic principle: “When government action triggers a hearing in which the interests protected by section 7 of the Canadian Charter of Rights and Freedoms are engaged, it is under an obligation to do whatever is required to ensure that the hearing be fair.” The majority judgment concluded that a fair hearing “in the unusual circumstances of this case” required that J.G. be represented by counsel, having regard to (1) the seriousness of the interests at stake; (2) the complexity of the proceedings; and (3) the capacities of the appellant. The majority judgment in J.G. identified a responsibility on the part of a trial judge to ensure a fair trial, if necessary by the appointment of state-funded counsel. The criteria apply in adversarial hearings.

According to the majority judgment, the right to “security of the person” protects “both the physical and psychological integrity of the individual.” An attempt by the state to remove children from their parents’ care, whether temporarily or permanently, “...constitutes a serious interference with the psychological integrity of the parent.”

Lamer, C.J.C. acknowledged that determining exactly what impacts psychological integrity is not simple. The impugned state action “must have a serious and profound effect on a person’s psychological integrity” and the effects of the interference must be assessed objectively, “with a view to their impact on the psychological integrity of a person of reasonable sensibility” (i.e. greater than ordinary stress or anxiety, but not to the level of nervous shock or psychiatric illness). The judgment concluded that “state removal of a child from parental custody pursuant to the state’s parens patriae jurisdiction constitutes a serious interference with the psychological integrity of the parent.”

The specific elements of the infringement of security of the person identified were: “the loss of companionship of the child”; the “gross intrusion [of the state] into a private and intimate sphere”; the serious consequences of being stigmatized as an “unfit” parent; and, the fact that “an individual’s status as a parent is often fundamental to personal identity”. The stigma and distress resulting from a loss of parental status is therefore a particularly serious consequence of the state’s conduct.

12 Supra, note 1 at para. 61.
13 Ibid. at para. 60.
14 Ibid. at para. 61.
15 Ibid.
The majority judgment also acknowledged that the right to security of the person extends beyond the criminal law context; thus, for example, the Court indicated that confinement to a mental institution by the state would infringe both liberty and security of the person.

Aside from further refining the understanding of the right to security of the person, the majority also identified some issues relevant to determining the complexity of proceedings that necessitate legal representation to ensure a fair trial. The majority described the hearing at issue in these terms:

The parties are responsible for planning and presenting their cases. While the rules of evidence are somewhat relaxed, difficult evidentiary issues are frequently raised. The parent must adduce evidence, cross-examine witnesses, make objections and present legal defences in the context of what is to many a foreign environment, and under significant emotional strain. In this case, all other parties were represented by counsel. The hearing was scheduled to last three days, and counsel for the Minister planned to present 15 affidavits, including two expert reports.16

Thus, factors that are relevant to a finding of complexity include: the likelihood of evidentiary issues being raised; the requirement to adduce evidence, cross-examine witnesses, make objections and present legal defences; the formality of the hearing and foreign environment of the court room; the emotional strain on the claimant; whether or not other parties are legally represented; the length of the hearing; and, the extensive nature of the evidence adduced by the other party.

The majority concluded that the legal standard is that parents should be able to participate effectively in the hearing. Effective participation goes “beyond mere competence” in understanding the proceedings and communicating with the court and extends to “effective” and “meaningful participation” at the hearing.

While agreeing with the test formulated in the majority judgment, the concurring judgment written by L’Heureux-Dube J. (Gonthier and McLachlin JJ. concurring) suggested its applicability was unlikely to be “exceptional”:

I would view these interests broadly, and would therefore find that the right to funded counsel in child protection hearings, when a parent cannot afford a lawyer and the parent is not covered by the legal aid scheme, will not infrequently be invoked.... Funded counsel must be ordered whenever a fair hearing will not take place without representation.... The trial judge’s duty to ensure a fair trial may therefore, when necessary, involve an order that the

16 Ibid. at para. 79.
parent be provided with legal counsel, and trial judges should not, in my view, consider the issue from the starting point that counsel will be necessary to ensure a fair hearing only in rare cases.\textsuperscript{17}

\textit{J.G.} has been cited in over 400 cases of which approximately 100 deal with some aspect of the right to state-funded counsel or access to justice issues. In the 14 years since \textit{J.G.} was decided, the right to state-funded counsel has been extended to very few other types of proceedings. For example, claims have been successful in some cases involving complex quasi-criminal offence proceedings,\textsuperscript{18} but not for:

- a human rights hearing\textsuperscript{19}
- several family law cases\textsuperscript{20}
- a case asserting a right to counsel in a property title matter\textsuperscript{21}
- a employment benefits case.\textsuperscript{22}

From 2009 to 2012, 24 Canadian judgments cited \textit{J.G.} in the context of applications for state-funded counsel. Twelve were administrative matters (eight child protection proceedings, three prison hearings and one extradition hearing), one was a human rights proceeding between private parties, and eleven were criminal cases. In the same period of time, there were 33 reported \textit{Rowbotham} application decisions, including the eleven criminal cases that also cited \textit{J.G.}

The biggest victory since \textit{J.G.} is, arguably, the \textit{T.L.} case. Here, parents involved in child welfare proceedings were financially ineligible for legal aid but also could not afford to pay counsel. The provincial court extended \textit{J.G.}, ordering that publicly-funded counsel be provided to the parents.\textsuperscript{23} This decision was upheld by the BC Supreme Court.\textsuperscript{24} The Attorney General appealed the decision but later abandoned the appeal. Similar claims

\textsuperscript{17} \textit{Ibid.} at para. 83.
\textsuperscript{18} \textit{R. v. Francis}, 2007 NSPC 28.
\textsuperscript{19} \textit{Hawkes v. Human Rights Commission (PEI) & Ano.}, 2007 PESCAD 1.
\textsuperscript{21} \textit{Lawrence v. British Columbia}, 2003 BCCA 379
\textsuperscript{22} \textit{Arbic v. British Columbia (Ministry of Housing and Social Development)}, 2011 BCSC 410.
\textsuperscript{23} \textit{Attorney General (British Columbia) v. T.L.}, 2009 BCPC 29 (per Skilnik, J.).
\textsuperscript{24} 2010 BCSC 105 (per Adair, J.).
had been raised unsuccessfully in earlier cases in Ontario, Yukon, and Saskatchewan.  

These four cases foundered on the issue of whether the claimants had proven their indigence.

In several prison law matters, the courts have applied an advance cost type of analysis and decided that while the individual inmate clearly required counsel there was insufficient “public interest” in the matter to warrant state-funded counsel.

Since 2009, there have been seven reported judicial reviews of immigration/refugee determinations, which were allowed on the basis that the hearings should have been postponed to allow the applicants to obtain or consult with counsel. However, none of these decisions conducted a full J.G. analysis to determine whether counsel should have been provided, but only considered whether the applicants should have been given the opportunity to attempt to secure counsel.

This poor record is not determinative; it must be remembered that J.G. emphasizes that the right to state-funded counsel applications under section 7 of the Charter are highly fact-specific and require an individualized contextual inquiry. So, these precedents do not bar future claims. A review of the body of case law developing under J.G. and related issues clearly illustrates how the law is being skewed by the fact that, in the vast majority of cases, the court only hears argument from one party, the Attorney General. Outside of some criminal law cases, the imbalance in positions is palpable. In a few cases, notably T.L., duty counsel has stepped in to briefly elucidate some point of law but for the most part the government’s submissions are not countered. This deep unfairness, which goes to the very heart of the rule of law and the meaningful protection of constitutional rights, is a further reason for concerted action by the CBA and its allies in pursuing test case litigation on the right to counsel in non-criminal matters.

The original CBA case pled causes of action based on sections 7, 15 and 28 of the Charter as well as other constitutional provisions and fundamental principles all as interpreted through international human rights obligations. The potential for asserting


a right to publicly-funded counsel as an aspect of the right to equal benefit and equal protection of the law remains unexplored in the courts. The CBA Test Case Committee opined that equality-based arguments would be particular important in family law and poverty law matters. In a BC family law right to counsel case, P.D. based her claim on Charter sections7, 15 and 28, as well as fundamental constitutional principles. In reasons determining a preliminary issue, Voith J. recognized that a reasonable cause of action could be founded on section15.28 Unfortunately the constitutional case has not proceeded due to a combination of factors, including lack of counsel resources and changes in the individual litigant’s situation. Furthermore, there is helpful obiter on the import of section 28, which guarantees all Charter rights equally to women and men, in Bastarache J.’s concurring reasons in R. v. Kapp.29

In 2010, the CBA Test Case Advisory Committee decided that other constitutional causes of action, such as arguments based on fundamental constitutional principles (rule of law, equal access to justice, independence of the judiciary) or section 36(1) (c) of the Constitution Act, which guarantees “essential public services of reasonable quality to all Canadians”, should not be pursued at that time given the state of the jurisprudence.30

3. US National Civil Right to Counsel Movement

The National Coalition for Civil Right to Counsel was established in 2004 and currently has about 240 organizations from 35 states. Participants come from legal aid organizations, public interest law firms, the private bar, academia, and state and local bar associations. A staff attorney at the Public Justice Center, Jonathan Pollock, serves as coordinator. The Coalition’s mission is to “encourage, support, and coordinate advocacy to expand recognition and implementation of a right to counsel in civil cases.”31 The Coalition leadership meets once a month by conference call. The Coalition has filed amicus briefs in four right to counsel cases.32

The Coalition’s website highlights the following advances achieved through litigation:

28 P. D. v. British Columbia, supra, note 10 at paras. 23, 66-103, Voith J. also set out some of the hurdles to be faced in P.D.’s section15 claim at paras. 153-158.


30 Christie, supra, dampened the enthusiasm for arguments based on the rule of law; and Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General), 2009 NSCA 44 severely circumscribes the potential of section 36(1)(c).

31 www.civilrighttocounsel.org/about_the_coalition/coalition_basics/

32 Links to the facta: King v. King, Parrish v. Romfeldt-Mendoza (In re KJP), In re McBride, and In re C.M.
In re E.H.

In this Washington Court of Appeals case, a juvenile court granted concurrent jurisdiction to the family court to conduct non-parental custody proceedings for a dependent child as well as evaluate possible reunification of the child with one of his parents. Among other issues, the court considered whether the parents have a right to counsel in the non-parental custody proceeding. The governing statute in Washington provides for a right to counsel “at all stages of a proceeding in which a child is alleged to be dependent.” The Court of Appeals found in September 2010 that the concurrent family court proceeding, in which the trial court would consider whether the child should return home, was a “stage of” and inextricably linked to, the juvenile proceedings that entitled the parents to appointed counsel. Because of its statutory holding, the court declined to reach a decision as to whether the state or federal constitutions required counsel in such proceedings. Although the opinion was originally unpublished, advocates in Washington successfully petitioned the court to publish the opinion.

In re I.B.

On Sept. 21, 2010, the Indiana Supreme Court issued a decision holding that parents in termination of parental rights cases have a right to counsel on appeal as a matter of statutory construction. In so ruling the Supreme Court overturned a Court of Appeals decision.

Franco-Gonzalez v. Holder

The Northwest Justice Project in Washington State and other organizations have filed a class action lawsuit against the United States arguing that, among other things, that the United States must provide appointed counsel for mentally disabled detainees in immigration proceedings under the Immigration and Nationality Act (INA), the Fifth Amendment, and the Rehabilitation Act. The district court judge has since ruled that 2 of the plaintiffs had a right to representation under the Rehabilitation Act.

Leone v. Owen

The Ohio Court of Appeals, 6th District, found a due process right to appointed counsel for respondent juveniles in civil protection order proceedings. The court first noted that being subjected to a civil protection order is not a criminal offense, and so there is ordinarily no due process protection, but that certain civil proceedings, including civil contempt, do create a right to counsel in Ohio. The court noted that “in all other cases dealing with children as parties, due process demands appointed counsel or a guardian to represent a minor child:
...." Thus, it was aberrant to deny juveniles appointed counsel in civil protection hearings that "may lead to criminal sanctions." The court also concluded that the juvenile had not waived his right to counsel, and that "[a]ppellant's young age alone would indicate that he should have been appointed counsel."

**In re D.R./A.R.**

The Washington Supreme Court recently granted review in In Re D.R./A.R., a case questioning whether children in Washington dependency cases have a right to counsel. The Court of Appeals refused to hear the question on mootness/jurisdictional grounds (since the state conceded that the particular mother in the case should have been appointed counsel as a discretionary matter).

**Bellevue School District v. E.S.**

The Washington Supreme Court heard oral argument on Jan. 19, 2010, on whether a child has a right to counsel at an initial truancy hearing. Almost exactly one year earlier, on Jan. 12, 2009, an appellate court found that due process required appointment of counsel for a 13-year-old accompanied at the hearing only by her mother, who spoke little English.

Several advocacy organizations appeared as *amici* in the Supreme Court. They were TeamChild and the Committee for Indigent Representation and Civil Legal Equality (CIRCLE) in Washington, the Juvenile Law Center in Philadelphia and the ACLU of Washington.

Under state law, a finding of truancy could lead to a finding of contempt, sanctions for which could include incarceration. In its ruling the appellate court relied heavily on the lesser capacity of children than of adults to understand legal proceedings and to advocate their own interests.

**Rhine v. Deaton**

The U.S. Supreme Court denied a petition of *certiorari* in this termination of parental rights case from Texas in which the mother was denied appointed counsel in the trial court. She claimed denial of equal protection and that the trial court failed to engage in a *Lassiter* due process analysis. (NB: *Lassiter* is a US Supreme Court decision which, like *J.G.*, found that there was no general right to counsel in child welfare proceedings and that the court had to decide on whether counsel was needed on a case by case basis). The Texas Supreme Court denied review, and after asking the Texas Solicitor General to file a response brief, the U.S. Supreme Court denied review as well.
Office of Public Advocacy v. Alaska Court System

The Alaska Supreme Court declined to rule in this case, dismissing an appeal that arose from a custody case involving an unrepresented mother's request for appointment of counsel when her opponent was represented by a private agency. An indigent party in Alaska has a statutory right to counsel when the opponent is represented by a public agency.

The American Bar Association filed an amicus brief with the Alaska Supreme Court in support of the mother's right to counsel; other amicus briefs were those from retired Alaska judges and from legal services providers.

Originally the Alaska Court System was directed to appoint counsel to represent the mother, with the court citing the due process and equal protection clauses of Alaska's Constitution. The trial court later changed its ruling to appoint the Alaska Office of Public Advocacy to represent the mother, citing statutory and equal protection grounds. The Office of Public Advocacy appealed, and after oral argument the Supreme Court requested briefing on mootness. The positive trial court ruling stands, although it lacks precedential value.  

While this update seems somewhat out of date, it does provide an idea of the range of cases and the twist and turns experienced in US civil right to counsel litigation. Very recently, in January 2013, the Ohio Supreme Court recognized a right to counsel in guardianship review proceedings. In Ohio v. McQueen, a litigant argued that he had a right to state-funded and appointed counsel for review of court-imposed guardianships. The litigant had been appointed counsel for the establishment of the guardianship as per an Ohio statute, but the state argued that the statutory right did not extend to annual review proceedings. In its opinion, the Ohio Supreme Court ruled that "there is no doubt in the provisions" and that the right to counsel did extend to such proceedings. The Coalition provided assistance to the petitioners and amici in this case.  

Members of the Coalition have also been very active on the law reform front; seeking legislative amendments that guarantee a right to state-funded counsel within a specific statutory context. For example, the Connecticut Legislature passed a bill requiring that the court appoint a child-directed attorney in all child protection proceedings (as opposed to an attorney acting as both attorney and guardian ad litem), and specifies a separate guardian ad litem can only be appointed upon request of the child's counsel.

33 www.civilrighttocounsel.org/advances/litigation/
34 www.civilrighttocounsel.org/news/recent_developments/
where it becomes apparent that the child cannot act in his/her own best interests and where the child's wishes would cause harm to the child.35

Coalition members have also been successful in having legislatures adopt measures to initiate right to counsel pilot projects. For example, California Assembly Bill 590, the Sargent Shriver Civil Counsel Act, which creates pilot projects to appoint counsel for low-income Californians in cases affecting basic human needs, was signed into law in October 2011 and became operational later that year. The Bill had received wide support, including from both parties in the legislature and editorial support from The New York Times.36

The Coalition has held several national one-day conferences on the civil right to counsel to maintain momentum of this movement. These events are often held in conjunction with a meeting of the National Legal Aid and Defender’s Association.

4. Discussion Questions

This brief overview of the CBA litigation, the post-J.G. right to counsel cases and the US National Coalition for Civil Right to Counsel provides a framework for discussions about whether and how to advance litigation on the right to counsel in non-criminal matters. Many questions remain as to what strategies could work in the current constitutional climate in Canadian courts including:

- Is the moment ripe for particular constitutional challenges (type of matter, causes of action, jurisdiction)?

- What are the greatest challenges? Opportunities?

- What are the prospects for building a larger coalition to work on test-case litigation?

- Should litigation be coupled more closely with other forms of strategic advocacy?

35 www.civilrighttocounsel.org/advances/legislation/
36 www.civilrighttocounsel.org/advances/legislation/