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The Impact of Litigation on Public Policy

Hugh Trenchard*

ABSTRACT

Litigation and public policy comprise an interconnected socio-political system that resides at the intersection between public policy, politics, and administrative and constitutional law. This paper reviews and considers examples of this policy-litigation interplay as it emerges in the following subject areas: litigation for the intended purpose of changing government policy, as contrasted with public interest litigation; state budgetary constraints and allocations for courts and administrative tribunals; legal aid funding; restorative justice, legal fee regimes and matters of access to justice; class actions and litigation involving standard-form contracts. A general policy trend is observed by which programs are funded to prevent litigation before it occurs.

1. INTRODUCTION

Civil litigation is a major cornerstone of modern, post-war, global society. Between 1960 and the early 1990s, many countries saw steadily increasing litigation volumes, albeit with considerable fluctuations.¹ For instance, between 1965 and 1975 in the United States "a legal explosion" occurred which saw the number of federal appellate cases increase from 5000 to 15000.² However, in more recent decades, the trend has reversed in the United States, as well as other countries, including Germany, Japan, the Netherlands, and the United Kingdom.³

Data compiled by Statistics Canada indicates that between 2006 and 2007 there was a modest 4.2 % increase in civil litigation nationwide.⁴ This was

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¹ Gerhard Clemenz and Klaus Gugler, "Macroeconomic Development and Civil Litigation" (2000) 9:3 *European Journal of Law and Economics* 215, at 219.

² John H Barton, "Behind the Legal Explosion" (1975) 27:3 *Stan. L. Rev.* 567, at 567, note 2.

³ Avner Levin and Asher Alkoby, "More lawyers, more litigation? Exploring trends in litigation and the legal profession in Ontario, Canada" (2021) 11:2 *Onati. Socio-Legal Series* 535, at 541.

followed by a remarkable increase of 13.9 % between 2007 and 2008 and by another substantial increase of 11.5% between 2007 and 2008. Since 2009, the trend has flattened, remaining relatively constant.⁵ This rise exceeds population growth between 2005 and 2020, which sits at 1.09%.⁶ The substantial 2008 increase in civil litigation relative to population growth coincides with the collapse of global markets occurring that year.^{7,8}

Fluctuations in civil litigation rates have many causes, including shifts in socio-economic development,⁹ social complexity, state regulation, mass production and consumption, and economic growth.¹⁰ These changes are also generally connected to public policy. In turn, fluctuations in civil litigation rate also influence public policy. Hence, in the integrated litigation-policy system, causality flows in both directions: policy may be legislated or acted upon by the state, giving rise to litigation; and court decisions that follow litigation may oblige the state to change existing policy or to implement new policy. Moreover, multiple iterations of the process can occur, during which the causal direction may become something of a chicken-or-egg scenario in which there is continuous tension between policy and litigation.

The implications of this litigation-policy tension are multi-faceted. In this paper, I do not attempt a comprehensive treatment of this broad topic. Instead, my objective is simply to conceptualize the policy-litigation interaction as comprising a system or sub-system that resides at the intersection between public policy, politics, and administrative and constitutional law, and to discuss some examples of this system.

Thus, I review the policy-litigation interplay as it emerges in the following areas: private-party attempts to litigate for the intended purpose of changing government policy, as contrasted with constitutional challenges to legislation; state budgetary constraints and allocations for courts and administrative tribunals; legal aid funding; restorative justice, legal fee regimes and matters of access to justice; and last, class actions and litigation involving standard-form contracts. Where there may be a choice of similar examples across Canadian jurisdictions, I focus on examples from British Columbia.

Statistics Canada — Civil court cases, by level of court and type of case, Canada and selected provinces and territories — Table 35-10-0112-01, online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510011201>.

Ibid.

Statistics Canada — Surveys and statistical programs — Chart 1 Population growth rate, 1999/2000 to 2019/2020, online: <https://www150.statcan.gc.ca/n1/daily-quotidien/200929/cg-b001-eng.htm>.

Kimberly Amadeo, "Top 10 Economic Events in 2008 — How the World Changed in Just One Year" (updated September 25, 2020) *The Balance*, online: <https://www.thebalance.com/top-ten-economic-issues-in-2008-year-in-review-3305686>.

Levin and Alkoby (2021), *supra* note 3, at 551.

David S. Clark, "Civil Litigation Trends in Europe and Latin America since 1945: The Advantage of Intracountry Comparisons" (1990) 24:2 *Law & Soc'y Rev.* 549, at 550.

Richard Abel, "Forecasting Civil Litigation" (2009) 58:2 *DePaul Law Review* 425, at 427-434.

2. LITIGATION TO CHANGE PUBLIC POLICY

Generally, civil litigation arises out of disputes between parties over factual circumstances; it cannot occur in hypothetical circumstances in the absence of factual evidence.¹¹ This is true for both actions in which parties seek declaratory judgments to interpret contracts¹² or legislation¹³ and for constitutional questions.¹⁴

In the context of evolving public policy, civil litigation must be distinguished from political lobbying or elections. The former arises from the legal process of resolving disputes between litigants in the context of existing facts; the latter arises from the process of electoral candidates proposing policy change during election campaigns. Moreover, it is important to note that in the context of litigation between private parties, policy change might occur without the parties seeking it. Indeed, policy or legislative revisions made after litigation are often not the result of parties pleading or arguing for such changes, but rather the consequence of government actors who learn from that litigation and recognize the need for new or updated regulatory regimes that impose specific obligations on persons and organizations.

Parties to litigation may be individuals, governments, corporations, societies, classes of persons, and sometimes third parties, among others. In addition to being a legal precondition, the question of whether or not a party has standing to litigate is an important policy question because it addresses the high cost to society that a widely permissive approach to standing involves. Except under class actions¹⁵ or other statutorily authorized representative actions like labor unions actions,¹⁶ or certain shareholders actions,¹⁷ parties typically seek resolution before the courts or tribunals on issues that affect them directly; and, in general, they do not have standing to sue on behalf of third parties who have no direct interest in a proceeding.¹⁸ The policy rationale for this is "to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere 'busy body' litigant, and to ensure that courts have the benefit of contending points of view of those most directly affected."¹⁹ Nonetheless, it is not always necessary for parties to

¹¹ *Vision Avant-Garde Inc. v. Superintendent of Financial Institutions*, 2000 BCSC 423 (B.C.S.C.) at paras. 9-22 [*Vision*].

¹² *Solosky v. The Queen* (1979), [1980] 1 S.C.R. 821 (S.C.C.) at 830-832.

¹³ *Vision*, *supra* note 11, at para 19.

¹⁴ *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 (S.C.C.) at 361-362.

¹⁵ *Vince Morabito*, "Standing to Sue and Multiple Defendant Class Actions in Australia, Canada, and the United States" (2003) 41 *Alberta L.R.* 295, at 296-298.

¹⁶ *Alan Bogg*, "Labor Law is a Subset of Employment Law" Revised" (2020) 43:2 *Dalhousie L.J.* 1, at 19.

¹⁷ *Stern v. Imasco Ltd.* (1999), 1 B.L.R. (3d) 198 (Ont. S.C.J.) at para. 78.

¹⁸ However, if numerous parties do in fact have the same interest in a proceeding, an action may be commenced by a representative: e.g., *Court Rules Act*, Supreme Court Civil Rules, B.C. Reg 168/2009, Rule 20-3 Representative Proceedings.

obtain standing or even to intend to litigate their claims to initiate policy change because, in some circumstances, simply filing claims may draw public attention and spur governments to act.²⁰

(a) Public interest litigation

As a mechanism for adjudicating policy issues or matters of broad public interest, courts have increasingly recognized that public interest litigation may be an appropriate means for bringing issues of public interest and importance before the courts.²¹ A key consideration in this matter is whether public litigation may provide access to justice for the poor and marginalized.²² This was the case in *Canada (A.G.) v. Downtown Eastside Sex Workers*,²³ in which the evidence showed that sex workers operating in the Vancouver downtown eastside were unanimously unwilling to commence an action due to a variety of concerns which the Supreme Court considered legitimate and compelling.²⁴ By facilitating access to justice through representative actions in *Downtown Eastside*, the Supreme Court was able to address the social policy concern of access to justice for communities or classes of society who, for many reasons, may be unable to litigate.

In *Downtown Eastside*, the respondents ultimately sought to challenge the constitutional validity of the prostitution provisions of the *Criminal Code of Canada*.²⁵ The action involved a legal challenge to existing legislation, as opposed to one in which the express litigation purpose was to force the state to introduce new legislation or policy. There is a subtle legal distinction between challenging legislation and asking the government, through litigation, to make new legislation. By challenging existing legislation, especially at the constitutional level, litigants attack not just procedural or definitional statutory problems, but also underlying social norms, attitudes and political views that are constantly evolving. So, while the legal objectives may differ as between public interest challenges to legislation, and litigation that directly seeks legislative change, the results may be much the same.

(b) Litigation intended to force government policy changes

While constitutional challenges may inherently but unintentionally cause state changes in social policy, numerous examples exist in which demonstrable detrimental impacts exist to large groups and populations, compelling parties

to litigate expressly with the intention of forcing governments to regulate. I briefly explore examples from environmental and labor litigation.

(i) Environmental litigation

Recent examples include climate-change actions occurring in the Netherlands, Germany, and Canada. In *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*²⁶ the Supreme Court of the Netherlands upheld lower court decisions that compelled the Dutch state to reduce the emission of greenhouse gases originating from Dutch soil by the end of 2020, by at least 25% compared to 1990.

Perhaps the most groundbreaking aspect of this case is that the plaintiffs in the original action, the Dutch environmental group Urgenda Foundation and 900 Dutch citizens,²⁷ proceeded against the Dutch government based on a scientifically credible scenario and the dangerous risk of future harm and “urgent necessity” for action,²⁸ rather than against corporations for post-lis consequences and compensation for tortious actions. The Supreme Court relied largely on the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) to find that the Netherlands was obliged to take suitable measures to protect citizens against risks to lives and welfare, including environmental hazards.²⁹ While the Netherlands argued that the courts inappropriately relied on political considerations in rendering its decision to impose regulatory obligations on the state, the Court concluded:

It is up to the courts to decide whether, in taking their decisions, the government and parliament have remained within the limits of the law by which they are bound. . . . This mandate to the courts to offer legal protection, even against the government, is an essential component of a democratic state under the rule of law.³⁰

A similar decision was made by the German Federal Constitutional Court in *Neubauer et al. v. Germany*³¹ in which the court observed that the “right to life and physical integrity” of the Basic Law of Germany, a German constitutional statute,³² imposes a positive duty on the state “to protect and promote the legal interests of life and physical integrity and to safeguard these interests against unlawful interference by others.”³³

²⁶ *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, [2019] Number 19/00135 (Supreme Court of the Netherlands) [unofficial English translation] [S.C. Netherlands].

²⁷ Online: <http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/>.

²⁸ S.C. Netherlands, *supra* note 26, at 5.

²⁹ *Ibid.*, at 4.

³⁰ *Ibid.*, at 5.

³¹ *Neubauer et al. v. Germany*, 1 BVR 2656/18 78/20 96/20 288/20 (Federal Constitutional Court) at para. 90 [Neubauer].

³² *Basic Law for the Federal Republic of Germany*, 23 May 1949, last amended 29 September 2020.

¹⁹ *Canada (A.G.) v. Downtown Eastside Sex Workers*, [2012] 2 S.C.R. 524 (S.C.C.) [*Downtown Eastside*], per Justice Cromwell, at para. 1.

²⁰ David Hunter, “The Implications of Climate Change Litigation for International Environmental Law-Making” (2007) American University WCL Research Paper no. 2008-14, Online: <http://papers.ssrn.com/sol3/papers.cfm?abstractid=1005345>, at 12.

²¹ *Supra* note 19, at para. 22.

²² *Ibid.*, at para 51.

²³ *Supra* note 19.

²⁴ *Ibid.*, at para. 71.

²⁵ *Criminal Code of Canada* R.S.C. 1985, c. C-46.

By contrast, section 7 of the *Charter of Rights and Freedoms*³⁴, the equivalent Canadian constitutional provision, has to-date not been interpreted to impose positive obligations on Canadian governments³⁵ to offer similar legal protection although the Supreme Court of Canada has said that "One day s.7 may be interpreted to include positive obligations."³⁶ By contrast, section 15 of the Charter which relates to equality rights, has been held to impose a duty to take positive action.³⁷ In the Canadian federal court decision, *LaRose v. Her Majesty the Queen in Right of Canada*³⁸ the plaintiffs sought to impose a positive obligation on the federal government to develop "an enforceable climate recovery plan that is consistent with Canada's fair share of the global budget plan".³⁹ The federal trial court held the issue was not justiciable "on the basis that there are some questions that are so political that the Courts are incapable or unsuited to deal with them"; in these circumstances, the plaintiffs' allegations of "overly broad and unquantifiable number of actions and inactions" did not meet the threshold under which policy could be translated into law or state action.⁴⁰ The matter is under appeal before the Federal Court of Appeal⁴¹ and as of December 20, 2021, no decision has been published.

The decision of the court in *La Rose* was similar in outcome to that of the 2020 Oregon appeal court decision in *Juliana v. U.S.*⁴² In *Juliana* the court did not "throw up [its] hands" by concluding that the plaintiff's claims are non-justiciable.⁴³ Essentially, however, it did just that in saying:

Not every problem posing a threat — even a clear and present danger — to the American Experiment can be solved by federal judges. . . . We reluctantly conclude, however, that the plaintiff's case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box.⁴³

³³ *Neubauer*, *supra* note 31, at para. 145.

³⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 91(24), s. 7 [Charter].

³⁵ Department of Justice, "Section 7 — Life, liberty and security of the person" (2021), online: <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/cerf-cedl/check/art7.html>, accessed August 10, 2021.

³⁶ *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 (S.C.C.) at para. 82.

³⁷ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.) at para. 80.

³⁸ *La Rose v. Canada*, 2020 FC 1008 (F.C.) [*LaRose*].

³⁹ *Ibid.*, at para. 12(f).

⁴⁰ *Ibid.*, at para. 40.

⁴¹ *La Rose et al. v. Her Majesty the Queen in Right of Canada and the Attorney General of Canada* (November 24, 2020), Doc. A-289-20.

⁴² *Juliana et al. v. U.S.*, 947 F.3d 1159 (9th Cir., 2020) [*Juliana*].

⁴³ *Ibid.*, at 1174-1175.

It is difficult to reconcile the diametrically opposed views of the North American and European courts. The Dutch and German courts take the view that courts have a duty to impose upon governments a positive obligation to act when citizens' constitutionally protected rights are under massive threat. On the other side of the Atlantic, the current and prevailing view is essentially that politics trumps law when the problem is both real and present and wide enough in scope as to be legally intractable. Arguably, by failing to impose action on governments North American courts must fail to grasp the enormity of the problem. The severity of the problem is registered in the fact that "the plaintiffs have made a compelling case that action is needed"⁴⁴ and yet the courts are prepared to yield to the political branches "even if those branches walk the Nation over a cliff."⁴⁵ The reality seems to be that for the North American judges the cliff's edge just is not near enough to compel them to impose action on the political branches. Surely, if the judges were aware they were staring down a cliff, they would not permit government inaction on policy change.

Nonetheless, a different decision was rendered by the Ontario Supreme Court of Justice in *Mathur v. Ontario*.⁴⁶ In this case, the plaintiffs challenged Ontario's targets for greenhouse gas reductions by 2030 and sought mandatory orders for Ontario to increase reductions.⁴⁷ Ontario sought to have the plaintiff's claims dismissed on the basis that the claims were not reviewable, provable or justiciable; further, Ontario claimed the targets and reductions had no reasonable prospect of success and depended on the inappropriate imposition of positive obligations on the state.⁴⁸ Justice Brown dismissed each of Ontario's arguments on these points and allowed the claims to proceed. No decision on its merits has been published as of December 20, 2021; and, pending a decision from the Supreme Court of Canada, the direction of Canadian courts with respect to litigation that prevents climate disaster remains to be determined.

(ii) Labor litigation

Labor litigation is another subject area in which there has been identifiable two-way interplay between law and public policy. Indeed, at least in the American context, it is arguable that labor litigation has been a significant agent of social change and has altogether altered American society.⁴⁹ This is demonstrated at the basic level of legal funding. For instance, some unions

⁴⁴ *Ibid.*, at 1175.

⁴⁵ *Ibid.*, at 1184.

⁴⁶ *Mathur v. Ontario*, 2020 ONSC 6918 (Ont. S.C.J.), leave to appeal refused *Mathur v. Her Majesty the Queen in Right of Ontario*, 2021 CarswellOnt 4050 (Ont. Div. Ct.), additional reasons *Mathur et al. v. Ontario*, 2021 CarswellOnt 8987 (Ont. S.C.J.) [*Mathur*].

⁴⁷ *Ibid.*, at paras. 2, 132.

⁴⁸ *Ibid.*, at para. 43.

⁴⁹ Charlotte Garden, "Union Made: Labor's Litigation for Social Change" (2013) 88:2 Tul.L. Rev. 193, at 194-195.

have provided active workers, retirees, and workers' spouses with access to free civil legal services.⁵⁰ Also, unions may facilitate associational standing in which representative groups litigate on behalf of members.⁵¹ Similarly, labor unions are often granted amicus standing in cases involving a wide range of concerns, often among subjects outside labor law.⁵² The wide scope of litigation supported by unions inherently invests unions with considerable power to effect broad social policy change, in areas as diverse as workplace and employment rights, sex and gender discrimination in the workplace, maternity rights, constitutional rights of public sector employees, rights to free speech and assembly, participation in the political process through protest and petitioning, as well as matters involving separation of powers.⁵³

An interesting Canadian example that altered British Columbia legislation and social policy which illustrates interaction between law and policy is the turn-of-twentieth-century case of *Union Colliery v. Bryden*.⁵⁴ This case involved a section of coal-mines regulations that restricted Chinese from working underground. Ultimately, the Privy Council overturned the provincial legislation on the basis that it encroached on the federal power to legislate over aliens and naturalized citizens.⁵⁵ While the decision was not framed in terms of human rights issues, being more of a contest between organized labor and capitalists over the freedom to contract, its effect was to protect the interests of Chinese workers in British Columbia.⁵⁶

Following *Bryden*, in 1922 the Supreme Court of Canada held that British Columbia acted *ultra vires* of its constitutional authority by enacting restrictions on the employment of Chinese and Japanese in connection with contracts, leases, and concessions entered into with the government.⁵⁷ The court largely founded its ruling on an international treaty between Japan and Britain that promised mutual non-discrimination of citizens.⁵⁸ These decisions pre-date human rights legislation and constitutional amendments prohibiting discrimination on various grounds, and demonstrate that litigation with roots in labor and contractual relations, and involving the division of federal/provincial powers, manifestly shaped public policy regarding human rights in the early decades of Canadian federalism.

⁵⁰ *Ibid.*, at 203.

⁵¹ *Ibid.*, at 204.

⁵² *Ibid.*, at 204.

⁵³ *Ibid.*, at 209-222.

⁵⁴ *Union Colliery Co. of British Columbia v. Bryden*, [1899] UKPC 58 (Jud. Com. of Privy Coun.) [*Bryden*].

⁵⁵ *Ibid.*, at 7; see Alan Grove and Ross Lambertson, "Pawns of the Powerful — The Politics of Litigation in the Union Colliery Case" (1994) B.C. Studies, No. 103, at 4-5.

⁵⁶ *Ibid.*, at 5.

⁵⁷ *In Re Employment of Aliens*, 63 S.C.R. 298 at 295, 341.

⁵⁸ *Ibid.*, at 303.

3. STATE BUDGETARY CONSIDERATIONS

Between the 2016/17 and estimated 2022/23 Ministry of Attorney General and Ministry of Public Safety and Solicitor General service plans, the estimated and actual budgets for British Columbia government services associated with litigation increased about 25%. This includes expenses for justice services; court services; legal services; agencies, boards, commissions, and tribunals; executive and support services; and the judiciary. It is not possible to extract the proportion of this budget that might be allocated strictly toward civil litigation; however, it excludes consideration of prosecution services, which consists of expenses for Crown counsel in handling criminal and most offence prosecutions.⁵⁹ The total value of these prosecution services is about 80% of the total Ministry of Attorney General and Ministry of Public Safety and Solicitor General budget of over \$605 million in 2020/21. The total government operating expense is \$69.1 billion.⁶⁰ Although this is less than 1% of the entire provincial budget, which comprises 25 ministries and appropriations, it ranks 14th in British Columbia's government expenditures.⁶¹ We can expect similar expenditures by proportion in other Provinces. Obviously, these expenditures are regulated by public taxation policy that is intended to determine the most appropriate and efficient allocation of taxpayers' dollars.

Thus, with the aim of reducing the strain on the public purse, the 2021 Service Plan identified "innovative ways to move certain types of disputes out of courtrooms," including The Accident Claims Transformation Project (ACTP) that enabled the recently established (2018) Civil Resolution Tribunal (CRT), an administrative tribunal intended to handle minor public motor vehicle insurance claims using online dispute resolution.⁶²

The ACTP is controversial because it involves a no-fault insurance scheme aimed at reducing expenses associated with lawyers and expert witnesses in certain circumstances.⁶³ This scheme was challenged by the Trial Lawyers Association of British Columbia⁶⁴ on the basis that derogating jurisdiction of motor vehicle accident claims to the CRT violates both the exclusive

⁵⁹ Ministry of Justice and Ministry of Public Safety and Solicitor General 2017/18 — 2019/20 Service Plan, February 2017; British Columbia; Ministry of Attorney General and Ministry of Public Safety and Solicitor General 2020/21 — 2022/23 Service Plan, February 2020, British Columbia [2021 Service Plan].

⁶⁰ British Columbia — Budget 2021 Backgrounder, Economic Snapshot: Investing in a strong economic recovery for B.C., April 20, 2021, online (pdf): [https://www.bcbudget.gov.bc.ca/2021pdf2021_Backgrounder_1_Fiscal\(3\)](https://www.bcbudget.gov.bc.ca/2021pdf2021_Backgrounder_1_Fiscal(3)).

⁶¹ British Columbia, Ministry of Finance — Estimates of Revenue Expenditure, ISSN 0707-3046 (pdf) Estimates, Fiscal year ending March 31, 2021, British Columbia, online: https://www.bcbudget.gov.bc.ca/2020_Estimates.

⁶² 2021 Service Plan, *supra* note 59, at 5.

⁶³ Richard Zussman, "B.C. government axing lawyer, legal costs to create no-fault styles insurance at ICBC" (February 7, 2020) *Global News*, online: <https://globalnews.ca/news/6516071/icbc-changes/>.

⁶⁴ Trial Lawyer Association of British Columbia v. British Columbia (Attorney

jurisdiction of the courts to hear such matters granted under section 96 of the Constitution⁶⁵, and the claimants' right to access the courts for the purpose of adjudicating their accident claims.⁶⁶ The British Columbia Supreme Court acceded to the major part of the plaintiff's arguments.⁶⁷ The Province has appealed this decision,⁶⁸ and as of December 20, 2021, no decision has been published.

Should it be upheld on appeal, the decision of Chief Justice Hinkson in *TLABC* has profound implications for the application of public policy that aims to limit costs to the taxpayers and insurance costs for drivers. The Attorney General argued that CRT jurisdiction was validated because the CRT is necessarily incidental to public policy objectives to both facilitate access to justice for low-value, high-volume motor vehicle accident claims, and to strike a balance between increased care for accident victims and more affordable and fair insurance rates.⁶⁹

The trial lawyers' association also presented an access-to-justice argument, but from a different angle, i.e., that the CRT is neither substantively nor procedurally comprehensive⁷⁰ and thereby limits claimants' access to justice. Thus, on one hand, the increased costs associated with insurance claims that must be litigated through the courts and handled by lawyers is both the price of the guarantee of core court jurisdiction afforded by section 96⁷¹ of the Constitution, as well as a guarantee of the highest standard of procedural fairness and substantive analysis. On the other hand, such a view implies that the CRT is not competent, in the colloquial sense, to apply these high standards of procedural fairness and substantive analysis to its decision-making processes.

From a taxpayer's perspective, the trial lawyers' position appears squarely aimed at preserving the cash-cow associated with motor-vehicle accident claims; it does not serve the public interest given that an administrative tribunal is surely competent (again, in the colloquial sense) to adjudicate the issues raised. Moreover, court oversight over tribunal decisions is retained by judicial review. It remains to be seen how the British Columbia Court of Appeal will address this constitutional conundrum and the public policy dilemma associated with reducing high motor-vehicle-accident litigation

⁶⁵ *General*, 2021 BCSC 348 (B.C.S.C.), additional reasons 2021 CarswellBC 2654 (B.C.S.C.) [*TLABC*].

⁶⁶ *The Constitution Act*, 1867, 30 & 31 Vict., c. 3.

⁶⁷ *TLABC*, *supra* note 64, at paras. 20-22.

⁶⁸ *TLABC*, *supra* note 64, at para. 414.

⁶⁹ *Trial Lawyer Association of British Columbia v. British Columbia (Attorney General)* (March 11, 2021), CA47320; (March 17, 2021), CA47332.

⁷⁰ *TLABC*, *supra* note 64, at para. 298.

⁷¹ *Ibid.*, at para. 366.

⁷² Section 96 "has been held to guarantee the core jurisdiction of provincial superior courts throughout the country": *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (S.C.C.) at para. 28.

volumes while maintaining the primacy of the rule of law. Undoubtedly, the matter will end up before the Supreme Court of Canada.

4. ACCESS TO JUSTICE

Canadian policymakers are highly concerned with matters of access to justice, and its associated issue, the cost of legal representation. While civil litigants do not have a constitutional right to consult counsel like those under arrest or detention by the state⁷², it is arguable that, given the principle of equality before the law, democratic governments have a constitutional obligation to ensure civil litigants access to justice.⁷³ Similarly, although there is no general constitutional right to state-funded legal counsel,⁷⁴ courts have found that in some non-criminal matters, legal aid may be a constitutional requirement.⁷⁵

Indeed, a positive obligation on governments to ensure access to justice exists in relation "not only to criminal matters but also to civil litigation concerning rights and obligations of a civil nature"⁷⁶ as imposed by Articles 2, 14(1) and 26 of the *International Covenant on Civil and Political Rights*.⁷⁷ Under the ICCPR, state parties are required to report to the United Nations on measures they have taken to give effect to the covenant; in Canada this includes the federal, provincial, and territorial governments.⁷⁸

The Human Rights Committee,⁷⁹ the agency that adjudicates claims under the ICCPR, has made it clear that Article 14 creates a right of access to justice in civil litigation, commenting that Article 14 confers "equal access and equality of arms" and encompasses "the right of access in cases of determination of . . . rights and obligations in a suit at law."⁸⁰ Similarly, the Human Rights Committee has interpreted the phrase "all persons shall be equal before the courts and tribunals" as preventing courts from imposing

⁷² *Canadian Charter of Rights and Freedoms*, s. 10(b), Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11; *R. v. Sinclair*, [2010] 2 S.C.R. 310 (S.C.C.) at para. 2.

⁷³ Melina Buckley, "Searching for the Constitutional Core of Access to Justice" (2008) *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*, 42 (2d) 567, at 577-582.

⁷⁴ *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 (S.C.C.) at para. 23.

⁷⁵ *Single Mothers' Alliance of BC Society v. British Columbia*, 2019 BCSC 1427 (B.C.S.C.) at paras. 90-103 [*Single Mothers' Alliance*].

⁷⁶ *Moraal v. France*, HRC Dec 207/1986, U.N. Doc. Supp. No. 40 (A/44/40) (1989) at para. 9.3.

⁷⁷ *International Covenant on Civil and Political Rights* G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171 [ICCPR], entered into for Canada March 23, 1976; see also Buckley, *supra* note 73, at 579.

⁷⁸ *International Covenant on Civil and Political Rights*, (2013) Sixth Report of Canada Covering the period January 2005 — December 2009; ICCPR, *ibid.*, Article 40.

⁷⁹ As established under article 28 of the ICCPR to hear complaints under the ICCPR. General Comment No. 32 Article 14: *Right to equality before courts and tribunals and to a fair trial*, UN CCPR/C/GC/32 32 August 2007.

costs on private parties that may have a chilling effect on their capacity to pursue justice. Indeed, the Committee considers that a "rigid duty under law to award costs to a winning party may have a deterrent effect on the ability of persons who allege their rights under the Covenant have been violated to pursue a remedy before the courts."⁸¹ The legal and policy consequence of the ICCPR and precedents such as the *Aarela* decision appears to be that Canadian jurisdictions (and indeed all states who are party to the ICCPR) must legislate solutions to access to justice issues in civil matters.

5. LEGAL AID

Legal aid is one mechanism for addressing cost impediments which prevent access to justice. Both the federal government and the provinces have made commitments to legal aid funding.⁸² In addition to criminal matters, legal aid regimes across Canada typically provide forms of financial aid to low-income persons involved in civil matters including family matters, housing and landlord and tenant, social benefits, employment insurance, and mental health, among others.⁸³ Civil matters account for over one-half of legal aid applications.⁸⁴

British Columbia has a checkered legacy in legal aid funding. British Columbia has long recognized the need for legal aid, and that low and middle-income citizens may have limited access to justice; however, the province has also furnished funding that was low in 2018-19 compared to other provinces, relative to population.⁸⁵ British Columbia justified relatively low funding on the basis that "access to courts cannot mean unlimited funding for legal representation. . . funding is necessarily limited by scarce resources and other social needs."⁸⁶

In his 2011 public commission on legal aid in British Columbia,⁸⁷ Leonard Doust, Q.C. described legal aid in British Columbia as the object of considerable budget reductions which began in 2002 at close to 40 percent.⁸⁸

⁸¹ *Anni Åhréið and Joana Nøktøið v. Finland*, Communication No. 779/1997 (4 February 1997), CCPR/C/73/D/779/1997 [*Åhréið*], at para. 7.2.

⁸² See e.g., *Legal Aid in Canada*, 2018-19, Government of Canada, Department of Justice, online: <https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/1819/p1.html>.

⁸³ Statistics Canada, "Legal Aid in Canada: Resource and Caseload Statistics" 2011/2012, online: <https://www150.statcan.gc.ca/n1/en/catalogue/85F0015X>, at 125 ("other civil matters") (last report 2011/2012); see also in Ontario, *Legalaid.ca* — What kinds of cases are covered by legal aid? online: <https://www.legalaid.ca/legal-answers/what-kinds-of-cases-are-covered-by-legal-aid/>.

⁸⁴ Statistics Canada, "Legal Aid in Canada: Resource and Caseload Statistics" 2011/2012, 6 [*Legal aid in Canada*].

⁸⁵ *Legal aid in Canada*, *supra* note 84.

⁸⁶ *Single Mothers' Alliance*, *supra* note 75, at para. 29.

⁸⁷ Leonard T. Doust, QC, "Foundation for Change — Report of the Public Commission on Legal Aid in British Columbia" (2011) Public Commission on Legal Aid.

⁸⁸ *Ibid.*, at 6.

Doust concluded that "We can no longer avoid the fact that we are failing the most disadvantaged members of our community, those for whom legal aid exists within our province."⁸⁹ Further, he made nine recommendations to address perceived deficiencies in the existing legal aid system.⁹⁰

In 2014, the crisis in legal aid in British Columbia resulted in Victoria lawyers withdrawing services for one week a month to protest chronic underfunding.⁹¹ Five years later, another report commissioned by the Attorney General, and drafted by Jamie McLaren, QC concluded that "It is time to move beyond speculation and anecdotal information and redesigning legal aid services."⁹² In terms of civil litigation, McLaren's recommendations included systemic improvements to assisting family law and poverty law services underscored by the need to fund services that prevent litigation before it occurs. This included funding Indigenous legal aid that includes preventative services, the creation of a child protection clinic to assist parents before protection concerns reach government intervention, and mechanisms to assist early resolution to avoid trials.⁹³ Some of McLaren's recommendations are being implemented; for example, in 2021 government policy commitments are addressing issues of access to justice for Indigenous people in British Columbia.⁹⁴

The appropriate extent of legal aid remains a matter of ongoing policy evaluation. Currently, British Columbia is evaluating and initiating public policy to improve access to justice.⁹⁵ Policy evaluations include consideration of legal aid funding for persons whose net income is below certain financial guidelines for family law matters,⁹⁶ in addition to analysis of legal aid funding for matters of criminal defense.⁹⁷ Moreover, the public purse does not allow unlimited public funding for civil litigation; and, if it did, there are no existing cost disincentives to stymie frivolous and vexatious litigation. However, it is not always true that legal aid potentially generates more litigation. Indeed,

⁸⁹ *Ibid.*, at 7.

⁹⁰ *Ibid.*, at 9-11.

⁹¹ Louise Dickson, "Lack of legal aid funding prompts Victoria lawyer protest" (July 9, 2014) *Times Colonist*, online: <https://www.timescolonist.com/news/local/lack-of-legal-aid-funding-prompts-victoria-lawyer-protest-1.1200567>.

⁹² Jamie McLaren, Q.C., "Roads to Revival — An External review of Legal Aid Service Delivery in British Columbia" (2019); conducted for the Attorney General of BC, at v.

⁹³ *Ibid.*, at ix-xi.

⁹⁴ Legal Aid Service Plan for 2021/22 — 2023/24, online (pdf): <https://www.bcbudget.gov.bc.ca/2021/sp/pdf/agency/labc.pdf>, at 9.

⁹⁵ Access to Justice BC — A Culture Shift in the Justice System, online: <https://accessjusticebc.ca/a-culture-shift/>; Law Society of British Columbia — Collaborations to Improve Access to Justice, online: <https://www.lawsociety.bc.ca/our-initiatives/access-to-justice/collaborations-to-improve-access-to-justice/>.

⁹⁶ Provincial Court of British Columbia — Who get legal aid, anyway? (2018), online: <https://www.provincialcourt.bc.ca/enews/enews-28-08-2018>.

⁹⁷ Government of Canada — Legal Aid Program — Overview, online: <https://www.justice.gc.ca/eng/fund-fina/gov-gouv/aid-aide.html>.

publicly funded civil litigation may deter activities that generate litigation in the first place. This was the finding of Lambert and Chappe, who observed that in the European Union, although publicly funded litigation can lead to an increase in accident cases being filed, there can also be a corresponding reduction in actual motor vehicle accidents and their attendant costs.⁹⁸ This finding suggests that public litigation funding may in fact lead to reduced costs in other socio-economic arenas. Lambert and Chappe's study, conducted in the context of European tort litigation, contained a vital analysis which demonstrated the potential positive impact of legal aid on other government-funded programs; it is hoped this will spur similar empirical studies in Canada.

6. RESTORATIVE JUSTICE

A different approach to reducing litigation costs is a restorative justice model. Restorative justice, ordinarily used in criminal proceedings, recognizes harms to communities and individuals and presents opportunities for accountability, dialogue and healing among affected parties. It proceeds more from an educational, than punitive paradigm. Applying these principles beyond criminal proceedings, this approach has also been employed in the resolution of disputed traffic violation tickets.⁹⁹ In this context, as Sarah Leamon argues, "restorative justice could take disputes out of the courtrooms and put them into the hands of participants."¹⁰⁰

A pilot of such a program called the "Safe Driver Dialogue Circle" was established in 2017, with "resoundingly" positive results.¹⁰¹ Such an approach ultimately requires a substantial change in public policy and buy-in from the public since it shifts away from punishment-based enforcement to an education-based approach in which parties come to understand the impact of their actions on others. Ultimately, this leads to reductions in the impugned behavior and activities.

7. FEE REGIMES AND ALTERNATIVE FUNDING MODELS

The rationale for generally entitling successful litigants to their costs is to compensate them for the expense of litigation. This promotes justice by not discouraging parties to litigate simply because litigation is costly. Similarly, imposing costs on losing parties — in particular, losing claimants — fulfills the policy objectives of deterring frivolous or unmeritorious claims, deterring improper or unnecessary steps in proceedings, and encouraging compliance

with court rules and procedures.¹⁰² At the same time, if cost awards are too high, claimants with legitimate disputes may be disincentivized to pursue their claims.

While legal aid is designed to facilitate access to justice for poor and marginalized members of society, other models exist to mitigate the chilling effect on access to justice that high litigation costs create.¹⁰³ For instance, court tariffs are aimed at striking a balance between the competing objectives of compensating the successful party and ensuring claimants have access to justice for the resolution of legitimate disputes.¹⁰⁴

Moreover, if parties are mandated to comply with court proceedings in order to meet the policy objectives of the "just, speedy and inexpensive determination of every proceeding on its merits,"¹⁰⁵ then the rules that govern those proceedings ought to be designed to facilitate these objectives. Thus, rules of court should be easy to understand and simple to apply; they ought not create more complex procedures than necessary and should encourage reasonable settlement by providing financial incentives along the litigation process.¹⁰⁶ Similarly, lawyers' rules of professional conduct, as a matter of public policy, should prohibit sharp practice (i.e., taking advantage of slips, irregularities, or mistakes by opposing parties not going to the merits of the case),¹⁰⁷ which contributes not only to increased litigation costs, but also to emotional and social damage.

In balancing these policy objectives, cost tariffs typically do not allow for costs incurred on a solicitor-and-client basis, although courts do retain jurisdiction to award solicitor-client costs if the conduct of an offending party is reprehensible, scandalous or outrageous.¹⁰⁸ So, in British Columbia, for example, the Supreme Court costs tariff permits the winning party to recover in the range of 25–30% of its solicitor and client costs incurred on a party-and-party basis.¹⁰⁹

In addition to the standard model in which parties personally fund litigation, there are several alternative models of litigation financing, such as unbundled legal services, third-party litigation funding, alternative fee arrangements, crowdfunding, legal expense insurance, and publicly funded litigation funds.¹¹⁰

¹⁰² Ante, Manitoba LRC, note 104, at 5-6.

¹⁰³ Erik S Knutsen, "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010) *Queens L.J.* 36, 113.

¹⁰⁴ Manitoba Law Reform Commission, "Costs Awards in Civil Litigation" (2005), Report #111, at 32 [*Manitoba LRC*].

¹⁰⁵ *Court Rules Act*, Supreme Court Civil Rules, B.C. Reg. 168-2009, Rule 1-1 (1).

¹⁰⁶ *Manitoba LRC*, *supra* note 104, at 5-6.

¹⁰⁷ *Xpress View Inc. v. Daco Manufacturing Ltd.* (2002), 36 C.C.E.L. (3d) 78 (Ont. S.C.J.), per Justice Nordheimer, at para. 15.

¹⁰⁸ *Kellogg Brown Root Inc. v. Aerotech Herman Nelson Inc.* (2004), 238 D.L.R. (4th) 594 (Man. C.A.) at para. 112, leave to appeal refused 2005 CarswellMan 35 (S.C.C.).

¹⁰⁹ Hon. Justice M. Macaulay, "Attorney General's Rules Revision Committee Discussion Paper on the Tariff of Costs" (2003) 61 *The Advocate* 699, at 699.

⁹⁸ Eve-Angeline Lambert and Nathalie Chappe, "Litigation with Legal Aid versus Litigation with Contingent/Conditional Fees" (2010) *Rev. Law Econ* 10:1, 95.

⁹⁹ Sarah Leamon, "Sarah Leamon: Province should embrace restorative justice to reduce carnage on B.C. roads" (July 24, 2021) *Georgia Straight*. Online: <https://www.straight.com/living/sarah-leamon-province-should-embrace-restorative-justice-to-reduce-carnage-on-bc-roads>.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

Without addressing each of these in detail, I briefly comment on third-party litigation funding because of a long-standing prohibition on third-party funding on the basis that it constitutes tortious conduct in the form of champerty and maintenance. Champerty arises when a third-party contracts with a plaintiff to share the proceeds of a claim in exchange for funding the claim; maintenance concerns assistance proposed by a third party to either litigant in a suit to which he or she has no legal interest in litigating.¹¹¹

Such a prohibition on third-party litigation funding can stifle access to justice for claimants of limited means. This has led courts to move away from prohibiting third-party litigation funding, and to impose a high-threshold test that determines such funding as tortious when it involves elements of "officials intermeddling, a stirring up of strife, or other improper motive."¹¹² In the 1979 British Columbia case *Wiegand v. Huberman*,¹¹³ Justice Berger observed that the alleged tortfeasor did not stir up litigation but financed it at the request of the defendants; hence, Berger recognized a public policy objective which balances the need to discourage frivolous or unmeritorious litigation, while also ensuring citizens' access to third party assistance given expensive litigation.¹¹⁴

Thus, if a third party is concerned about the litigant's rights, or has a genuine interest in the dispute result, a funding arrangement between the litigant and third party is not considered champerty or maintenance.¹¹⁵ Increasingly, courts and policymakers are recognizing that, due to limitations to access to justice, third-party funding contributes to the public interest and integrity of the justice system.¹¹⁶ Additionally, access to justice may be improved through specific types of fee distribution,¹¹⁷ including the British Columbia class action model in which parties do not pay for the costs of the opposing party, regardless of outcome.¹¹⁸ In the section that follows, I discuss other policy implications of class actions.

8. CLASS ACTIONS AND STANDARD-FORM CONTRACTS

Another category of litigation is multi-party action involving litigant classes or mass-consumer standard-form contracts. Public policy emerging

from multi-party litigation is comparatively new and still evolving, especially outside the United States.¹¹⁹ In terms of class proceedings, Ontario was the first province in Canada to legislate class procedures in 1992, soon after which the other common-law provinces followed as well as the federal jurisdiction;¹²⁰ in Quebec, a regime for class actions has existed in the *Quebec Code of Civil Procedure*¹²¹ since 1978.¹²²

Class action legislation in Canada was a solution to problems not resolvable under the common law: an absence of appropriate representative-action procedures involving notice to class members; the appointment of class representatives; how best to remove plaintiffs; and how best to establish a common-interest among plaintiffs that is required to ground representative actions.¹²³

Class actions do not alter the substantive content of underlying claims. Rather, they are procedural tools that facilitate collective litigation.¹²⁴ In terms of social and economic policy, class actions improve access to justice for members of a class who may not have financial means to pursue claims; they are also effective means of modifying corporate behavior and compensating multiple victims for torts and breaches of contract; they also promote judicial economy by avoiding duplication of fact finding and legal analysis.^{125,126}

Standard-form contracts — non-negotiated "boilerplate" contracts that are written by one party and presented to non-drafting parties on a take-it-or-leave basis¹²⁷ — involve different, but related policy issues to class actions.¹²⁸ Standard-form contracts are ideally suited to litigation as class actions because they usually involve multiple parties. However, while class-actions address policy considerations of judicial economy by advancing multi-party claims, standard-form contracts involve different substantive policy considerations. If properly addressed, these considerations may reduce unfairness between parties and resulting litigation.

The underlying problem with standard-form contracts rests in the potential for the drafting party to exploit an inequality in bargaining power

¹¹⁹ Andrew Borrell and Ward Branch, "Power in Numbers: B.C.'s Proposed *Class Proceedings Act*" (1995) 53:4 *The Advocate* 515, at 515.

¹²⁰ *Ibid.*, at 515.

¹²¹ *Quebec Code of Civil Procedure*, C.Q.L.R. c. C-25.01.

¹²² Christopher Naude and Eric Prefontaine, "Class/collective actions in Canada: overview" (2016) Thomson Reuters Practical Law.

¹²³ Neil J. Williams, "Consumer Class Actions in Canada—Some Proposals for Reform" (1975) 13:1 *Osgoode Hall L.J.* 1, at 13-24.

¹²⁴ Martin H. Redish, "Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals" (2003) *U. Chi. Legal F.* 71, at 74.

¹²⁵ *Hollick v. Toronto (City)*, 2001 SCC 68 (S.C.C.) at para. 15.

¹²⁶ Redish (2003), *supra* note 124, at 71.

¹²⁷ *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 (S.C.C.) at para. 28.

¹²⁸ 676083 B.C. Ltd. v. *Revolution Resource Recovery Inc.*, 2019 BCSC 2007 (B.C.S.C.) at paras. 165-166, reversed in part 2021 CarswellBC 512 (B.C. C.A.).

¹¹⁰ B.C. Law Institute, "Study paper on financing litigation" (2017), BCLI Study Paper no.9.

¹¹¹ *Wiegand v. Huberman*, 1979 CarswellBC 443 (B.C. S.C.) [*Wiegand*], paras. 8-10.

¹¹² *Ibid.*, at para. 9, citing *Monteith v. Calladine*, 1964 CarswellBC 150 (B.C. C.A.).

¹¹³ *Wiegand*, *supra* note 111.

¹¹⁴ *Ibid.*, at para. 11.

¹¹⁵ *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 (Ont. C.A.) at para. 29.

¹¹⁶ Rachel Howie and Geoff Moysa, "Financing Disputes: Third-Party Funding in Litigation and Arbitration" (2019), 57 *Alta L.R.* No 2 (Energy Law Edition) 465, at 485.

¹¹⁷ Knutsen (2010), *supra* note 103, at 145-157.

¹¹⁸ *Class Proceedings Act* [R.S.B.C. 1996] c. 50, s. 37.

by inserting terms that are disadvantageous to the other, ostensibly consenting parties. This was the case in *Uber Technologies Inc. v. Heller*¹²⁹ in which an Uber driver accepted the non-negotiated terms of Uber's standard-form services agreement, under which the driver was required to resolve disputes through an arbitration procedure based in the Netherlands.¹³⁰ The Supreme Court of Canada determined that this clause was unconscionable, canvassing the law relating to unconscionability in standard-form contracts.¹³¹ On the other hand, the multi-party nature of standard-form contracts also makes them attractive because of their transactional efficiencies, which arise from an absence of negotiating time and standardized market expectations regarding contract terms.¹³² Arguably it is not commercially feasible for drafting parties to negotiate terms individually with parties: the entire global economic system would grind to a halt if it were.

Nonetheless, there is scope for regulating standard-form contracts and preventing litigation arising from their unfair application. Although consumer protection law protects against certain kinds of unconscionable and deceptive acts,¹³³ as does the common law (a la *Uber*), there is no specialized regulatory oversight in Canada of standard-form contracts, despite the fact they comprise roughly 99% of all contracts now made.¹³⁴ I propose that as a matter of access to justice and for the purpose of preventing litigation, standard-form contracts in Canada ought to a) be subject to review by an administrative body prior to being executed, and b) be removed from the courts and instead adjudicated by administrative tribunals.

While these are not new juridical concepts, they appear not to have been applied in Canada. In 1964, Israel appears to have been the first country to regulate standard-form contracts to permit their administrative review prior to their execution.¹³⁵ This legislation authorized suppliers to submit draft standard-form contracts prior to execution before a trade practices board for review, as well as empowering the Attorney General to challenge restrictive clauses.¹³⁶ Reviewing standard-form contracts prior to their execution addresses commercial inefficiencies involved in individualized negotiations.

¹²⁹ *Uber Technologies Inc. v. Heller*, 2020 SCC 16 (S.C.C.) at para. 2 [*Uber*].

¹³⁰ *Ibid.*, at para. 2.

¹³¹ *Ibid.*, at paras. 53-99.

¹³² Russell Korobkin, "Bounded Rationality, Standard Form Contracts, and Unconscionability" (2003) 70:4 *University of Chicago L.R.* 1203, at 1205-1206.

¹³³ See e.g., *Business Practices and Consumer Protection Act* [S.B.C. 2004], c. 2, s. 4 (deceptive acts); s. 8 (unconscionable acts or practices).

¹³⁴ W. David Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" (1971) 84:3 *Harv L. Rev.* 529, at 529; although this article is from 1971, the figure is surely much the same in 2021 if not considerably higher.

¹³⁵ Kenneth Frederick Berg, "The Israeli Standard Contracts Law 1964: Judicial Controls of Standard Form Contracts" (1979) 28:4 *The Intl. Comparative L.Q.* 560.

¹³⁶ Eyal Zamir and Tal Mendelson, "Three Modes of Regulating Price Terms in Standard-Form Contracts — The Israeli Experience" (2017) *Hebrew University of Jerusalem Legal Research Paper No.* 17-40, at 4.

Proposals for agencies to review proposed standard-form contracts before execution have been made in Scandinavia¹³⁷ and India.¹³⁸

The adjudication of standard-form contracts by administrative tribunals may fall within the jurisdiction of certain Canadian tribunals, such as the Civil Resolution Tribunal in British Columbia, first constituted in 2016¹³⁹ as discussed earlier. However, the Civil Resolution Tribunal does not specifically identify standard-form contracts as falling within its jurisdiction and is limited in scope, handling compensation claims only up to \$5000.¹⁴⁰

Due to the ubiquity of standard-form contracts, I propose specialized Provincial tribunals be established to address issues of unfair or unconscionable terms in standard-form contracts. This would require legislating principles to govern the review of standard-form contracts before they are executed, and to resolve disputes related to standard-form contracts. Authorizing specialized tribunals to address issues related to standard-form contracts would have several benefits including improving access to justice by lessening delays in bringing the matters to hearings, encouraging tribunals to provide procedural assistance to claimants, and permitting lower evidentiary thresholds suitable to non-lawyers and self-represented claimants.

CONCLUSION

In analysis of public policy and litigation as part of a broader inquiry into political law, they must be regarded as a highly integrated two-way system in which causality runs in both directions. In this paper I have not sought a comprehensive overview of this system, nor an in-depth analysis of any selected sub-topic positioned within the wide scope of this multi-faceted subject area.

Instead, I have endeavored simply to illustrate the continuous interplay between litigation and public policy, establishing it as a bi-directional sub-system of political law. I have reviewed a few examples of this sub-system, including litigation as an intentional means of changing public policy, matters of judicial standing, access to justice, legal aid, government budgetary allocations for the judiciary, restorative justice, fee regimes to control legal costs that are frequently overwhelming and which limit access to justice, and policy considerations relating to litigation generated through class actions and standard-form contracts.

¹³⁷ Ole Lando, "Standard Contracts - A Proposal and a Perspective" (1966) 10 *Scandinavian Stud L.* 127, at 141-143.

¹³⁸ Ameya Garud & Harsh Budhe, "Misuse of Standard Form of Contracts on Consumers: Tribunalised Monitoring as a Solution" (2020) 7:1 *Indian J.L. & Pub Pol'y* 1, at 17.

¹³⁹ British Columbia — *Civil Resolution Tribunal Act*, online: <https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/civil-resolution-tribunal-act>.

¹⁴⁰ *Ibid.*

A current and general policy theme that emerges from this analysis is the implementation of regimes aimed at preventing future costs to persons and society at the front end *before* litigation is required, or the actionable conduct or consequences, in fact, occur. As discussed, we have repeatedly seen an approach adopted that prioritizes prevention over reaction: in climate change litigation aimed at preventing climate disaster; in arguments for funding family-relations services that prevent litigation; in restorative justice models aimed at education and reconciliation that reduce litigation and court costs in motor-vehicle cases; and in administrative review of standard-form contracts aimed at preventing unfairness arising in non-negotiated contracts and resulting litigation. This is a trend that ought to continue.

BIBLIOGRAPHY

Legislation/International covenants

- Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, s. 4 (deceptive acts); s. 8 (unconscionable acts or practices).
- Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 91(24).
- Class Proceedings Act*, R.S.B.C. 1996, c. 50.
- Court Rules Act*, *Supreme Court Civil Rules*, B.C. Reg. 168-2009, Rule 1-1 (1).
- Criminal Code of Canada*, R.S.C. 1985, c. C-46.
- International Covenant on Civil and Political Rights* G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No 16) at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171 [ICCPR], entered into for Canada March 23, 1976.
- The Constitution Act*, 1867, 30 & 31 Vict., c. 3.
- Quebec Code of Civil Procedure*, C.Q.L.R. c. C-25.01.

Jurisprudence

- 676083 B.C. Ltd. v. *Revolution Resource Recovery Inc.*, 2019 BCSC 2007 (B.C. S.C.), reversed in part 2021 CarswellBC 512 (B.C. C.A.).
- Anni Åðrelð and Joana Nðkkðlðjðrvi v. *Finland, Communication No. 779/1997* (February 4, 1997), CCPR/C/73/D/779/1997.
- British Columbia (Attorney General) v. Christie*, 2007 SCC 21 (S.C.C.).
- Canada (A.G.) v. Downtown Eastside Sex Workers*, [2012] 2 S.C.R. 524 (S.C.C.).
- Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.).
- Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 (S.C.C.).
- Hollick v. Toronto (City)*, 2001 SCC 68 (S.C.C.).
- In Re Employment of Aliens*, 63 S.C.R. 298.
- Juliana et al. v. U.S.*, 947 F.3d 1159 (9th Cir., 2020).
- Kellogg Brown Root Inc. v. Aerotech Herman Nelson Inc.* (2004), 238 D.L.R. (4th) 594 (Man. C.A.) at 630, leave to appeal refused 2005 CarswellMan 35 (S.C.C.).
- La Rose v. Canada*, 2020 FC 1008 (F.C.).
- Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 (S.C.C.).
- Mathur v. Ontario*, 2020 ONSC 6918 (Ont. S.C.J.), leave to appeal refused.
- Mathur v. Her Majesty the Queen in Right of Ontario*, 2021 CarswellOnt 4050 (Ont. Div. Ct.), additional reasons *Mathur et al. v. Ontario*, 2021 CarswellOnt 8987 (Ont. S.C.J.).
- Morael v. France*, HRC Dec 207/1986, U.N. Doc. Supp. No. 40 (A/44/40) (1989) at para. 9.3.
- McIntyre Estates v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 (Ont. C.A.).
- Single Mothers' Alliance of BC Society v. British Columbia*, 2019 BCSC 1427 (B.C. S.C.).
- Solosky v. The Queen*, [1980] 1 S.C.R. 821 (S.C.C.).

- Stern v. Imasco Ltd.* (1999), 1 B.L.R. (3d) 198 (Ont. S.C.J.).
- The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, [2019] Number 19/00135 (Supreme Court of the Netherlands).
- Neubauer et al. v. Germany*, 1 BVR 2656/18 78/20 96/20 288/20 (Federal Constitutional Court).
- Trial Lawyer Association of British Columbia v. British Columbia (Attorney General)*, 2021 BCSC 348 (B.C. S.C.), additional reasons 2021 CarswellBC 2654 (B.C. S.C.).
- Uber Technologies Inc. v. Heller*, 2020 SCC 16 (S.C.C.).
- Union Colliery Co. of British Columbia v. Bryden*, [1899] UKPC 58 (Jud. Com. of Privy Coun.).
- Vision Avant-Garde Inc. v. Superintendent of Financial Institutions*, 2000 BCSC 423 (B.C. S.C.) at paras. 9-22.
- Wiegand v. Huberman*, 1979 CarswellBC 443 (B.C. S.C.).
- Xpress View Inc. v. Daco Manufacturing Ltd.* (2002), 36 C.C.E.L. (3d) 78 (Ont. S.C.J.).

Articles and reports

- Richard Abel, "Forecasting Civil Litigation" (2009) 58:2 DePaul Law Review 425.
- Kimberly Amadeo, "Top 10 Economic Events in 2008 — How the World Changed in Just One Year" (updated September 25, 2020) *The Balance*, online: <https://www.thebalance.com/top-ten-economic-issues-in-2008-year-in-review-3305686>.
- John H. Barton, "Behind the Legal Explosion" (1975) 27:3 Stan. L. Rev. 567.
- B.C. Law Institute, "Study paper on financing litigation" (2017), BCLI Study Paper no.9.
- Kenneth Frederick Berg, "The Israeli Standard Contracts Law 1964: Judicial Controls of Standard Form Contracts" (1979) *The Intl. Comparative L.Q.* 28:4.
- Alan Bogg, "'Labor Law is a Subset of Employment Law' Revisited" (2020) 43:2 Dalhousie L.J. 1.
- Andrew Borrell and Ward Branch, "Power in Numbers: B.C.'s Proposed *Class Proceedings Act*" (1995) 53:4 *The Advocate* 515.
- Melina Buckley, "Searching for the Constitutional Core of Access to Justice" (2008) *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*, 42 (2d) 567.
- David S. Clark, "Civil Litigation Trends in Europe and Latin America since 1945: The Advantage of Intracountry Comparisons" (1990) 24:2 *Law & Soc'y Rev.* 549.
- Gerhard Clemenz and Klaus Gugler, "Macroeconomic Development and Civil Litigation" (2000) 9:3 *European Journal of Law and Economics* 215.
- International Covenant on Civil and Political Rights, (2013) Sixth Report of Canada Covering the period January 2005 — December 2009.
- Louise Dickson, "Lack of legal aid funding prompts Victoria lawyer protest" (July 9, 2014) *Times Colonist*, online: <https://www.timescolonist.com/news/local/lack-of-legal-aid-funding-prompts-victoria-lawyer-protest-1.1200567>.
- Leonard T. Doust, QC, "Foundation for Change — Report of the Public Commission on Legal Aid in British Columbia" (2011) Public Commission on Legal Aid.
- Charlotte Garden, "Union Made: Labor's Litigation for Social Change" (2013) 88:2 Tul. L. Rev. 193.
- Ameya Garud & Harsh Budhe, "Misuse of Standard Form of Contracts on Consumers: Tribunalised Monitoring as a Solution" (2020) 7:1 *Indian J.L. & Pub. Pol'y* 1.
- Alan Grove and Ross Lambertson, "Pawns of the Powerful — The Politics of Litigation in the Union Colliery Case" (1994) B.C. Studies, No. 103.
- Rachel Howie and Geoff Moysa, "Financing Disputes: Third-Party Funding in Litigation and Arbitration" (2019), 57 *Alta L.R.* No. 2 (*Energy Law Edition*) 465.
- Erik S. Knutsen, "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010) *Queens L.J.* 36.
- Russell Korobkin, "Bounded Rationality, Standard Form Contracts, and Unconscionability" (2003) *University of Chicago L.R.* 70:4.
- Eve-Angeline Lambert and Nathalie Chappe, "Litigation with Legal Aid versus Litigation with Contingent/Conditional Fees" (2010) *Rev. Law Econ.* 10:1, 95.
- Ole Lando, "Standard Contracts — A Proposal and a Perspective" (1966) 10 *Scandinavian Stud. L.* 127.
- Sarah Leamon, "Sarah Leamon: Province should embrace restorative justice to reduce carnage on B.C. roads" (July 24, 2021) *Georgia Straight*, online: <https://www.straight.com/living/sarah-leamon-province-should-embrace-restorative-justice-to-reduce-carnage-on-bc-roads>.
- Avner Levin and Asher Alkoby, "More lawyers, more litigation? Exploring trends in litigation and the legal profession in Ontario, Canada" (2021) 11:2 *Onati Socio-Legal Series* 535.
- Jamie McLaren, QC, "Roads to Revival — An External review of Legal Aid Service Delivery in British Columbia" (2019) Conducted for the Attorney General of BC, p.v.
- Manitoba Law Reform Commission, "Costs Awards in Civil Litigation" (2005), Report #111.
- Hon. Justice M. Macaulay, "Attorney General's Rules Revision Committee Discussion Paper on the Tariff of Costs" (2003) 61 *The Advocate* 69.
- Vince Morabito, "Standing to Sue and Multiple Defendant Class Actions in Australia, Canada, and the United States" (2003) 41 *Alberta L.R.* 295.
- Christopher Naude and Eric Prefontaine, "Class/collective actions in Canada: overview" (2016) Thomson Reuters Practical Law.
- Martin H. Redish, "Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals" (2003) *U. Chi. Legal F.* 71.

W. David Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" (1971) 84:3 Harv L Rev 529.

Neil J. Williams, "Consumer Class Actions in Canada—Some Proposals for Reform" (1975) 13:1 Osgoode Hall L.J. 1.

Eyal Zamir and Tal Mendelson, "Three Modes of Regulating Price Terms in Standard-Form Contracts — The Israeli Experience" (2017) Hebrew University of Jerusalem Legal Research Paper No. 17-40.

Richard Zussman, "B.C. government axing lawyer, legal costs to create no-fault styles insurance at ICBC" (February 7, 2020) *Global News*, online: <https://globalnews.ca/news/6516071/icbc-changes/>.

Other material

British Columbia — Budget 2021 Backgrounder, Economic Snapshot: Investing in a strong economic recovery for B.C., April 20, 2021, online (pdf): [https://www.bcbudget.gov.bc.ca/2021/pdfs/2021_Backgrounder_1_Fiscal\(3\).](https://www.bcbudget.gov.bc.ca/2021/pdfs/2021_Backgrounder_1_Fiscal(3).)

Statistics Canada — Civil court cases, by level of court and type of case, Canada and selected provinces and territories — Table 35-10-0112-01, online: <https://www150.statcan.gc.ca/t1/tb1/en/tv.action?pid=3510011201>.

Statistics Canada — Surveys and statistical programs — Chart 1 Population growth rate, 1999/2000 to 2019/2020, online: <https://www150.statcan.gc.ca/n1/daily-quotidien/200929/cg-b001-eng.htm>.

Department of Justice, "Section 7 — Life, liberty and security of the person" (2021), online: <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art7.html>.

British Columbia, Ministry of Finance — Estimates of Revenue Expenditure. ISSN 0707-3046, online (pdf) Estimates, Fiscal year ending March 31, 2021, British Columbia; <https://www.bcbudget.gov.bc.ca/2020/Estimates>.

General Comment No. 32 *Article 14: Right to equality before courts and tribunals and to a fair trial*, UN CCPR/C/GC/32 32 August 2007.

Access to Justice BC — A Culture Shift in the Justice System, online: <https://accesstojusticebc.ca/a-culture-shift/>; [https://www.lawsociety.bc.ca/our-initiatives/access-to-justice/](https://www.lawsociety.bc.ca/our-initiatives/access-to-justice/collaborations-to-improve-access-to-justice/).

Government of Canada — Legal Aid Program — Overview, online: <https://www.justice.gc.ca/eng/fund-fina/gov-gouv/aid-aide.html>.

British Columbia — *Civil Resolution Tribunal Act*, online: <https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/civil-resolution-tribunal-act>.

Provincial Court of British Columbia — Who get legal aid, anyway? (2018), online: <https://www.provincialcourt.bc.ca/news/enews-28-08-2018>.

La Rose et al. v. Her Majesty the Queen in Right of Canada and the Attorney General of Canada (November 24, 2020), Doc. A-289-20.

Law Society of British Columbia — Collaborations to Improve Access to Justice, online: <https://www.lawsociety.bc.ca/our-initiatives/access-to-justice/collaborations-to-improve-access-to-justice/>.

Legal Aid in Canada, 2018-1209, Government of Canada, Department of Justice, online: <https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/1819/p1.html>.

Legal Aid Service Plan for 2021/22 — 2023/24, online: <https://www.bcbudget.gov.bc.ca/2021/sp/pdf/agency/labcc.pdf>.

Legalline.ca — What kinds of cases are covered by legal aid?, online: <https://www.legalline.ca/legal-answers/what-kinds-of-cases-are-covered-by-legal-aid/>.

Ministry of Justice and Ministry of Public Safety and Solicitor General 2017/18 — 2019/20 Service Plan, February 2017, British Columbia.

Ministry of Attorney General and Ministry of Public Safety and Solicitor General 2020/21 — 2022/23 Service Plan, February 2020, British Columbia.

Statistics Canada, "Legal Aid in Canada: Resource and Caseload Statistics" 2011/2012, online: <https://www150.statcan.gc.ca/n1/en/catalogue/85F0015X>, p. 125 (last report 2011/2012) Statistics Canada, "Legal Aid in Canada: Resource and Caseload Statistics" 2011/2012.

Trial Lawyer Association of British Columbia v. British Columbia (Attorney General) (March 11, 2021), Doc. CA47320; (March 17, 2021), Doc. CA47332.