

Right to counsel: An essential human right

(Remarks on receipt of the International Commission of Jurists Walter Tarnopolsky Human Rights award August 13, 2007, Calgary Alberta)

by David Matas

A. The proposition

In the year 2000, in a book I authored titled *Bloody Words: Hate and Free Speech*, I wrote:

"all human rights have to be read together as a coherent whole. Each human right is part of a package. Each contributes to the overall goal of enhancing the worth and dignity of the individual. Each needs to be nurtured, protected and developed. No one human right trumps other human rights. ... Because human rights are an interconnected whole, it is easy to link one right to another....Take any thread out of the quilt of rights and the quilt unravels. To choose only one thread and proclaim that this is the thread that counts is arbitrary."¹

In that book, I was defending the right to be free from incitement to hatred against the criticism that it unduly fettered the right to freedom of expression. But what I wrote applies not just to the right to freedom from incitement to hatred. It applies to all human rights.

Today, I want to make the same point in support of another human right, the right to counsel. The right to counsel, I say, is a basic human right, important to respect for other human rights. Take the right to counsel out of the quilt of human rights and the quilt unravels. If we are to respect other human rights, we must respect the right to counsel. No other human right trumps the right to counsel. The right to counsel needs to be nurtured, protected and developed.

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B. Difficulties

You may think that to convince the group before me of this proposition, a group of jurists, I have set myself all too easy a task. But I am not so sure.

For one, the right to counsel is not to be found in any of the basic human rights instruments. The right to counsel is a shorthand phrase encompassing two rights, the right to offer or provide the assistance of counsel and the right to seek and receive the assistance of counsel. The first right, the right to provide assistance of counsel, is recognized in the United Nations Declaration on Human Rights Defenders. That Declaration says:

"everyone has the right, individually and in association with others, inter alia:

(c) To offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms."²

But the second right, the right to seek and receive the assistance of counsel is found nowhere. It is not to be found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights or the Canadian Charter of Rights and Freedoms.

In the Universal Declaration of Human Rights, there is nothing. All we find in the International Covenant on Civil and Political Rights is a right of a person charged with a

² "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" General Assembly resolution 53/144 United Nations document number A/RES/53/144, 8 March 1999, Article 9(3)

criminal offense to use legal assistance to defend himself³. The Canadian Charter of Rights and Freedoms has nothing about legal assistance. It asserts only a right to retain and instruct counsel and only to those who are arrested or detained⁴.

So, there is a recognized human right to seek the assistance of counsel when the right to liberty is threatened. But I go further than that. I say that there is a right to counsel in the pursuit of all fundamental human rights and freedoms, not just the right to liberty. Moreover, I say that respect for this right is essential for the respect of all other rights.

The absence of any explicit assertion of the right to counsel in the international or Canadian human rights instruments is one obstacle to persuading you of existence of the right. The second is this.

Human rights belong to individuals, not to their counsel. Human rights are the domain of the amateur, not the professional. A right to counsel is a right to professional assistance in defense of human rights. Yet, if assertion of human rights becomes the domain of professionals alone, those rights will surely wither.

C. The connection to other human rights

Well, how do I answer these difficulties? A simple answer is that the right to offer and provide professionally qualified legal assistance in defending human rights and fundamental freedoms, found in the Human Rights Defenders Declaration I just quoted, is thwarted if the right to receive the benefit of that assistance is denied. The correlative to the right to provide assistance is the duty to allow that assistance to be given. If the duty to allow assistance is rejected the right to provide assistance is

³ Covenant article 14(b)

⁴ Canadian Charter of Rights and Freedoms section 10(b)

denied.

I have an even more basic answer than that. The existence of a human right is demonstrated by its inclusion in the standard human rights instruments. But it is not excluded by its absence from the standard human rights instruments. The logic of human rights must tell us whether any particular right really is a human right.

Human rights, though a plural linguistic form, are not a list. In a sense, there is only one human right, the right for each and every individual to realize his or her self worth. The Universal Declaration of Human Rights speaks of the "inherent dignity" of all members of the human family. The two Covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights, both have the same preamble which recognizes that all human rights "derive from the inherent dignity of the human person". The Canadian Charter of Rights and Freedoms states two underlying principles, the supremacy of God and the rule of law.

The position I take is that the right to counsel in pursuit of fundamental human rights and freedoms both derives from the inherent dignity of the human person and is part and parcel of the rule of law. When the right to counsel in pursuit of human rights is denied, what the individual is being told is that you can assert your fundamental human rights, but you can not have help in doing so. You are left to assert your human rights on your own as best you can, though you may have never done so before and know nothing of the system or standards or the people who decide your rights. Inexperience and ignorance are no excuse. Nor is incapacity.

Put this way, one can see that denial of the right to counsel to assert fundamental human rights can not help but undermine respect for those rights. A novice without assistance in the assertion of human rights is handicapped. It is as much an attack on the dignity of this novice to deny this person legal assistance as it is an attack on the dignity of a physically handicapped person to deny the physical assistance that this

person needs to go about daily life.

The case for the right to counsel where the rule of law is under threat is even more clear cut. Albert Venn Dicey, a British author who wrote in the nineteenth and early twentieth century, in his *Introduction to the Study of the Law of the Constitution* asserted that the rule of law has three meanings:

- 1) supremacy of regular law as opposed to the influence of arbitrary power,
- 2) equality before the law, or the equal subjection of all to the ordinary law of the land administered by the ordinary law courts,
- 3) the rights of individuals to personal liberty, which in foreign countries form part of a constitutional code, are in Britain the consequence of judicial decisions determining the rights of private persons in particular cases brought before the courts.

Dicey wrote long before the Canadian Charter of Rights and Freedoms and the United Kingdom adherence to the European Convention on Human Rights. Now that Canada has a constitutionally entrenched Charter of Rights and Freedoms, the third aspect of Dicey's rule of law has not disappeared. On the contrary, the Canadian courts have told us that, in determining what are the principles of fundamental justice guaranteed in the Charter of Rights and Freedoms, we must look to the basic tenets of the common law⁵.

How can anyone expect to be effective in challenging a threat to the rule of law without legal assistance? It is said that a lawyer who represents himself has a fool for a client. Even lawyers need professional assistance when their basic human rights are at stake.

Specific examples of general principles do not limit the generality of those principles. The explicit reference in the International Covenant on Civil and Political Rights to the right to counsel in a criminal case and in the Canadian Charter of Rights and Freedoms

⁵ *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486 paragraph 31.

to a right to counsel on detention should not be read as implicitly excluding the right to counsel in other cases. Rather they are specific examples of a more general right, the right to counsel whenever any other fundamental human right is at stake.

The Supreme Court of Canada has said of all the specific rights found in sections 8 to 14 of the Canadian Charter of Rights and Freedoms, including the right to counsel on detention found in section 10(b), that they are illustrative of the right to life, liberty and security of the person in accordance with the principles of fundamental justice. One can think of the general right to life, liberty and security of the person in accordance with the principles of fundamental justice and the specific right to counsel on detention as having inserted between them the phrase

"and, without limiting the generality of the foregoing the following shall be deemed to be in violation of a person's rights under this provision".⁶

D. The benefits of counsel

What do counsel bring to a client who is asserting basic human rights? One benefit is knowledge. There is a right to know your basic human rights. This right is found in the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe Declaration of Principles⁷. It is also found in the Human Rights Defenders Declaration, which states:

"Everyone has the right, individually and in association with others:

- (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic

⁶ *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486 paragraph 29.

⁷ Principle VII

legislative, judicial or administrative systems;"⁸

Denial of the right to counsel is a form of denial of the right to know your human rights.

Second, counsel can give a client strategic advice. Legal systems offer a myriad of options to achieve a result. Some are more likely to bear fruit than others. Sound legal advice can point the client in the right direction and prevent the client from charging off in the wrong direction.

Third counsel can help by getting the law right, both its substance and its procedure. It is not enough simply to tell the client what his or her rights are. Lay individuals need guidance, hand walking through intricate legal systems.

While human rights in principle should be simple and clear, with in the grasp of all, the law regrettably is not. It is full of procedural and substantive complexities. A lay person confronted with the law is often completely bewildered. Most areas of law are so specialized that a client needs the assistance not merely of counsel, but counsel who is specialized in that area of law. To deny the client that right means inserting the client in a labyrinth without any way out.

Fourth, counsel can help a client develop an appreciation of the system which will be determining his or her rights. Counsel can win over the confidence of a client. By winning over the confidence of the client, counsel can help win the client over to confidence in the system which will determine his or her rights.

A fifth way counsel helps is presentation of the relevant evidence. Being honest means telling the truth, telling the whole truth, and telling nothing but the truth. Counsel can make a difference for all three.

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Counsel will know what is relevant and what is irrelevant when the client will not. Counsel can present a case directly, efficiently, succinctly by wading through with the client all the information the client has to offer.

Clients, without the assistance of counsel, fall into two opposite traps. On the one hand, clients on their own will present irrelevant evidence, not realizing its irrelevance, consuming time and effort and generating expense for no reason. On the other hand, and even more damaging, clients left to their own devices will fail to present relevant evidence, not realizing its relevance. The best case in the world will be lost if the winning evidence is not presented to the tribunal because the client did not appreciate its significance.

Relevant evidence consists of two sorts. One is general contextual evidence. The second is evidence within the direct knowledge of the client.

The general contextual evidence is more likely to be within the grasp of counsel than the client. Counsel who specialize in any field should know not just the law of the area, but as well, the background of facts which are common to cases in the area.

In many cases, those who make decisions where human rights are at stake may and, in principle, should know this background contextual evidence as well. But no counsel ever did a client a disservice by assuming ignorance on the part of the tribunal which is to decide the client's rights. In reality, those who decide on human rights sometimes know the relevant background facts, sometimes do not.

As well, depending on the tribunal and the rules of evidence, there may be constraints to taking notice of relevant facts. A tribunal may not be able to take notice of relevant facts within the knowledge of the tribunal unless those facts are properly presented as evidence, which only counsel may be able to do.

Moreover, these background facts are subject to analysis and interpretation. The client benefits from an analysis and interpretation which counsel presents for the client.

Even for evidence within the knowledge of the client, counsel can assist. There may be need for corroboration. Counsel should know what sort of evidence would corroborate the story of the client and where to find it.

Credibility is often an issue. The question for a tribunal may not be so much the existence of the claimed human right as its applicability on the facts of the case. If the client is to be believed, human rights would be violated. But can the client be believed?

Innocent misunderstandings all too often lead to adverse credibility findings. Experienced counsel can help to dispel these misunderstandings before they cause problems. Counsel knows not just what the client is saying but as well what the client means to say. Where the two diverge, counsel can help them converge. Counsel can give the client an opportunity for clarification which the tribunal may not give, because the tribunal may have jumped to a mistaken conclusion based on befuddled evidence.

It happens as regularly as clockwork that officials and tribunals ask leading questions packaged with false assumptions. The typical response of the client is simply to attempt to answer the question as best as he or she can. Counsel is much more likely and much more able to challenge the assumptions on which the questions are based. Counsel will have the temerity to question false assumptions where the client may not.

Counsel can put forward an alternative argument on credibility, something that a client left to his or own devices would have trouble doing. It is generally true that any claim should be accepted if the evidence which is believed is sufficient to establish the claim even if there is other evidence which is not believed. Counsel can make the submission, even if you do not believe my client or part of what my client says, that the claim is still established. The client on his or her own would be hard put to put forward

a claim in the alternative, that it should be accepted even if the client is lying.

A client on his or her own may be reluctant to tell the whole truth for fear of the authorities, to protect a friend, or because of unconscious suppression. When human rights are at stake, the worst victimization is sometimes suppressed because it is just too awful to recall. Sometimes what is needed to get the story out of what happened to the client is medical or psychological examinations of the client. These sorts of examinations a client is unlikely to initiate on his or her own, without assistance or direction from counsel.

Maintaining confidentiality and getting access to information also benefit from assistance of counsel. The client may not know what information is already in the possession of the tribunal or the other side relevant to his or her case. Experienced counsel can both advise the client of the information already available and assist the client in accessing that information.

A client may want confidentiality but not know how to get it. The feared absence of confidentiality may prevent a client from putting forward his or her case. Knowledgeable, experienced counsel can advise the client and pull the right levers to put available confidentiality mechanisms in place.

The converse is also true. Others may want what is confidential to be made public. But to do that, they too will need the assistance of counsel.

Consistency is a hobgoblin which counsel can scare away. Clients sometimes get caught in a tangle between a desire to tell the whole truth and a feeling that they must remain consistent with the partial first telling. Counsel can help clients escape from this tangle.

Clients, especially when rights are stake, get emotional. They may overstate their case,

because of its importance to them personally. This overstatement may do them more harm than good, leading the tribunal to think that what they are hearing is just so much hot air. Counsel can be the voice of reason and moderation, of rationality and detachment, of distance and perspective. Counsel can argue that a case, though maybe exaggerated by the client, has a solid foundation, something an emotional, distraught client left to his or own devices would never say.

I claim that there is a right to counsel not just in court, but before every tribunal, every official who makes a decision on basic human rights. In court, where procedural formalities are greater and debates about the meaning of law become more central to the ultimate outcome, the importance of the right is heightened. The right becomes even more important still where the court system is adversarial.

In an adversarial court system, the court relies on the parties to bring the evidence and arguments forward. As Mr. Justice Lebel wrote in the case of *Lavallee*, the operation of the system is predicated on the presence of opposing counsel. The denial of the right to counsel in such a circumstance means denial of access to justice⁹.

There are cases where the matter is so simple, where what is at stake is so insignificant, or where the client is so able to represent him or herself that the presence of counsel would be superfluous¹⁰. A standard can be breached without its breach amounting to a violation of basic human rights. For the breach of a standard to amount to a violation of human rights, the breach must be serious. An example of this principle is recognized explicitly in the Canadian Charter of Rights and Freedoms with the statement that, where evidence was obtained in a manner that infringed or denied any

⁹ *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, [2002] 3 S.C.R. 209, 2002 SCC 61, paragraph 68

¹⁰ See *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 paragraphs 86 to 90.

rights or freedoms guaranteed by the Charter, the evidence can nonetheless be admitted if its admission would not bring the administration of justice into disrepute¹¹.

So, where the breach or the threatened breach is trivial in nature, the right to counsel does not arise. One can say the same where the matter is straightforward or where the client has the ability to act on his or her own without prejudice to him or herself - that there is no right to counsel. Alternatively, one can say that, even if there is a right to counsel, its breach has no practical consequences. There is no need for counsel to accompany his or her client to absolutely every single proceeding in order for human rights to be respected.

That is true of every aspect of the duty of fairness. No matter what the form of violation of the duty of fairness, it is excusable if it would not have and could not have made a difference to the result. However, that caveat does not negate the existence of the duty of fairness.

The right to counsel, the right to professional assistance for the assertion of human rights, would seem so basic to respect for human rights, one has to wonder not so much whether the right exists as why it has not been articulated and respected. Why is there any hesitation at all in recognizing a full throated right to counsel in every human rights context?

E. Objections to the right to counsel

I have litigated the right to counsel in a number of different situations and have heard a number of different objections to their participation. Let me list ten.

I have heard that the participation of counsel

¹¹ Section 24(2).

1. takes up time,
2. complicates matters,
3. generates delays,
4. requires facilities which may be not be available,
5. makes the process more costly,
6. introduces formality into proceedings which should informal,
7. generates confrontation in an environment that should be non -confrontational,
8. shifts control of the proceedings to the counsel who end up determining what questions are asked and answered,
9. means that clients are sometimes charged too much or charged at all for what should be free and
10. causes clients in some cases to be led astray, to make misrepresentations to improve their chances.

Let me deal with each of these objections in turn. First the notion that counsel take up time and complicate matters. Those were concerns expressed by the Supreme Court of Canada in the case of *Dehghani*¹² where the issue was the right to counsel at port of entry secondary examinations. I should warn you that I was counsel to the intervener Canadian Council for Refugees in that case, that the arguments of the Canadian Council for Refugees were rejected and that I have an unfortunate tendency to think that every case a client of mine loses is wrongly decided.

This is what Mr. Justice Iacobucci wrote for the Supreme Court of Canada:

"To allow counsel at port of entry interviews would, in the words of Heald J.A. in *Montfort v. Minister of Employment and Immigration*, [1980] 1 F.C. 478 (C.A.), at pp. 481-82, "entail another "mini-inquiry" or "initial inquiry" possibly just as complex and prolonged as the inquiry provided for under the Act and

¹² *Dehghani v. Canada (Minister of Employment & Immigration)*, [1993] 1 S.C.R. 1053

Regulations".

So, put counsel in the mix and what we get, according to the Supreme Court of Canada, is complexity and prolongation. I beg to differ. The presence of counsel does not change the rules of procedure nor the nature of the inquiry. Simply because counsel is present, what would otherwise be an interview does not change into a trial. An interview remains an interview whether counsel are present or absent.

The assistance of knowledgeable experienced counsel, I suggest, makes matters simpler rather than more complex and saves rather than consumes time. The officer is spared the necessity of extensive fishing expeditions to find out the information being sought. Misunderstandings can be avoided or cleared up quickly. Documents can be prepared before the interview begins and presented on request; the officer does not have to wait till after the interview has been partially completed while the individual concerned searches after materials the officer wants.

Even in those cases where an interview would be quicker without counsel, denying the benefit of counsel to save time is minute wise and hour foolish. It may be quicker at first instance to rush ahead without the benefit of knowledgeable professional assistance. But any tribunal does so at their peril. Pushing aside those in the know when reaching decisions is a recipe for error. Decisions made in error have to be redone. The time saved initially is more than lost cleaning up afterwards the mess that has been created.

The concern about delay is equally misplaced. The right to counsel does not necessarily require scheduling of proceedings to suit the convenience of counsel. Many tribunals will do this out of courtesy, a courtesy, I, for one, welcome. But it is not an entitlement, particularly in administrative proceedings. The right to counsel is not a right to an adjournment. Officials can allow counsel to participate at an interview if counsel is ready to join the interview when it is scheduled. There is no inconsistency

between respecting the right to counsel at an administrative interview and going ahead with an interview at the time allotted even though counsel is not available.

The objection that the presence of counsel may require facilities which are not available is real but strange. What we are talking about here is chairs. The presence of counsel means one extra person, one extra chair. It is hard to believe that anyone would object to the presence of counsel on this basis. But I have seen it.

The Ha sisters, who were living in Vietnam, had applied to come to Canada as refugees from Cambodia. I, as counsel, asked to be present at their visa office interview in Ho Chi Minh City; but the visa office said no. The visa office then refused the applications of the sisters; I challenged their refusal in Federal Court. In Court, I argued that the denial of right to counsel violated the duty of fairness.

The Minister disagreed and one reason was the strain on facilities that the presence of counsel would impose. I asked Foreign service officer George Barry, who I cross examined, this question:

"Q Your concern is that there might be a room available for three people, but not for four; is that it?

A That, yes, that's -- or for two people and not for three, for three people and not four, and that's right".¹³

When I got to argue this case in Court, I pointed out that, if there were really not enough chairs or room enough for an extra chair, counsel could stand; counsel are used to standing while representing clients in court. In any case, this concern, that the presence of counsel would require facilities which are not available, could not possibly be real for every single proceeding. The Court of Appeal ruled that the duty of fairness required that counsel be allowed to be present at the interviews of the sisters.

¹³ *Ha v. M.C.I.* A-38-03, Appeal Book page 491.

The notion of extra cost associated with the presence of counsel is tied up with the objections of longer, more complicated proceedings, delays in proceedings and the need for more facilities. If these objections founder, so does the notion of extra cost.

What is one to make of the concern about formality? Is it a concern that, once counsel are present, clients will have to be addressed by their last names rather than their first names? Is there a worry that, once counsel are present, officials will have to show up in a shirt, jacket and tie instead of tee shirt and jeans?

Foreign service officer George Barry in the case of *Ha* put it this way:

"...there is certainly a desire to have it (the interview) reasonably informal, both from the perspective of being able to talk to the individual and put them at ease as much as possible, and also from an operation perspective in order to be able to make the process itself as simple as possible."¹⁴

I suggest that an individual is much more likely to be at ease, to feel free to talk, when his or her own counsel is present than when counsel is excluded and the individual is forced to deal with an official he has never met before on his or her own.

The notion of the confrontational nature of counsel is similarly misplaced. Counsel in court, by the very nature of the Canadian legal system, are placed in an adversarial context. For the court adversarial system to work, counsel have to be adversarial. But that does not make counsel personally or even professionally confrontational. Counsel are perfectly capable of functioning in an investigative setting, if that is the setting in which they are placed. The job of the counsel, after all, is to represent the client, not to argue for argument's sake. To jump from the observation that counsel, in some contexts, function in an adversarial setting to the belief that counsel are personally disputatious is just a prejudice, a stereotype.

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The fear that a right to counsel would mean handing over to counsel control of the proceedings has been negated directly in the recent judgment of the Federal Court of Appeal in the case of *Thamotharem*¹⁵. At issue there was a guideline of the Chair of the Immigration and Refugee Board.

The guideline stated that the standard practice would be that an official of the Board would question refugee protection claimants first, before their own counsel. A number of unsuccessful claimants who were rejected in hearings where that guideline was followed based an application to Court to set aside their refusals on a challenge to that guideline.

The Federal Court and the Federal Court of Appeal both held that the guideline did not breach the duty of fairness owed to claimants. The Court reasoned that because the procedure for determining refugee claims was inquisitorial or investigative and not adversarial, the duty of fairness did not require respect for the adversarial model where counsel for the applicant goes first¹⁶.

Because this case was decided as recently as May 25, 2007, it could still be appealed to the Supreme Court of Canada. Moreover, it remains possible that the Supreme Court of Canada would both grant leave and overrule the Federal Court of Appeal. If it does happen, the basis for the decision is likely to be the particular situation of refugees rather than a finding of violation, in every case, of the duty of fairness in an investigative setting when counsel for the applicant is denied the first opportunity to question.

I am asserting, as you can see, a right to counsel not just in court, but before strictly

¹⁵ *M.C.I. v. Thamotharem* 2007 FCA 198, May 25, 2007

¹⁶ Paragraph 35.

administrative tribunals as well. Administrative tribunals may be quasi-judicial boards; but they may be just government officials. These officials are mostly not lawyers and feel ill placed to insist that counsel be lawyers. Yet, where counsel are not lawyers, there is a fear of incompetence and worse. Unscrupulous consultants are both a reality and a fear. That is a fear though which is manageable through regulation.

For instance, the Canadian Immigration Department insists that counsel with whom it deals who act for pay be either members of provincial law societies or the Canadian Society of Immigration Consultants. The Department has entered into an agreement with the Society requiring that the Society have a code of conduct, an effective complaints and discipline mechanism, an ongoing training plan, minimum language standards and a liability insurance plan¹⁷.

No one would ever think of forbidding medical assistance because of the risk of medical malpractice. It should be the same for legal assistance. It is bizarre to suggest that just because there can be bad counsel there should be no counsel. Certainly within law societies, there is more than enough capability to regulate and control misbehaviour, dishonesty, or exorbitant fees.

F. The attributes of the right

Instead of talking about the right to counsel in the abstract, it is perhaps simpler and more direct for me to address the practical consequences of accepting that right. If there is a right to counsel, what does that mean?

Because the right to counsel is part of the duty of fairness and the duty of fairness varies with the circumstances, the right to counsel has different meanings in different

¹⁷ Canada Gazette Part III Volume 138, number 4, April 14, 2004, Regulatory Impact Analysis Statement.

contexts. In some contexts, there will be many attributes of the right to counsel. In other contexts there will be few. But, where the right to counsel is linked to the respect for human rights, I say that there are some bare minimum attributes attached to the right to counsel, whatever the context.

They are the right to

1. access to counsel,
2. notice of the right to counsel, and
3. effective representation by counsel.

They are also a right, in all proceedings, to allow counsel to:

4. communicate with the authorities on behalf of the client,
5. be present at the proceedings,
6. elicit evidence from the client and present other evidence, and
7. make submissions both orally and in writing.

Where the client is free, at liberty, there should, in principle, be no obstacle to physical access to counsel or access of counsel to the client. At first impression, it would seem that where the client is detained, here too access to counsel should not be a problem because as noted, human rights instruments assert the right of access to counsel on detention. However, that first impression, at least for Canada, is misleading. In Canada, a person can be detained, but not constitutionally detained.

Where a person is detained, but not constitutionally detained, then the Charter right on detention to retain and instruct counsel and be informed of that right does not apply. That was the situation in the case of Dehghani. Dehghani was detained at the port of entry for secondary examination, but not, according to the Supreme Court of Canada, constitutionally detained.

This distinction between the constitutionally detained and the actually detained is similar to the distinction between those whose rights are seriously breached and those

whose rights are only technically breached. But it is not quite the same because it ignores the difference between those who face no risk of violation of rights other than their detention and those who face the risk, while in detention, of violation of other fundamental human rights.

One would think that a person who, while in detention, is conscripted against himself by evidence emanating from himself without counsel or notice of the right to counsel is always constitutionally detained. That is certainly true in the criminal context, because the right to self incrimination is violated¹⁸. But, according to the Supreme Court of Canada in *Dehghani*, it is not true in a civil context.

The decision in the *Dehghani* case that there is no right of access to counsel in this situation has been justified on the ground that at port of entry secondary examinations, no decisions are made, that secondary examination is an information gathering exercise only and therefore no rights are affected. The problem with that reasoning is that the information gathering is conducted by one side in what can later be an adversarial process in which rights are at stake, refugee determination. Information gathered by the Minister at secondary examination in the absence of counsel can be used to impugn credibility at the refugee hearing.

Indeed, those were the facts of the *Dehghani* case itself. The Minister relied on the interview notes taken at the port of entry without counsel later to impugn the credibility of *Dehghani* during his refugee claim. The tribunal justified its rejection of the claim by reference to these notes.

Those concerned with refugee protection made subsequent efforts to limit the damage from that decision. I and others urged the Government not to conduct refugee claims interviews at secondary examinations. Exploring the basis for a refugee claim has

¹⁸ *R. v. Collins* [1987] 1 S.C.R. 265

nothing to do with the purpose of those interviews, the reason why Parliament gave officials the power to conduct those interviews. The Immigration Manual now provides under the heading "Appropriate Questions", in the context of processing port of entry claims to refugee status:

"The officer should ask the claimant the standard questions on the refugee claim and the answers should be recorded. However, the officer should not ask the claimant to elaborate on the basis of the claim unless the information relates to admissibility and eligibility."¹⁹

The Federal Court has since, in a few cases, overturned negative refugee determinations where the Board rejection was based on the fact that elements of the refugee story told at the hearing were not to be found in the port of entry notes²⁰. In so doing, the Court has referred to and relied on this Manual instruction.

Not examining refugee claimants at ports of entry on the basis of their claims or not relying, during refugee determinations, on port of entry notes of examinations of the basis of refugee claims would avoid the necessity for access to counsel at ports of entry. But in any case where there is, despite the Manual instruction, an examination of the basis of a refugee claim at a port of entry, and regrettably, that still happens all too often, I say that a refugee determination tribunal should not consider those notes or at the very least should give them substantially diminished weight because the claimant at the time of the port of entry examination had no access to counsel.

Alternatively, if officials at ports of entry insist on examining refugee claimants about their claims despite the Manual instruction and refugee determination tribunals insist on

¹⁹ Immigration Manual PP (Protected Persons) 1 section 8.7

²⁰ *Sawyer v. M.C.I.* 2004 FC 935, June 19, 2004, paragraph 7; *Thambirasa, Sakuntala v. M.C.I.* (F.C.T.D., no. IMM-1224-98), Reed, February 3, 1999; *Samarakkodige v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 301 (I was counsel for Sawyer and Samarakkodige).

considering the notes of those examinations, claimants at ports of entry should have access to counsel. To deny them that access becomes an obstacle to the realization of the rights at stake in refugee determination itself.

Second, the right to counsel includes notice of the right to counsel. This notice can be communicated in a number of different ways - orally or in writing, through pamphlets, through web site postings, through information on forms, or as part of letters of communication with the individuals affected.

The case of Cha addressed the right to notice of the right to counsel. Jung Woo Cha, a South Korean in Canada studying in Ottawa on a student visa, was convicted of driving while over the permissible alcohol limit and fined. Because of the conviction an immigration officer reported him as inadmissible and a delegate of the Minister of Public Safety and Emergency Preparedness ordered him removed. Cha was interviewed by both the officer and the Minister's delegate before they made their decisions.

Cha challenged the removal in Federal Court asserting that he had a right to counsel at these proceedings but was not advised of that right. The Court of Appeal held that, other than when the person is detained, the right to counsel does not import notice of the right to counsel. Since Cha did not bring counsel with him to the interviews, the issue whether there was a right to counsel did not arise²¹.

Cha had won at the Federal Court and the Minister appealed. Cha left the country, lost interest in the litigation and did not contest at the Court of Appeal. The Court of Appeal decision was reached without oral or written argument from Cha's counsel. The Canadian Council for Refugees has sought leave to appeal this decision in the Supreme Court of Canada. I am acting for the organization. It will not surprise you to learn that I think the appeal in the Court of Appeal was wrongly decided.

²¹ *Cha v. M.C.I.* 2006 FCA 126

The right to know your basic human rights includes the right to know your right to counsel where basic human rights are at stake. Notice of the right to counsel is the portal through which knowledge of other rights is gleaned. The notice of the right to counsel means that individuals can be informed of their other rights in context, when they are relevant to what is happening to them.

The conclusion of the Court of Appeal is based on the reasoning that, since notice of the right to counsel is explicitly mentioned in the Canadian Charter of Rights and Freedoms in relation to detention, it does not arise elsewhere. This reasoning ignores the principle that the specific statements or rights in sections 8 to 12 of the Charter are meant to be examples of more general principles.

The express Charter right to retain and instruct counsel presumably implies a right to act in court on behalf of the client in pursuance of those instructions. The reason the Charter right is limited to those in detention is that those who are free have access to counsel on their own²². Asserting the right to retain and instruct counsel where a person is free would be meaningless. But asserting the right to notice to counsel where a person is at liberty does have meaning.

Third, the right to counsel should import the right to effective counsel. I still shake my head when I read the case of Ali Sheikh²³. Poor Mr. Sheikh had a counsel who, during his hearing, fell asleep on three different occasions. The Federal Court of Appeal, in its wisdom, held that the right to counsel was not violated because from the transcript it seemed that counsel was awakened each time by the presiding tribunal member "relatively quickly"²⁴. The Court, even in that case, accepted that the right to counsel

²² *R. v. Therens* [1985] 1 S.C.R. 613 Le Dain J.

²³ *Sheikh v. M.E.I.* A-521-89, July 4, 1990

²⁴ At page 11.

imported a right to effective counsel. I would hope that in other cases the acceptance of that principle would be more real.

Fourth, the right to counsel should mean the ability to communicate with the relevant authority, to send a letter and receive a response, to present evidence and make submissions, at the very least, in writing. It may seem strange that something as simple as that is an issue, but it is.

My own province, the province of Manitoba, has this statement on its website for its immigration program, the nominee program. The website states:

"Manitoba reserves the right to deal directly with the applicant, and only with the applicant, at any time this is considered to be in the best interests of Program Integrity."²⁵

So, according to Manitoba, there is no right to counsel, only a discretionary power to allow counsel.

Think how strange this would seem in detention context or criminal trial. Imagine the police saying that they reserve the right, when a person is detained, to deny access to counsel when the police consider it to be in the best interests of the combat against crime. Imagine the courts saying that they reserve the right, when a person is tried with a criminal offence, to insist that the accused represent himself when courts consider it to be in the best interests of the administration of justice. This is the sort of thing that Manitoba is saying about its immigration program.

Not every immigrant applicant is asserting basic human rights. But some are. Family

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<http://www.gov.mb.ca/about/immigrate/pnp/print_immigratereps.html>

unity is a basic human right²⁶. But even for the family support stream of the Manitoba nominee program, Manitoba reserves the right to ignore all communications from counsel.

Another very basic right associated with the right to counsel is the right simply to be present during the course of a proceeding. That was the issue in the Ha case. There was no question of scheduling to suit the convenience of counsel. Counsel offered to be present at the convenience of the visa office, when they scheduled the interview. There was no question of counsel taking up time by actually saying anything.

Counsel for the Minister argued that allowing counsel to be present at visa office interviews would chew up time, mean less interviews and fewer immigrants. In response, I offered to be present and say nothing. At least being there would allow me to make informed submissions subsequently. Mr. Justice Sexton for the Court agreed. He wrote:

"Given the limited role that counsel will play during the interview, I do not think that this Court is imposing a level of procedural formality that would unduly encumber efficient administration, and I do not think that the respondent's efficiency concerns are warranted."²⁷

Sixth, the right to counsel should entail the right to present evidence on behalf of the client. The right to present evidence does not mean the right to question the client first. Nor does it mean the right to give answers on behalf of the client. What it does mean is the right to present documentary evidence and the evidence of witnesses, either orally or through affidavits, as well as to clarify through questioning of the client during the proceeding answers that the client has already given.

²⁶ Universal Declaration of Human Rights Articles 12 and 16(3)

²⁷ Paragraph 65

Rights associated with the duty of fairness are waivable, and I chose not to press the point in the Ha case, for tactical reasons, in order to have a complete answer to the concern of the Minister that my presence at the interview would chew up time. But, in spite of that waiver in that case, in my view, there is such a right.

In the case Qi²⁸, the client was convoked by letter to an interview and told in the letter:

"Should you wish to have counsel present, it is your responsibility to arrange for counsel to attend the interview."

The client brought counsel to the interview. At the time of the interview, the officer advised counsel that he could be present but could have no input. Counsel asked if the officer was denying counsel the opportunity to take part in the interview. The officer said he was. The Federal Court set aside the ensuing adverse decision by the officer.

Madam Justice Reed wrote:

"After issuing the invitation to have counsel present, to then deny the applicants' representative the right to take part in the interview is a breach of natural justice."

This case was later distinguished in the case of Charles²⁹ on the basis that, in that case, there was no letter inviting counsel to be present. Both the Federal Court and Court of Appeal held that, during an interview to gather information to decide whether to grant an application to remain in Canada on humanitarian grounds, there is no right to allow counsel to pose questions to the applicant.

²⁸ *Qi v. M.C.I.* IMM-469-95, December 5, 1995.

²⁹ *Charles v. M.C.I.* IMM-164-98, October 8, 1998, Hugessen J., A-610-98, May 6, 1999. I represented the Canadian Bar Association in an unsuccessful application to intervene at the Federal Court of Appeal.

In coming to that conclusion, the courts relied on a prior decision in the Federal Court of Appeal in the case of *Shah*³⁰ that the duty of fairness owed to a client making a humanitarian application was minimal. Subsequently, the Supreme Court of Canada in the case of *Baker*³¹ disagreed with this reasoning in *Shah*. The *Shah* case is no longer good law. Neither is the part of the *Charles* case denying to counsel the right to question the client, which relies on the *Shah* decision.

As a matter of principle, the *Charles* decision is hard to justify. As I indicated, a right to counsel includes a right to effective counsel. The right to effective counsel is breached if counsel does nothing to elicit the client's evidence or provide supplemental available documentation to support the client's case³². The failure to elicit evidence and provide documentation is a breach of the duty of fairness owed to the client. It makes little sense to say that this breach has occurred where counsel is allowed to participate and is incompetent but has not occurred because counsel is not allowed to participate.

Even the *Charles* case, at a time when the rights associated with a humanitarian interview were thought to be minimal, asserted the right of counsel to make submissions. Mr. Justice Hugessen of the Federal Court observed that counsel were not denied the right to make representations either orally or in writing with regard to the client's case. He added: "I think I might take a different view of the matter if that had happened."³³ The Court of Appeal did not touch the issue.

G. Limits to the right

³⁰ *Shah v. Minister of Employment and Immigration* (1994), 170 N.R. 238

³¹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, paragraph 32.

³² *Shirwa v. M.E.I.* A-129-92, Denault J>

The right to counsel has limits. There are attributes of the right to counsel which arise in some settings, but not all. There are some claimed attributes of the right of counsel which are not part of the right to counsel in any setting. The most basic form of the right to counsel does not include a right

1. to an interview where counsel and client can be present,
2. to have proceedings scheduled to suit the convenience of counsel,
3. to have counsel control proceedings,
4. to have counsel answer on behalf of the client,
5. to have counsel question the client first,
6. to tax exemptions for counsel in order to make legal assistance more accessible for clients,
7. to state funding for counsel.

Some of these I have discussed before. But let me say a word about the first, the right to an interview, and the last two, tax exemptions for counsel and state funding to pay for counsel fees.

There is a right to an interview or hearing where fundamental human rights are at stake and credibility is at issue³⁴. However, if credibility is accepted or assumed and the decision is administrative only, the matter can proceed without a hearing.

The issue of tax exemptions for counsel was addressed recently in the case of *Christie* in the Supreme Court of Canada³⁵. Lawyer Dugald Christie challenged a British Columbia tax on legal services on the basis that it made it impossible for some low income clients to pursue their claims. The Supreme Court of Canada rejected the challenge. When I printed out this case and saw that it amounted to only four pages

³³ Paragraph 7.

³⁴ *Singh v. M.E.I.* [1985] 1 S.C.R. 177

³⁵ *AG of BC v. Christie*, 2007 SCC 21.

and thirty paragraphs of reasons, I was, at first, delighted. However, once I read it, my delight diminished. The judgment loses in analysis and distinctions what it gains through brevity.

I mentioned that the rule of law imports the right to counsel where arbitrariness, equality before the law or the principles of fundamental justice are at stake. The Supreme Court of Canada in *Christie* states that general access to legal services for proceedings dealing with rights and obligations is not a currently recognized aspect of the rule of law. I accept that statement as correct. But it does not contradict what I have said about the rule of law.

The Court assumes, for the purpose of its reasoning, an equation between the Charter right to counsel and the right of counsel to be exempt from taxes³⁶. But surely that is not so. The logic of the assumption of the Court is that any taxation on counsel which impedes their ability to act for indigent clients in detention is unconstitutional.

Indigent clients held in criminal detention are typically covered by legal aid schemes. But not every person in detention is held in criminal detention. Some are held in immigration detention. And some provincial legal aid schemes do not cover immigration. Are lawyers in provinces where there is no immigration legal aid who represent clients held in immigration detention immune from taxation or partially exempt from taxation? The assumption on which the *Christie* case is based suggests that they may be. But I am not holding my breath waiting for that to happen.

A statement of rights, including the right to counsel, is an assertion of the results which should be achieved. But there is more than one way to reach those results. For the indigent, the right to counsel can be achieved through legal aid. But it can also be achieved through pro bono legal work or contingency fees. In the United States, some

³⁶ Paragraph 28.

of the most important human rights litigation in the world is taking place under the Alien Torts Act without the benefit of legal aid and funded only through pro bono legal work and contingency fees.

The International Covenant on Civil and Political Rights addresses the issue of state funding for counsel in a criminal context. It provides,

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;"³⁷

The question becomes what do the interests of justice require?

In Canada, this question was addressed in a civil context in the case of *G.(J.)* in the Supreme Court of Canada, in a majority judgment authored by the then Chief Justice Antonio Lamer and a separate concurring judgment authored by Madam Justice Claire L'Heureux Dubé³⁸. The concurring judgment stated categorically: "Funded counsel must be ordered whenever a fair hearing will not take place without representation."³⁹ The majority judgment was more nuanced, asserting a right to funding on the particular facts of that case, but not in all cases where a fair hearing would not take place without representation.

For the majority, there are two thresholds for three criteria before the right to legal aid funding arises. The criteria are the seriousness of the threatened breach of a human right, the complexity of the case and the capacity of the individual. The first, lower,

³⁷ Article 14(3)(d).

³⁸ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46

³⁹ Paragraph 125.

threshold determines whether fundamental human rights and the duty of fairness are engaged. The second, higher, threshold determines whether the duty of funding arises.

The Canadian Bar Association has begun a legal action in British Columbia challenging the constitutional validity of the British Columbia legal aid system. The action asserts that the large gaps in the BC legal aid scheme of coverage amount to a violation of constitutional rights. In light of the fact that whole subject matter areas where fundamental human rights are at stake are omitted from BC legal aid coverage, it should not matter whether one accepts the majority or minority analysis in the G.(J.) case. The Canadian Bar Association action must be right. The action was nonetheless dismissed in the Supreme Court of British Columbia on a procedural ground, that the CBA had no standing to bring the action⁴⁰. The decision is under appeal.

H. The Global Context

I have been addressing the right to counsel to pursue fundamental human rights by reference to Canadian jurisprudence. But this right, like all human rights, has global significance. In Canada, when the right to counsel is denied, both counsel and clients are frustrated. Elsewhere, human rights counsel may be beaten up, detained, tortured or killed.

- In Iraq, lawyer Sadan Janabi was abducted from his office and killed in October 2005. Gunmen shot at lawyers Adel Mohamed Al-Zubaidi and Thamer Hamood Al-Quaee in November. Al-Zubaidi was killed and Al-Quaee was wounded and taken to the hospital. All three were representing accused members of the Saddam Hussein regime. The United Nations Special Representative of the Secretary-General on Human Rights Defenders, Hina Jilani, expressed the concern that the attacks on these men were

⁴⁰ *Canadian Bar Association v. Her Majesty the Queen* 2006 BCSC 1342, Brenner C.J.

related to their work as defense lawyers⁴¹.

- In Mongolia, lawyer Lodoisambuu Sanjaasuren was sentenced in November 2004 to eighteen months imprisonment for "disclosure of a state secret". The UN Representative reported that this conviction was connected to his work defending a client who denounced torture practices of officers from the General Intelligence Agency⁴².

- In the Philippines, attorney Norman Bocar was killed in September, 2005. He was a human rights lawyer and the Regional Chairman of Bayan, a national alliance of people's organizations. Bocar assisted the families of victims of human rights violations in filing cases against military officials. According to Bayan, he was a victim of a crusade to eliminate "enemies of the state" that was publicly declared by a military general in Samar, a region in which Bocar worked⁴³.

- In Sri Lanka, police accused of torturing clients of lawyer W. R. Sanjeeva threatened the lawyer if he did not move his clients to withdraw their torture petitions. The lawyer complained to police headquarters in October 2005 about these threats, naming the police involved. But no action was taken. The UN representative wrote that the threats against the lawyer and the inaction by the authorities "gave rise to the preoccupation that his life might be at risk."⁴⁴

⁴¹ "Promotion and Protection of Human rights: Human Rights Defenders" Report of the Special Representative of the Secretary-General, Hina Jilani Addendum Summary of cases transmitted to Governments and replies received, UN Document number E/CN.4/2006/95/Add.1, 22 March 2006, paragraph 273.

⁴² Paragraph 343.

⁴³

<<http://www.united-church.ca/getinvolved/takeaction/050926>>

⁴⁴ Paragraph 468.

- In Turkey, lawyer Erin Keskin in April 2005 received a letter from a group called the Turkish Revenge Brigade threatening to kill her. The UN representative wrote that the death threat may represent an attempt to prevent her human rights defence activities ⁴⁵.
- In Kashmir, lawyer Jalil Andrabi, then chair of the Kashmir Commission of Jurists, was found dead in March 1996 after having been taken away several days earlier by military personnel⁴⁶. Before his death, Andrabi had documented cases of arbitrary arrests and detention, custodial killings and disappearances. His court petitions had led to orders that district committees made up of judicial, police and medical authorities make regular visits to all jails, detention centres and police lockups in the state. Those responsible for his death have been identified, but more than eleven years after the murder, still remain free⁴⁷.
- In Mexico, lawyer Digna Ochoa was shot dead in her office in October 2001. She was the defense lawyer for Rodolfo Montiel and Teodoro Cabrera, environmental activists opposing deforestation who had been prosecuted on trumped up charges. In spite of overwhelming evidence to the contrary, state authorities labelled her death a suicide. Amnesty International has called her death murder. Kairos has called it assassination ⁴⁸.
- In Iran, lawyer Shirin Ebadi won the Nobel Peace Prize in 2003 for her efforts to promote the rights of women and children. Subsequent to the awarding of the prize, she was imprisoned once, narrowly escaped two assassination attempts, and been

⁴⁵ Paragraph 548.

⁴⁶ Amnesty International Index: ASA 20/010/1997, 27 March 1997

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<http://www.amnesty.org.uk/actions_details.asp?ActionID=104>

⁴⁸ Linda Diebel *Betrayed: The Assassination of Digna Ochoa* Harper Collins, Toronto 2005, pages 189 to 191.

summoned to court twice on criminal charges⁴⁹.

- In China, lawyer Gao Zhisheng was arrested in August 2006, tortured, prosecuted for inciting subversion, convicted and sentenced in December to three years suspended for five years. He went into house arrest where he remains to this day. Before his arrest, he had advocated on behalf of a long list of clients in difficult situations - for instance, coal miners suing their employers and a client demanding compensation for his home confiscated in preparation for the 2008 Olympics. His protests against the victimization of the Falun Gong was what ultimately got him into trouble with the authorities. David Kilgour and I have nominated Gao for the Nobel Peace Prize.

These are just a few examples. Regrettably, I could give many more.

I. Conclusion

William Shakespeare's arch villain Richard Duke of York, later Richard III, in the play *Henry VI, Part II*, foments a rebellion against Henry VI. The aptly named Dick the Butcher, one of Richard's gang of rebels, sets out what he thinks the rebels should do when they get to power. He says: "The first thing we do, let's kill all the lawyers"⁵⁰. So speaks every human butcher.

Forgive me for stating the obvious, but Iraq where Sadoon Janabi and Adel Mohamed Al-Zubaidi were killed and Thamer Hamood Al-Quaee was wounded, Mongolia where Lodoisambuu Sanjaasuren was jailed, the Philippines where Norman Bocar was murdered, Sri Lanka where W. R. Sanjeewa was threatened, Turkey where Erin Keskin received a death threat, Kashmir where Jalil Andrabi was found murdered, Mexico

⁴⁹ "Reforming Iran" A discussion with *Stanford Lawyer* editor Eric Nee, 2005.

⁵⁰ Act IV, Scene II.

where Digno Ochoa was assassinated, Iran where Shirin Ebadi escaped assassination attempts, and China where Gao Zhisheng was tortured and sentenced are all on the same planet as Canada.

In Canada, we are more polite. We do not kill or attempt to kill or threaten or jail or torture our lawyers. Instead we say to individuals, you can not have the assistance of counsel because we do not have enough chairs, or there is not enough room for an extra chair, or counsel would take up too much time, or counsel would impose unnecessary formalities, and so on. But, for would be human rights violators, the priority is the same. In Canada, too, would be human rights violators also say: "The first thing we do, let's get rid of all the lawyers"

For those of us who want to promote respect for human rights, we must learn the opposite lesson. The first thing we must do is protect the lawyers, defend the right to counsel. The edifice of basic human rights and fundamental freedoms depends on it.

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