

## Access to Justice in Criminal Law

**By: Alice Woolley**

**Case Commented On:** *R. v. Moodie*, [2016 ONSC 3469](#) (Can LII)

The *Charter of Rights and Freedoms* guarantees everyone the right to retain and instruct counsel on arrest or detention. What do we mean by that? Specifically, *do* we mean it? Do we mean it for people other than the relatively affluent few?

Canadian governments claim that we do. The [vision](#) of Legal Aid Alberta states that it aims for “An Alberta where everyone can access justice and achieve fair and lasting resolutions to their legal issues.” Legal Aid Ontario’s [website](#) says that it “provides legal assistance for low-income people”.

Justice Ian Nordheimer isn’t buying it. In a stinging judgment issued on May 26 in *R. v. Moodie* [2016 ONSC 3469](#), he stayed charges against Tyrell Moodie pending the provision of state-funded counsel. The charges faced by Mr. Moodie were serious and raised complex legal issues. Justice Nordheimer described the Ontario legal aid guidelines as having no “reasonable relationship to what constitutes poverty in this country” (para 6). He rejected as unrealistic the Crown’s suggested alternatives for Mr. Moodie to raise the funds – a part-time employee at a Boys and Girls club who lives with his mom and is facing a serious drug charge, is not a viable candidate for a bank loan, can legitimately have problems getting another job, and cannot pay for his legal bills with a credit card. Justice Nordheimer acknowledged the legitimate role of the legislature in setting legal aid levels, and even that it could be appropriate in some circumstances for a person to face a criminal trial unrepresented. But a 5-7 day trial, raising complex *Charter*, evidentiary and severance issues, and with a potential consequence of imprisonment, is not one in which an accused should be unrepresented.

Justice Nordheimer’s decision solves Tyrell Moodie’s lack of counsel problem – subject to appeal. But it reveals a reality that we do not talk about as much as we should, which is that Canadians can face criminal sanctions – even imprisonment – without having the benefit of counsel. And they do so because they are poor. Just not quite poor enough.

Legal aid financial eligibility guidelines ensure that some criminal accused will be unrepresented. Ontario’s guidelines are especially miserly (truly – Scrooge himself would be impressed at the \$12K cut-off for a single person) but even in provinces with considerably higher cut-offs – in [Alberta](#) \$19,653 for a single person – the reality is that many people without the actual financial means to retain counsel will not be eligible for legal aid.

And courts are not necessarily willing to appoint counsel, even for impecunious accused. For example, in *R. v. Martin*, [2015 NSCA 82](#) (Can LII), the Nova Scotia Court of Appeal described how Mr. Martin represented himself in defence of 25-26 charges of tax evasion and successfully had the charges dismissed on *Charter* grounds. That result was reversed on summary conviction appeal, again with Mr. Martin representing himself. Mr. Martin was denied legal aid for the

appeal, but the Crown acknowledged he did not have the financial resources to retain a lawyer. Nonetheless, the Court of Appeal did not appoint counsel for him, because the case was not complex, the Court could make a determination and the Crown had a duty to “assist the Court in ensuring that the appellant receives a fair trial” (para 28).

This reality – that poor Canadians go to court without lawyers even when facing criminal charges – means that we need to ask ourselves hard questions about what kind of legal system we really have. A simple understanding of the rule of law requires that people not be subject to legal consequences except where legally justified. And any more complex understanding of the rule of law views a system of fair adjudication – its procedures and systems of argument – as essential for achieving the rule of law, and views lawyers as a [necessary part](#) of that system. It is hard to see a criminal accused without a lawyer as having truly had access to the rule of law.

I understand the political realities of legal aid. Creating an effective ad campaign featuring accused tax evaders and drug dealers would defy even Don Draper at his finest. There are many demands on our public finances. I even have my doubts as to whether Justice Nordheimer’s reasons will stand up on appeal – I’m not sure the appellate courts will want to force the expenditure of public funds on not-quite-desperately-indigent criminal accused. But inadequate legal aid funding undermines the rule of law.

And even if we increase legal aid funding – or if we can’t – the time has come to think about other changes.

What about, for example, eliminating the now *de facto* requirement for a pre-law undergraduate degree? It adds three or four years of costs to law training – both opportunity costs and direct costs. There may be some benefit from it in terms of writing and analytical ability and in general learning-readiness. But is the benefit worth the cost?

What about moving law school – or at least some law schools – out of the universities altogether? Universities maintain – with good reason – that they have an academic mission that precludes their law schools focusing only on producing practicing lawyers. And – not surprisingly! – I agree with the proposition that law faculties contribute to society in ways that go beyond our teaching mandate. But if we need people to obtain inexpensive legal education that allows them to provide inexpensive legal services to low-income people, then we need to create low cost but effective legal education. Over the last twenty years universities may have been effective, but they’ve been anything but low cost, especially in Ontario.

Another option might be to end lawyers’ exclusive right to practice law. If the state will not provide lawyers, and people of modest means cannot afford them, and if ensuring the rule of law requires legal assistance in trials where someone’s liberty is at stake, then non-lawyer legal service providers should be an available alternative

I don’t see any of these ideas as a silver bullet. As I noted, meaningful increases in legal aid are politically difficult if not impossible. Other changes to the procedures and practices of the administration of justice may be required. There are risks as well as benefits in changing legal education or eliminating lawyers’ exclusive right to deliver legal services (although Trevor Farrow and I have some [ideas](#) on how to expand the role of non-lawyer legal service providers).

But at the end of the day, I don't think we have the rule of law that we claim to have. Not having lawyers in court with accused like Mr. Moodie and Mr. Martin undermines my confidence that they get the legal outcomes their cases warrant, or that they enjoy the procedural protections the law must provide. It sickens me to think that that is the case just because they are poor. And right now I'm open to any idea that may bring us closer to the rule of law our system aspires to but fails to achieve more often than it should.

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