

Submission on
**Law and Development: Strengthening Aid
Effectiveness**

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**INTERNATIONAL DEVELOPMENT COMMITTEE
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PREFACE

The Canadian Bar Association (CBA) is a professional, voluntary organization which represents some 37,000 lawyers, judges, notaries, law teachers, and law students from across Canada. Approximately two-thirds of all practicing lawyers in Canada belong to the CBA. The CBA is committed to the values of an independent legal profession, an independent judiciary, the rule of law and the dignity of the individual and knows that access to justice is essential to all of these values.

This submission was prepared by Andrea Redway for the International Development Committee of the Canadian Bar Association with assistance from the Legislation and Law Reform Directorate at the National Office. Ms. Redway spent from 1997 to 2000 in Shanghai and Beijing, China on behalf of Blake, Cassels & Graydon LLP. While in Asia, Ms. Redway also participated in legal reform projects sponsored by the Asian Development Bank and CIDA and frequently provided commentaries on the development and reform of China's legal system.

The submission has been approved as a public statement of the International Development Committee of the Canadian Bar Association.

Submission on Law and Development: Strengthening Aid Effectiveness

I. Introduction

The International Development Committee (IDC) of the Canadian Bar Association (CBA) is pleased to respond to the consultation paper released by the Minister of International Cooperation in June 2001 regarding the Canadian International Development Agency (“CIDA”) that is titled “Strengthening Aid Effectiveness: New Approaches to Canada’s International Assistance Program” (the “Consultation Paper”). The submission is based on the CBA’s experience with international cooperation on legal reform.

The CBA’s IDC has been actively involved in planning and implementing legal reform projects throughout Eastern Europe, Asia and Africa for more than a decade. Most recently, the CBA has been engaged in projects in China, Cambodia, Vietnam, Kenya, Uganda, Tanzania and South and Southern Africa. The nature of the projects have varied from assisting to develop local lawyers associations and continuing legal education programs to law reform, the administration of justice, legal advocacy and constitutional development.

For the past three years, the CBA has also been one of the main organizers of a Workshop on International Cooperation in the Justice Sector held in association with the Canadian Bar Association’s Annual Conference. The Workshop brings together individual lawyers and judges as well as legal, government and academic institutions that participate in rule of law development work. It serves as a forum for sharing experiences and lessons learned as well as providing an opportunity for discussion of future initiatives.

This submission will examine the role of law in the development process, including the links between the development of the rule of law and the effectiveness of aid programs. It will then discuss Canada’s current justice and legal reform activities as well as lessons learned to date. Finally, the submission will make recommendations regarding CIDA’s approach to legal reform projects and the use of law as a method of increasing the effectiveness of its aid programs.

II. The Importance of Legal Systems to the Development Process

The nature and requirements of international development assistance have evolved a great deal since its inception in the mid-20th century. Throughout this period the number of organizations and individuals taking part in development work has grown exponentially and as a result, a variety of approaches to development assistance have been tried and many lessons have been learned. While some advocate grassroots development projects such as the provision of clean water and the construction of schools, others focus on the need for increased work at the policy level. Notwithstanding the variety of interests and actors involved, a general consensus has been reached amongst the major players in the international community on certain key policy issues.

The first and foremost of these issues is that the overriding goal to be advanced by the development community is the reduction of poverty. The supremacy of this goal is evidenced in its adoption as the central theme of all development assistance to be provided by development agencies including the United Nations, the World Bank, the Asian Development Bank and CIDA.¹ As a result, the effectiveness of aid programs and their sustainability are being assessed in this context.

An alternative approach to development has been proposed by economist Amartya Sen, who was awarded the Nobel Prize for Economic Science in 1998 for his work in this field. Mr. Sen's theory is that development needs to be measured in terms of individual freedoms rather than by wealth and other economic measures. His perspective on development maintains that individual freedom should be the central goal of development work and is the most effective means of countering poverty. Mr. Sen advances that five types of freedom are instrumental to the development process: (1) political freedoms; (2) economic facilities; (3) social opportunities; (4) transparency guarantees; and (5) protective security. He argues that "[E]ach of these distinct types of rights and opportunities helps to advance the general capability of a person. They may also serve to complement each other."²

This view is supported by the World Bank's *2002 World Development Report*. The Report suggests that when there is a free flow of information, property rights are protected and the poor are given meaningful access to economic and legal institutions, far greater advances can be made towards reducing poverty.³

The Link Between the Rule of Law and the Effectiveness of Aid

¹ www.un.org; World Bank Annual Report 2000, see www.worldbank.org/html/extpb/annrep/poverty.htm; for Asian Development Bank, see www.adb.org/About/objpov.asp; www.acdi-cida.gc.ca/whatwedo.htm; *Shaping the 21st Century: The Contribution of Development Cooperation*, Development Assistance Committee, Organisation for Economic Cooperation and Development, 1996

² Sen, Amartya, *Development as Freedom*, (New York, N.Y.: Anchor Books, 1999) at p.10

³ World Bank Development Report 2002: *Building Institutions for Markets*, (Washington, DC: Oxford University Press (September 2001))

There is recognition that the reduction of poverty is a very broad and ambitious goal and a growing consensus that sustainable poverty reduction is extremely difficult to achieve in countries and regions where governance is weak. The Consultation Paper itself points out that the “World Bank’s 1998 research report, *Assessing Aid*, showed that good governance and a sound policy environment were the most important determinants of aid effectiveness and development progress.”⁴

Moreover, in his welcoming speech at the Second Global Conference on Law and Justice in July 2001, World Bank President James D. Wolfensohn asserted that *“an effective legal and judicial system is not a luxury, but a key component of a well-functioning state and an essential ingredient in long-term development.”* According to the press release associated with the conference, “Wolfensohn said that the empirical evidence shows a large, significant and causal relationship between improved rule of law and income of nations, rule of law and literacy, and rule of law and reduced infant mortality. The difference in income per capita and in reduced infant mortality can be about 3 to 1 between a country with relatively good rule of law institutions and those with inadequate institutions.”⁵ A copy of the press release is attached as Appendix A.

Whether approaching development with the more traditional goal of poverty reduction, or using Mr. Sen’s theory that the level of individual freedom is the more appropriate measure, it is clear that legal systems play an integral role in the development process.

Canada has adopted six Official Development Assistance (“ODA”) priorities:

- basic human needs
- gender equality
- infrastructure services
- human rights, democracy and good governance
- private sector development
- protection of the environment.⁶

In order to achieve the goals associated with any one of these ODA priorities, proper legal frameworks and institutions need to be established. Standards, as well as methods of enforcing those standards, must be institutionalized for each of these priority areas. Legal frameworks and bodies enable individuals to better themselves through the assertion of their rights and are essential to the establishment of democratic self-government.

⁴ Consultation Paper at p.12

⁵ Press Release titled “Rule of Law Central to Fighting Poverty: World Bank President Calls Upon Governments to Recognize the Link Between Law and Development”, July 9, 2001, News Release No. 2002/013/S, see www4.worldbank.org/legal/legop_judicial/

⁶ Consultation Paper at p.21

Addressing the development of legal systems should therefore be a programming priority for each country with which Canada engages for the purpose of providing development assistance. However, in the absence of sufficient food, shelter, health care and education these legal tools are useless to the vast majority of individuals. An effective program of development assistance must address development at multiple levels. Grassroots development projects such as the provision of clean water and basic education are essential, but on their own will not effect sustainable long term development. If development assistance it is to be truly successful, it must address key policy issues, one of the most important of which is the promotion and establishment of the rule of law.

Responding to the Anti-Globalization Movement

The anti-globalization movement has focused its message on multinationals and multilateral institutions such as the United Nations, the World Bank, the International Monetary Fund, the World Trade Organization and the G-8. A key component of the movement's message is clearly directed against the "consensus" policy agendas of international organizations regarding trade and development. As one of the emerging components of the "consensus" policy on development, any increased focus on rule of law initiatives may subject CIDA to further criticisms from factions that view development assistance targeted at the state or policy level as an ineffective tool in relieving poverty and alleviating human and environmental oppression.

CIDA and other bilateral and multilateral institutions must respond to such criticisms by highlighting the critical link between the development of appropriate legal systems and the protection of the interests advanced by the anti-globalization movement. It must be made clear that without the rule of law, social goals such as basic health, labour and environmental standards will be very difficult to achieve. There needs to be recognition that engagement at the policy level will be a key component of any strategy designed to meet the anti-globalization movement's concerns.

III. Canada and International Legal Reform Initiatives

CIDA has supported legal and justice sector reform initiatives for a number of years, both as stand alone projects and as part of larger, multidisciplinary projects. In addition, a number of different Canadian organizations, institutions and individuals are engaged in rule of law projects around the world. Some of these projects are funded by CIDA; others are supported by alternative sources of funding and/or the generous support of volunteers from the professional and academic communities. The projects which these organizations contribute to range from the development of policing and security systems, criminal and human rights laws, court administration and judicial systems to infrastructure projects and commercial/ financial sector reforms.

Below is a sample list of the various organizations in Canada that carry out a significant amount of work on rule of law projects:

- Department of Justice (Ottawa)
- International Centre for Criminal Law Reform (Vancouver)
- Commonwealth Institute for Judicial Education (Halifax)
- Canadian Institution for the Administration of Justice (Montreal)
- Canadian Bar Association (Ottawa)
- International Centre for Development and Governance, University of Saskatchewan (Saskatoon)
- Centre for Democracy and Human Rights, University of Ottawa
- Pearson Peacekeeping Centre (Halifax)
- Office of the Commissioner for Federal Judicial Affairs (Ottawa)
- National Judicial Institute (Ottawa)

In addition, many Canadian law faculties, management consulting firms and law firms also engage in this work. A more detailed list of Canadian organizations involved with legal development projects is attached as Appendix B.

Value of Canadian Legal Expertise

Although rule of law work has grown in popularity over the past several decades, one of the problems identified by the international legal community is that the legal expertise provided has predominantly come from American lawyers and consultants. As a result, many legal reform projects are criticized for being too rigidly based on the American legal system.

There is growing recognition that expertise from other jurisdictions is needed. Alternative perspectives and a more flexible approach to legal reform initiatives, which take greater account of local culture and customs, are increasingly in demand. Any given country's legal and dispute resolution system must be drawn from the country's own historical and cultural context. Civil law systems and indigenous methods of dispute resolution are not always compatible with American legal principles and procedures.

Canadian legal experts can add valuable experience and expertise to rule of law projects and are able to provide a different perspective on democratic governance issues. Canada's system of constitutional democracy, the country's Commonwealth links and its lack of a colonial legacy, provide a more attractive model for many developing countries than other Western legal systems. Canadian lawyers have many unique skills to offer to developing nations, including expertise in common, civil and aboriginal law systems. Canada also has significant expertise in administrative law, an area commonly employed by countries committed to good governance and legal reform as a preliminary means of establishing state accountability.

It should also be noted that Canada's legal expertise is being actively sought out by developing nations that recognize the above characteristics as well as Canadians' ability to establish responsive and cooperative working relationships including effective partnerships between government, civil society and the private sector.⁷ More importantly, Canadians have already demonstrated their significant capabilities with a history of successful projects.

Value of International Cooperation to Canada

In addition to the valuable expertise and skill Canadians are able to offer to the international community, it must be recognized that Canada can also derive significant benefits from engaging in international cooperation work. First of all, Canada's own legal system can be advanced and improved through the exchanges that occur in the course of international cooperation. In many cases, legal reform projects provide an opportunity for a two-way exchange of experiences, with expertise flowing both ways. As an example, the CBA is engaged in a large project regarding the development of constitutional law in South Africa. At the same time, South African human rights laws are widely regarded as some of the most innovative and progressive in the world. Therefore rather than being a one-way transfer of technical assistance, the experience gained by Canadians involved with this project has added immense value to Canadian human rights expertise.

Increasing Canada's role in legal development initiatives will support the objectives of Canada's Countries in Transition Program:

- to promote democratic development
- to support the transition to market-based economies
- to increase Canadian trade and investment links with the region
- to promote the global interests and security of Canada

Such initiatives can provide Canada with extensive opportunities to engage foreign governments at the policy level.

Efforts to establish the rule of law will also support the needs of Canadian businesses. For many developing countries, the incentive to establish a sound legal framework and its accompanying institutions comes from a desire to develop the local economy by attracting foreign trade and investment. Enabling developing countries to stabilize their political and economic environments will assist Canadian businesses in obtaining the level of transparency and certainty they need to take advantage of global opportunities and in turn, increase their international presence and competitiveness.

⁷ Toope, Stephen J., "Programming in Legal and Judicial Reform: An Analytical Framework for CIDA Engagement", Political and Social Policies Division, Policy Branch, CIDA, 1997 at p.14

*Lessons Learned*⁸

As discussed above, CIDA has supported rule of law projects for a number of years and many Canadian legal experts have gained experience working on projects funded by CIDA and other organizations. As a result of this work, the legal community has learned a number of important lessons regarding the effective implementation and planning of rule of law initiatives. These lessons relate directly to many of the issues raised in the Consultation Paper and are outlined in detail below:

- ***Strategic Approach:*** Effective legal reform work requires a strategic approach that first evaluates the level of development and specific needs of the target country's legal system, then provides assistance at the appropriate level. For example, establishing judicial independence is most certainly essential to a fair and effective justice system but may be irrelevant if political support for legal reform is insufficient and/or policing and legal training systems are inadequate. Reform efforts must take a comprehensive approach that ensures that all of the basic elements of a fair and effective legal system are considered prior to selecting the initial area of engagement. Clearly this strategic approach cannot be performed in isolation, but must involve a collaborative and coordinated effort by the international development community.⁹
- ***Planning:*** In order to be more effective, projects need to be planned more carefully. The project's objectives, the roles and responsibilities of the participants, the process for carrying out the project and the timelines involved need to be clearly defined from the outset. In addition, overall timelines for projects need to be increased as legal reforms often take a significant amount of time and are extremely political in nature.
- ***Funding:*** Rule of law projects are often under funded. In order to achieve lasting and sustainable results, projects must be planned and funded with a longer term time horizon in mind. Additionally, an investment in developing Canadian expertise in rule of law development work both within and outside of CIDA, would significantly improve the effectiveness of rule of law projects the agency plans and funds.

⁸ Based on discussions at the Workshop on International Cooperation in The Justice Sector held on August 12, 2001 in Saskatoon, Saskatchewan. The Workshop was jointly organized by The Canadian Bar Association, Council of Canadian Law Deans, Correctional Service Canada, Department of Justice Canada, National Judicial Institute, Office of the Commissioner for Federal Judicial Affairs and the Royal Canadian Mounted Police.

⁹ This concept is referred to as "sequencing" in "Evaluation of Programs Promoting Participatory Development and Good Governance Synthesis Report", DAC Expert Group on Aid Evaluation, 1996 at p.36 and Toope, Stephen J., "Programming in Legal and Judicial Reform: An Analytical Framework for CIDA Engagement", Political and Social Policies Division, Policy Branch, CIDA, September 1997 at pp.11-14

- **Cooperation:** At any one time in any given country, a variety of rule of law projects may be sponsored by different multilateral and bilateral development agencies. Due to the lack of proper coordination and consultation, both amongst international agencies and with local governments, efforts are often duplicated and valuable resources wasted. Coordination amongst donors must be improved and there must be an ongoing dialogue with the local government in order to ensure that local needs, perspectives and cultural differences are duly considered and incorporated into project plans.
- **Implementation:** The proper balance between clarity and flexibility must be struck when planning and implementing projects. Legal reform projects often need to adapt to unforeseen circumstances such as political developments and cultural differences. Local expertise should always be consulted and utilized during the implementation process. Moreover, legal projects cannot proceed without complementary institutions and processes being addressed. In many cases a multidisciplinary approach is required. Administrative tasks such as reporting procedures must also be simplified in order to enable participants to focus their resources on achieving the project's goals.
- **Sustainability:** In order to ensure their sustainability, legal reform projects must be planned and implemented in a manner that envisions what will be left behind and builds the capacities required for the ongoing roles of the local governments and citizens. In order to accomplish these goals there must be an objective assessment of needs at the outset rather than blind acceptance of the needs advocated locally. To the extent possible, safeguards must be built in which address any tensions between the legal institutions and the local governments that threaten their independence and credibility. Finally, in order to ensure projects are truly sustainable in the long term, funding needs to be allocated to measuring, assessing and communicating the effectiveness of programs. The lessons learned must then be incorporated into the process.

IV. Recommendations Regarding CIDA's Role in Rule of Law Initiatives

The lessons learned by the Canadian legal community directly relate to many of the issues raised in the Consultation Paper. Specific recommendations regarding the issues raised for discussion are listed below.

CIDA as an Institution

CIDA should continue its program of renewal in order to ensure that its strategies and procedures reflect the lessons learned and incorporate conventional wisdom regarding the effectiveness of the delivery of development assistance. One important area of conventional wisdom and indeed, policy consensus, is that policy based approaches that enhance governance and rule of law capabilities are one of the most effective methods of increasing the effectiveness of aid.

CIDA needs to enhance its internal expertise regarding rule of law projects and create a method of coordinating and disseminating this expertise within the agency. CIDA also needs to create a method of more effectively coordinating its efforts with the Canadian legal community in order to share information, lessons learned and to consult on new approaches and methods of achieving rule of law development goals. Internal processes and procedures at CIDA need to be simplified in order to allow development officers to focus on substantive issues. Reporting procedures also need to be simplified to enable those implementing projects to focus on the project's goals and objectives.

Sectoral Concentration

A strategic approach to aid that takes full advantage of the expertise of CIDA and Canadians will provide the maximum benefit to Canada's developing country partners. Given the important role the law and legal institutions play in the development process and in the overall effectiveness of aid projects, Canada's legal strengths and CIDA's considerable experience with governance programming should be exploited to the fullest. Although CIDA should maintain its support for grassroots development projects, CIDA should consider placing more emphasis on, and providing more funding to, legal reform initiatives and/or identifying alternative funding sources that will enable CIDA to increase its capacity to support legal projects in spite of its budgetary constraints.

Geographic Concentration and Multilateral Assistance

In order to plan and implement sustainable rule of law initiatives, CIDA should limit its support of such projects to organizations and/or governments that are committed to achieving the goals of the project.¹⁰ Moreover, in order to ensure that such projects are effective, there must be extensive consultation, cooperation and coordination with other development agencies and local governments to avoid duplicative efforts and misunderstanding of the local culture and context.

Private Sector Development

The policy framework to be drafted to guide CIDA's private sector development initiatives must recognize that private sector development is very closely linked to the establishment of the rule of law. The Consultation Paper points out that "*Assessing Aid* concluded, assistance provided to countries with a good policy environment and strong institutions acts

¹⁰ There is evidence that rule of law development programs are more effective when there is a policy convergence between host country government priorities and those of the donor nation: "Evaluation of Programs Promoting Participatory Development and Good Governance Synthesis Report", DAC Expert Group on Aid Evaluation, 1996 at p.36

as a magnet to draw in private investment by a ratio of \$2 for every dollar in aid. In contrast, in poorly managed countries, aid ‘crowds out’ private investment’.¹¹

Development of the private sector drives the growth of prosperity. Enabling legal systems must be established in order to achieve the goal of sustainable poverty reduction and increase the level of individual freedom. In order to strengthen the effectiveness of its private sector development initiatives, CIDA must ensure that rule of law initiatives are an essential component of its policy and programming frameworks.

Policy Coherence

Canada’s policies should reflect its desire to build policy coherence at a level that will maximize the developing world’s ability to achieve a sustainable reduction in the level of poverty and enhance individual freedom. Developing nations must be able to access and function within the international system in order to benefit from it. The establishment of the rule of law in developing countries is essential to achieving policy coherence between developed and developing countries. Canada should review its policies while being mindful that without effective legal systems and legal institutions, developing nations will not be able to derive the associated benefits from global trade and investment and will be far less likely to obtain a sustainable reduction in poverty.

Additional Recommendations

In addition to the points discussed above, two further recommendations are as follows:

- **Cross-Sector Legal Policy** – CIDA should consider developing a legal policy that accords the same importance to the issues surrounding the establishment of a fair and effective legal system as it accords to gender equality and environmental protection. Such a policy would require an assessment of the impact of the level of development of a country’s legal system on each of CIDA’s programs, projects and policies. One component of such a policy might be for CIDA to require a summary of the legal context in which a project will proceed as one of the basic requirements for funding requests. This requirement would assist CIDA in determining the relative merits of various funding proposals. In addition, it would provide CIDA with more detailed information regarding the local context and thereby assist development officers to establish appropriate development priorities and benchmarks to measure the project’s success. Another approach CIDA might take is to develop a policy on key elements to consider when engaging in legal reform work in a given sector (i.e. human rights,

¹¹ Consultation Paper at p.33

financial, court administration, etc.). This policy would provide a framework for addressing the key issues, but would be broad enough to provide the flexibility to adapt to different environments. This approach would recognize the importance of addressing the various components of a problem area together rather than dealing with issues in isolation. The goal being to develop an integrated strategy for legal reform rather than piecemeal solutions that cannot function together as a whole.

- **Centre for Legal Excellence** – CIDA should also consider supporting the establishment of a Centre for Legal Excellence that would act as a resource centre for legal and justice sector reform work. Such a Centre could be used to accumulate and disseminate information on lessons learned and provide access to research materials and reports of other development organizations focused on rule of law work. It might also be used to provide skills training to members of the legal community thus enabling broader Canadian participation in this field as well as providing an opportunity for Canadians to develop this expertise.

V. Conclusion

The core message of this submission was very effectively summed up in Mr. Wolfensohn's speech at the Second Global Conference on Law and Justice in July:

There can be no good and clean government without respect for the rule of law, nor transparent and well-functioning financial markets, nor equitable and sustainable development What do legal and justice systems have to do with powerlessness, vulnerability and lack of opportunity? Almost everything: the quality of the legal norms in a society and the manner in which they are administered have clear and direct impacts on the extent to which citizens have a voice in the government decisions that affect their lives, the extent to which there are official safety nets and mechanisms that help them cope with economic and natural shocks, and the ways open to them to overcome disadvantages and to grasp opportunities. ...

Poverty is seen by the poor all over the world not simply as income that lies below a poverty line, or a consumption basket insufficient to meet minimum nutrition and health standards ...but as the deprivation of basic capabilities that impede people's ability to realize their fundamental human rights and to develop their innate talents and capacities that make them able to contribute as productive members of society. We must develop the intellectual framework and the practical means whereby law and justice can be put at

the service of all people -- not just the powerful -- to enhance freedom and to ensure equality of opportunity and the protection of rights.¹²

¹² *Supra*, footnote 5