



THE CANADIAN BAR ASSOCIATION

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Canada's Crisis in Access to Justice

CANADIAN BAR ASSOCIATION

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Canada's Crisis in Access to Justice

Canadian Bar Association Submission to the United Nations Committee on Economic, Social and Cultural Rights on the occasion of the consideration of its review of Canada's Fourth and Fifth Reports on the Implementation of the *International Covenant on Economic, Social and Cultural Rights*

CANADIAN BAR ASSOCIATION

The Canadian Bar Association (CBA) is a national professional organization. The CBA's membership consists of approximately 36,000 lawyers, notaries, law students and teachers from across Canada, representing about two thirds of Canada's legal profession. Our mandate includes seeking improvements in the law and the administration of justice.

ARTICLE 2: CIVIL LEGAL AID IN CANADA

The CBA appreciates this opportunity to make a submission to the United Nations Committee on Economic, Social and Cultural Rights (CESCR) concerning Canada's compliance with the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. The focus of this submission is on Canada's crisis in access to justice because of governments' failure to ensure that adequate civil legal aid is available to all people when fundamental interests are at stake.

The CBA's top priority over the past several years has been advocating for access to justice for poor people by improving our system of publicly funded legal services. As lawyers, CBA members know that too many people have no access to the rights and protections our laws notionally provide. The poor people who are denied access to justice are the same people who already experience disadvantages of many other kinds, including women, children, people living with disabilities, Aboriginal people, members of racialized minorities, the elderly and refugees.

Over the past two decades, the CBA has been unrelenting in expressing concerns about the lack of access to justice, a cornerstone of our legal system. In spite of our efforts, legal aid in Canada, and especially for civil legal aid services, such as those related to family law, housing issues, denials of pension and other income security benefits and refugee law, is getting worse. Yet, there appears to be no political will to address this crisis.

Governments' attempts to characterize access to justice as unaffordable are not persuasive. Deficiencies in legal aid result in a high proportion of unrepresented litigants trying to make their own way through complex legal proceedings. This reality bogs down the court system, using much more court time than would be required with lawyers involved. Judges are asked to assist unrepresented litigants to ensure a fair trial, but also maintain independence and impartiality. We incarcerate already disadvantaged people at significant social and economic cost, and those people may not have faced incarceration if they had legal counsel and access to adequate social programs. Failing to facilitate legitimate claims for family child support and division of matrimonial property, as well as access to social programs increases poverty. It also denies poor people access to domestic remedies when they are denied benefits and services to which they are entitled under Canadian law. These benefits and services are the practical means through which *ICESCR* obligations may be realized. Currently, the federal government has a significant surplus with which it could improve access to justice through better funding for legal aid, and ensure adequate and consistent civil legal aid services across the country.

Canada provides no minimum standards for non-criminal legal aid services, except for recognition by the courts that legal aid must be provided in some cases when the state threatens to apprehend a child. Legal aid is administered by distinct legal aid plans in each province and territory, and coverage and eligibility vary dramatically. Generally though, eligibility requirements are so low that they exclude many poor people from access to civil legal aid. There is a dire need for national standards for civil legal aid to ensure compliance with Canada's *ICESCR* and constitutional obligations.

In contrast, Canada's federal Department of Justice funds criminal legal aid through cost sharing agreements with each province and territory. The agreements are periodically renegotiated and the amount transferred is transparent; it must be spent on legal aid and the

provincial or territorial contribution is part of the calculation. Criminal legal aid funding is also inadequate. Too many poor people are forced to represent themselves, even on serious charges, resulting in unnecessary criminal records and even wrongful convictions.

However, the systemic picture with respect to lack of civil legal aid is even more abysmal.

The CBA and others trace the decline of civil legal aid to a 1995 change in the structure of federal funding for civil legal aid. Under the *Canada Assistance Plan*, which was repealed in 1995, the federal transfer required an equal provincial or territorial contribution, and money transferred had to actually be spent on legal aid. The new 1995 regime, originally called the *Canada Health and Social Transfer (CHST)*, introduced a global, “no strings” transfer rolled in with a number of other social programs. It gave provinces and territories more flexibility and autonomy in determining regional priorities. The CBA vigorously opposed the change, fearing it would require no actual funding for civil legal aid services at all. Predictably, civil legal aid lost out when competing for limited funds with other essential, though perhaps more appreciated services, such as health care and education. As a particularly egregious example, in 2002, British Columbia (BC) eliminated poverty legal aid services (for such matters as income security matters and housing issues), and imposed severe restrictions on access to legal aid for family law matters. Removing these legal protections impacts most heavily on already disadvantaged groups.

The CBA has urged that federal civil legal aid funds be “carved out” of the global transfer, now called the *Canada Social Transfer*, and put into a separate *Access to Justice Transfer*, requiring provinces and territories to spend the money on improving access to justice and do their part financially too. We have urged that one federal Minister have designated responsibility for civil legal aid, as there has been no such Minister. Logically, responsibility for civil legal aid should be combined with the federal Minister of Justice’s responsibility for criminal legal aid.

Over the past five years, the CBA has acknowledged that our lobbying efforts have not achieved the desired results, in spite of the resources and influence of our large association. We believe that access to justice is deteriorating in Canada, not improving. Provinces are cutting legal aid services, narrowing the types of cases they cover and lowering the eligibility criteria, making it harder to qualify for legal aid services. The federal

government has assumed no responsibility for ensuring any minimum level of coverage for civil legal aid services across the country. Even when critical interests are at stake, decisions such as those involving the risk of homelessness, loss of income security or loss of children to a former partner, people too often have no legal representation.

Given the lack of results and the ongoing suffering of people denied access to justice, the CBA has decided to litigate to expand constitutional recognition of a right to civil legal aid. During 2001 – 2004, we carefully researched the idea of constitutional test litigation, acknowledging the risks and many complex challenges. One preliminary determination was in which Canadian jurisdiction we should litigate, though we expect the case to ultimately be heard by the Supreme Court of Canada. We chose BC, given the radical deterioration in that province's civil legal aid scheme in 2002, and for related reasons.

The CBA filed suit in June 2005 in British Columbia Supreme Court, naming the provincial government of BC, the BC Legal Services Society and the federal government of Canada for failing to provide access to justice in compliance with the *Constitution* and Canada's obligations under international law, including the *ICESCR*. While we hope to achieve judicial recognition of a constitutional right to civil legal aid when fundamental interests are at stake, at a minimum our test case will draw attention to the inequities in access to justice in Canada, and the devastating impact that the absence of an adequate legal aid system has on poor people.

We are aware of the CESCR's previous comments about access to legal aid. The CBA wishes to ensure that the CESCR is informed of the current legal aid crisis in Canada, and of our concerns about inadequate access to domestic remedies for the vindication of people's *ICESCR* rights.

RECOMMENDATION:

The federal government of Canada should provide targeted funds to support civil legal aid. In co-ordination with provincial and territorial governments, the federal government of Canada should guarantee effective national standards pertaining to coverage, eligibility and adequacy of civil legal aid.