



Legal Aid: A Right or a Privilege?

The Right to Legal Aid

*A Guide to International
Law Rights to Legal Aid*

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations

The Right to Legal Aid

*How British Columbia's
Legal Aid System Fails to
Meet International Human
Rights Obligations*

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+ Legal Aid: A Right or a Privilege?

- Sources of international law right to legal aid
- Scope of international law right to legal aid
- Canada's duty to implement international law rights to legal aid
- Right to legal aid in British Columbia

“Legal aid is an essential component of a fair and efficient justice system founded on the rule of law.”

(Report of the United Nations Special Rapporteur on the Independence of judges and lawyers, Gabriela Knaul, 15 March 2013.)

+ Sources of right to legal aid in international law – explicit references

■ United Nations instruments:

- *International Covenant on Civil and Political Rights (ICCPR)*, s.14(3)(d)
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)*, s. 18(3)(d)
- *Basic Principles on the Role of Lawyers*, para. 6
- *Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment*, para. 17(2)
- *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*
- *Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, para. 15.1 (right to apply for free legal aid “where there is provision for such aid in the country”)
- *Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)*, para. 18(a) (right to apply for free legal aid “where such aid is available”)
- *UN Standard Minimum Rules for the Treatment of Prisoners*, para. 93 (right to apply for free legal aid “where such aid is available”).

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■ Regional instruments:

- *European Convention on Human Rights (ECHR)*, Article 6(3)(c).
- *The Charter of the Organization of American States (OAS Charter)*, Article 45(i)
- *American Convention on Human Rights (ACHR)*, Article 8(2)(e).
- *The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (African Guidelines)*
- Various Council of Europe recommendations, resolutions and directives
- *The Hague Convention on Civil Procedure*, Article 20(1)

UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

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+ Sources of right to legal aid in international law – implied right

- Right to a fair trial
- Right to non-discrimination and to equality before the law
- Right to an effective remedy

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+ Scope of right to legal aid in international law

- Not everyone who applies is entitled
- 2 conditions (under ICCPR):
 - lack sufficient means
 - “interests of justice”

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- provided at all stages of process
- State must not be arbitrary
- competence, accountability and independence of legal aid providers
- Right to an effective remedy for violation of right to legal aid

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+ Canada's duty to implement right to legal aid

- Treaty obligations
- Regional Human Rights instruments
- Respect UN and regional Declarations, Principles and Resolutions
- Vienna Convention

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- Criticism by international treaty bodies
 - failure to provide effective access to justice
 - denial of fair process
 - discrimination

+ The right to legal aid in British Columbia

- *Criminal Code of Canada*
- *Legal Services Society Act, SBC 2002, c. 30*
- Canadian Jurisprudence

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■ *Legal Services Society Act*

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- No eligibility criteria
- No appeals process
- Dependent on an MOU
- Gov approval of budget

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+ The right to legal aid in British Columbia

- Canadian (BC) legal aid jurisprudence
 - Little reference to international law
 - No general constitutional right to counsel
 - No right to legal aid at all stages
 - Civil right limited to violations of right to liberty and security of the person

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- Canadian (BC) legal aid jurisprudence
 - **No general constitutional right to counsel**
 - Right to a fair trial and right to liberty and security of the person
 - Right to equality
 - Right to a remedy

Charter of Rights and Freedoms,
s. 10 (b):

Everyone has the right on arrest or
detention

...

(b) to retain and instruct counsel without
delay and to be informed of that right;

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 - Right to equality
 - Right to a remedy

Charter of Rights and Freedoms,
s. 11 (d):

Any person charged with an offence has
the right

...

(d) to be presumed innocent until proven
guilty according to law in a fair and public
hearing by an independent and impartial
tribunal;

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 - Right to a fair trial and right to liberty and security of the person - *Charter*, sections 7 and 11(d)
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Charter of Rights and Freedoms, s. 7:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

+ The right to legal aid in British Columbia

- Canadian (BC) legal aid jurisprudence
 - No general constitutional right to counsel
 - Right to a fair trial and right to liberty
 - **Right to equality - *Charter*, sections 15 and 28**
 - Right to a remedy

Charter of Rights and Freedoms,
s. 15 (1):

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination....

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 - No general constitutional right to counsel
 - Right to a fair trial and right to liberty and security of the person
 - Right to equality
 - **Right to a remedy - Charter, section 24**

Charter of Rights and Freedoms, s. 24 (1):

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

+ Conclusions and Recommendations

- Legal aid in BC falls short of Canada's obligations to provide legal aid under international human rights law.
- LRWC recommends the enactment of legislation creating a provincial duty to ensure the right to legal aid in civil, administrative and criminal law matters.