

Lawyers' Rights Watch Canada

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Canadian Jurisprudence Regarding the Right to Legal Aid

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Introduction:

1. In recent years, the decline of legal aid funding in Canada¹ has renewed interest in access to justice and whether there is a constitutional right to legal aid. Canadian courts recognize access to justice as “a cornerstone of our rights in a democratic society”² and “one of the foundational pillars protecting the rights and freedoms of our citizens.”³ Indeed, in limited circumstances, in both criminal and civil proceedings, courts have recognized that individuals may have a right to government-funded counsel. Nevertheless, Canadian courts have rejected arguments that there is a general constitutional right to legal aid. The leading Canadian jurisprudence regarding the right to legal aid and government-funded counsel is discussed below. Interestingly, in coming to this conclusion, there has been very little or no consideration of or reference in the jurisprudence to Canada's obligations under international human rights law of right to legal aid.

A. Is there a general right to legal aid in Canada?

2. In Canada, there is currently no overarching constitutional right to legal aid in criminal or civil proceedings. In the 2007 case of *Christie v. British Columbia*⁴ (“*Christie*”), the Supreme Court of Canada (“SCC”) rejected the respondent’s argument that the rule of law provides a general right to counsel. The respondent argued British Columbia’s *Social Service Tax Amendment Act (No. 2), 1993*, which imposes a seven percent tax on the price of legal services in the province, is unconstitutional because it makes it impossible for low-income clients to retain legal services.

3. In *Christie*, the SCC recognized that “[a]ccess to legal services is fundamentally important in any free and democratic society.”⁵ Nevertheless, the SCC held that “a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent’s contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law [emphasis added].”⁶

¹ See http://www.publiccommission.org/media/PDF/pcla_report_03_08_11.pdf.

² Justice MacAdam in *Pleau v. Nova Scotia* (Supreme Court, Prothonotary), [1998] N.S.J. No. 526 at para 110.

³ *B.C.G.E.U. v. British Columbia (Attorney General)* [1988] 2 S.C.R. 214 at paras 25-26.

⁴ [2007] 1 S.C.R. 873.

⁵ *Ibid* at para 23.

⁶ *Ibid*.

4. In *R v. Prosper*,⁷ the SCC considered whether section 10(b) of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”), which provides the right to retain counsel upon arrest or detention,⁸ imposes a positive obligation on the government to provide free legal services to a person who has been arrested or detained. The SCC concluded that the government does not have a constitutional obligation to provide an accused person with free and immediate 24-hour duty counsel service upon their arrest or detention.⁹ While the government must provide the accused the immediate opportunity to speak with counsel and inform them of the availability of legal aid and duty counsel,¹⁰ it has no obligation to provide or pay for the lawyer. In reaching its decision, the SCC held that such a right had been considered and deliberately omitted by framers of the *Charter*.¹¹

B. The right to publically funded counsel in certain circumstances

5. Although no general right to legal aid has been established in Canadian jurisprudence, courts have recognized a right to publically funded counsel in certain circumstances. A summary of the jurisprudence regarding the right to publically funded counsel in the criminal and civil proceedings is below.

B.1 Criminal Proceedings

6. Although *Christie* held there is no constitutional right to access counsel, there are circumstances in which publically funded counsel must be provided to a person charged with a criminal offence. *R. v. Rowbotham*¹² (“*Rowbotham*”) is commonly cited as authority for the right to government-funded counsel in situations where counsel is necessary to ensure a fair trial. In that case, the accused was one of four persons charged with drug-trafficking. She was refused legal aid, because her income was too high to be eligible for it. The accused was convicted following a 12-month trial during which she was unrepresented. On appeal, the accused argued that although she had some funds to pay for a defence, they were not sufficient given the length of the trial.

7. In *Rowbotham*, the Ontario Court of Appeal held that, although the *Charter* does not explicitly constitutionalize the right of an indigent accused to be provided with government-funded counsel, sections 7 and 11(d) of the *Charter* do provide accused with the right to counsel in situations where lack of counsel would compromise their right to a fair trial.¹³ The Court noted that the decision of a legal aid official regarding an accused’s financial means to employ counsel is “entitled to the greatest respect.”¹⁴ Nevertheless, it held that there may be rare circumstances in which legal aid is denied but the trial judge is satisfied that, due to the length and complexity of the trial, the accused is entitled to counsel.¹⁵ The Court stated that:

⁷ [1994] 3 S.C.R. 236.

⁸ *Canadian Charter of Rights and Freedoms*, s. 10(b).

⁹ *Supra* note 7.

¹⁰ *R v. Brydges* [1990] 1 S.C.R. 190.

¹¹ *Prosper*, *supra* note 7.

¹² [1988] 41 C.C.C. (3d) 1 (S.C.C.).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

a trial judge confronted with an exceptional case where legal aid has been refused, and who is of the opinion that representation of the accused by counsel is essential to a fair trial, may, upon being satisfied that the accused lacks the means to employ counsel, stay the proceedings against the accused until the necessary funding of counsel is provided.¹⁶

8. The Court also noted that prior to the *Charter*, the concept of right to counsel had “evolved into a social right or a human right implying an obligation on the state to provide counsel for an accused who lacks sufficient means to pay a lawyer.”¹⁷ The Court recognized this obligation is reflected in Article 14 of the *International Convention on Civil and Political Rights*, which Canada has signed, and in Article 6 of the *European Convention on Human Rights*.¹⁸

9. In *Rowbotham*, the Court held it was unnecessary to decide whether, in such circumstances, the trial judge would have the authority to direct either the Crown or Legal Aid to pay the fees of counsel.¹⁹ However, in *Attorney General of Quebec v. R.C.*,²⁰ the Court of Appeal of Quebec stated that: “[s]taying the proceedings until the order is complied with does not authorize the court to set the amount of the fees or to dictate to the government how it will fulfill its constitutional duty.”²¹ Therefore, the Court has jurisdiction only to stay the proceedings until government-funded counsel is appointed.

10. In order to make an application for government-funded counsel, the applicant must establish they have been denied legal aid, have exhausted all avenues of appeal for legal aid, and are “in a state of indigence such that he or she cannot retain the services of counsel.”²² In considering whether the accused’s right to a fair trial will be infringed if they are not provided with state-funded counsel, the trial judge should consider: the seriousness of the charges; the length and complexity of the proceedings; and the applicant’s ability to participate effectively and defend their case at trial.²³ Canadian courts have considered a number of factors to decide whether appointing counsel is necessary given the seriousness and complexity of the case. These factors include: the likelihood of imprisonment; the complexity of evidence and likely complexity of proceedings; and the personal abilities and capacity of the accused, such as their intelligence, education level and articulateness.²⁴ In deciding whether counsel is necessary, the Court should

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ [2003] RJQ 2027.

²¹ *Ibid* at para 163.

²² *Ibid* at para 130.

²³ *R v Rushlow* [2009] ONCA 461 at para 19.

²⁴ *Ibid* at para 20. For overview of issues considered in *Rowbotham* applications, see also *R. v. Phillips*, 2003 ABCA 4, 172 C.C.C. (3d) 285, *R. v. Cai*, 2002 ABCA 299, 170 C.C.C. (3d) 1, *R. v. Drury*, 2000 MBCA 100, 150 Man. R. (2d) 64, *R. v. Rain*, 1998 ABCA 315, 130 C.C.C. (3d) 167. In *R. v. Fleischman*, 2012 ONCJ 120 at para 30, the Court notes that the fact that an accused is *not* facing incarceration does not disentitle them from seeking state-funded counsel.

also consider the trial judge's duty to assist an unrepresented accused and the prosecution's obligation to ensure full disclosure.²⁵

B.2 Civil Proceedings

11. In the civil context, the right to government funded legal representation has been recognized in limited circumstances. In *New Brunswick (Minister of Health and Community Services) v. G.(J.)*²⁶ ("G.(J.)"), the SCC recognized that, in some cases, there may be a right to legal aid based on section 7 of the *Charter*. In that case, the Province of New Brunswick sought to extend a temporary custody order for the appellant's three children. The appellant was unable to hire representation for the custody proceedings, because she was denied legal aid on the basis that New Brunswick's legal aid plan did not cover temporary custody cases.

12. The SCC unanimously held that, based on the specific circumstances of the case, the appellant had a constitutional right to be provided with government-funded counsel. The SCC held that the appellant's section 7 *Charter* right to security of the person had been violated, finding that:

...without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's Section 7 right to security of the person.²⁷

13. In reaching its decision, the SCC considered the complexity of the proceedings, the appellant's capacities, and the seriousness of the interests at stake.²⁸ The Court also held that the section 7 infringement was not saved by section 1 of the *Charter*, because a parent's right to a fair hearing when the state seeks to suspend custody of their child outweighs any additional costs to the legal aid system incurred by providing them with state-funded legal counsel.²⁹ The Court noted that these were "relatively modest sums, when considered in light of the government's entire budget."³⁰

14. In *G.(J.)*, the Court was clear that "[n]ot every state action which interferes with the parent-child relationship will restrict a parent's right to security of the person."³¹ For example, a parent's security of the person would not be restricted if their child were sentenced to jail or killed by a police officer.³² The Court noted that state involvement is unlikely to restrict security of the person unless it "directly interfer[es] with the psychological integrity of the parent [in their role as] parent."³³ In *Blencoe v. British Columbia (Human Rights Commission)*,³⁴ the SCC held

²⁵ *Rushlow*, *supra* note 20 at para 21.

²⁶ [1999] 3 S.C.R. 46.

²⁷ *Ibid* at para 81.

²⁸ *Ibid* at para 75.

²⁹ *Ibid* at para 100.

³⁰ *Ibid*.

³¹ *Ibid* at para 63.

³² *Ibid*.

³³ *Ibid* at para 64.

³⁴ [2000] SCC 44.

that where the psychological integrity of a person is at issue, security of the person is restricted to “serious state-imposed psychological stress.”³⁵

15. In civil disputes involving private parties, the courts have refused to order government-funded counsel. In *P.D. v. British Columbia*,³⁶ the plaintiff claimed its section 7 *Charter* right to security of the person had been infringed by the government’s failure to provide government-funded counsel or a legal aid regime ensuring access to justice for women in family law proceedings. The Supreme Court of British Columbia rejected the claim on the basis it was a private dispute that could not support a section 7 *Charter* claim. The Court held there is “no constitutional right that supports a general entitlement to state-funded counsel”³⁷ and “no authority which supports a right to state-funded counsel in private disputes.”³⁸

16. In 2005, the Canadian Bar Association launched a test case in British Columbia to establish a broad constitutional recognition of a right to civil legal aid.³⁹ The suit alleged the federal and provincial governments and the British Columbia Legal Services Society failed to provide adequate access to justice through legal aid for British Columbians, resulting in a breach of the *Charter*, provisions of the Constitution, and various international human rights instruments.⁴⁰ The Supreme Court of British Columbia dismissed the case before trial for lack of public standing, which was upheld by the British Columbia Court of Appeal.⁴¹ An application for leave to appeal was dismissed by the SCC.⁴² With respect to the Canadian Bar Association’s argument that inadequacies with British Columbia’s civil legal aid program were violating the province’s obligations under international human rights law, the British Columbia Supreme Court stated:

It is doubtful that the international agreements pleaded by the CBA would create enforceable domestic rights that do not exist under the *Charter*. Individuals may seek direct adjudication of their rights under international human rights instruments from the appropriate UN or other relevant agency, but agreements entered into by Canada do not create enforceable rights unless and until they have been incorporated into domestic Canadian law.⁴³

Conclusion:

17. In conclusion, no overarching constitutional right to legal aid is recognized in Canada. In the criminal context, an accused may be entitled to government-funded counsel if the court determines that failure to do so would compromise the accused’s right to a fair trial. In reaching their conclusion, courts will consider the seriousness of the charges, the length and complexity of proceedings, and the accused’s ability to participate effectively in the trial. The accused must also have applied for and been denied legal aid and be unable to retain counsel on their own. The

³⁵ *Ibid* at para 57.

³⁶ [2010] BCSC 290.

³⁷ *Ibid* at para 145.

³⁸ *Ibid*.

³⁹ *The Canadian Bar Association v. HMTQ et al* [2006] BCSC 1342.

⁴⁰ *Ibid* at para 5.

⁴¹ [2008] BCCA 92.

⁴² [2008] S.C.C.A. No. 185.

⁴³ *Supra* note 88 at para 121.

right to government-funded legal counsel has also been extended to the civil context. Courts have held that when the state seeks to obtain custody of a child, failure to provide the parent with government-funded counsel would violate their *Charter* right to security of the person. However, in order for security of the person to be engaged in such circumstances, the psychological stress must be serious and state-imposed. Courts have not extended the right to government-funded counsel to private civil disputes.

All of which is respectfully submitted by Lawyers Rights Watch Canada.

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Thursday, September 03, 2013

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