

Lawyers' Rights Watch Canada

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

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Legal Aid in British Columbia: Implementation of BC's International Human Rights Treaty Obligations

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The Chief Justice of the Supreme Court of Canada stated in 2011 that “access to justice is a fundamental right of every person – every man, woman and child...” and it is “the fundamental responsibility of governments, of the legal profession and the courts, working together to ensure that people have access to justice” including “representation by a qualified lawyer as needed...”¹ Four years later, inadequate legal aid remains a barrier to equality of access to justice and a grave concern to courts, the legal profession,² the public³ and international human rights bodies of the United Nations (UN) and the Organization of American States (OAS). Funding for legal aid in BC falls far short of meeting the critical need to ensure legal representation for those who cannot adequately defend themselves or otherwise access remedies without the assistance of a lawyer.

Lawyers' Rights Watch Canada (LRWC) recently published two reports: a guide to international law rights and state duties to provide legal aid;⁴ and a report explaining how legal aid in BC fails to meet international law standards.⁵ Adequate legal aid is a principal means of ensuring rights to the equal access to justice and protection of the law. BC and Canada continue to be criticized by human rights bodies of both the UN and the OAS for failing to ensure adequate legal aid, particularly for civil, family and poverty law cases.

Provision of legal aid must meet both domestic and international law obligations. Failure to meet Canada's international law obligations to provide legal aid is part of a broader concern that failure to implement international human rights treaty obligations “is one of the most serious obstacles” to protection of human rights in Canada.”⁶ Less than 43% of tax revenues collected through BC Provincial Sales Tax (PST) on legal services is directed to the Legal Services Society (LSS) even though the PST on legal services was expressly created to ensure adequate funding for legal aid.

This briefing note provides references to discussions and recommendations on:

- Funding of BC legal aid through taxes collected on the PST on legal services;
- BC's international law obligations to provide legal aid for criminal, civil and administrative law matters;
- BC's international law obligations related to the organization of the LSS.

1. Ensure that PST on legal services is directed to legal aid

In 1992, the Province of BC imposed the PST on legal services⁷ for the express purpose of funding legal aid.⁸ No PST is imposed on any other professional services. BC now collects approximately \$145 million dollars in PST on legal services each year.⁹ The Federal Government transfers more than \$13.6 million per year to BC for the purposes of criminal legal aid funding.¹⁰ In 2014, BC provided only \$75 million to the LSS, representing less than 43% of the tax collected. Funding for prosecution services and the courts has increased by more than 100% since 2004, while funding for legal aid has decreased by more than 20%.¹¹ The number of lawyers providing legal aid has decreased from more than 1,700 in 1996 to just over 1,000 in 2011.¹² A tax on legal services may itself act as a barrier to access to justice. Non-transparent diversion of taxes collected for funding of legal aid fosters public distrust of government. Studies indicate that public investment in legal aid reduces court time, improves outcomes and “saves money both within the justice system and in other areas of government spending.”¹³ If a special PST on legal services is to persist, the *Social Service Tax Amendment Act (No. 2)* should be amended to ensure

that the tax is designated as a special purpose tax and subjected to strict regulation and oversight to ensure it is used only to fund legal aid. Since the PST on legal services is a special tax, it should be subject to a sunset clause to ensure a review of its continued collection.

2. Ensure implementation of BC's international law obligations to provide legal aid

UN human rights monitoring bodies have criticized BC for its failure to ensure legal aid necessary to guarantee access to justice for poor people, including indigenous peoples, women and minorities, since 2005. BC has not implemented the legal aid recommendations of the UN Committee on Economic, Social and Cultural Rights (CESCR) in 2006,¹⁴ the Committee on the Elimination of Discrimination Against Women in 2008¹⁵ and 2015¹⁶ or the Committee on the Elimination of Racial Discrimination in 2012.¹⁷ The CESCR recommended that Canada “ensure that legal aid with regard to economic, social and cultural rights is provided to poor people.” In 2013, the UN Human Rights Council’s Universal Periodic Review (UPR) of Canada included recommendations that Canada improve access to justice for indigenous women and minorities.¹⁸ The December 2014 report of the OAS Inter-American Commission on Human Rights (IACHR), *Missing and Murdered Indigenous Women in British Columbia Canada*, identifies lack of legal aid as a factor that impedes the prevention and remediation of violations against aboriginal women in BC, thereby perpetuating discrimination and inequality. The IACHR urged Canada (at federal and BC levels) to ensure access to effective legal aid for indigenous women in relation to custody matters as well as to families of missing or murdered indigenous women.¹⁹ BC should implement all recommendations of the UN Special Rapporteur on Independence of Judges and Lawyers for legal aid in criminal, civil and administrative law.²⁰

3. Ensure independence for the administration and provision of legal aid

The LSS Board under the current statute lacks the independence required by international law. In 2003, the Attorney General dismissed the LSS Board and replaced it with a trustee after the Board refused to implement government budget cuts. The *BC Legal Services Society Act*¹³ was amended to ensure that government appointees comprise the majority of board members and to require the LSS to accept government budgets allocations. International law, as set out in the UN *General Assembly’s 2013 Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*²¹ requires that bodies established to provide, administer, coordinate or monitor legal aid be free from political or judicial interference, be independent of government in their decision-making and have the necessary mandate to provide effective legal aid. These Guidelines are grounded in the principle of independence of the legal profession and the judiciary, which are fundamental to the rule of law.

4. Conclusions: BC must enact legislation to provide legal aid in compliance with international law

The Government of BC must enact legislation to ensure, in accordance with BC’s international law duties, access to legal aid for civil, administrative and criminal law matters in all cases where the individual cannot adequately protect his/her rights without legal representation and cannot afford a lawyer, and specifically to:

- Amend or replace the *Social Service Tax Amendment Act (No.2)* so that the tax on legal services is:
 - guaranteed to be directed to legal aid;
 - characterized as a special purpose tax and subject to strict regulation and oversight;
 - subject to a sunset clause to ensure periodic examination of its rationale by the legislature.
- Amend the *Legal Services Society Act* to recognize legal aid as an essential service and to recognize the entitlement to legal aid where an individual has a legal problem that puts into jeopardy their or their family’s security, ensuring that:
 - the objects of the LSS are clearly defined as being to ensure that services ordinarily provided by a lawyer are afforded to individuals who would not otherwise receive them because of financial or other reasons;
 - the services provided by the LSS and the qualification for those providing such services are clearly defined;
 - the LSS and the LSS Board of Directors operate independently of government;
 - Government officials operate only in an advisory capacity to LSS;
 - LSS funding and administration are both adequate to achieve the statutory mandate and independent of government financial control that could affect its independence.

References

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- ¹² *Ibid.*
- ¹³ *Making the Case for the Economic Value of Legal Aid: Supplemental Briefing Note*, by Sharon Matthews, CBABC President, February 2, 2012, available http://cbabc.org/CBAMediaLibrary/cba_bc/pdf/ForThePublic/LegalAid/ReportsResearchPapers/Economic_Value_of_Legal_Aid-Briefing_Note.pdf.
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