

The Right to Legal Aid: How British Columbia's Legal Aid System Fails to Meet International Human Rights Obligations

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Acronyms or Abbreviations¹

ACHR:	American Convention on Human Rights
Convention against Torture:	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT:	UN Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW:	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW:	UN Committee on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic Social and Cultural Rights
CERD:	Committee on the Elimination of Racial Discrimination
CMW:	UN Committee on the Protection of Migrant Workers and Members of their Families
CPT:	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC:	Convention on the Rights of the Child
CRC:	UN Committee on the Rights of the Child
ECHR:	European Convention on Human Rights
ECtHR:	European Court of Human Rights

¹ Abbreviations taken from Office of the High Commissioner for Human Rights, Annex VI, Abbreviations in OHCHR Report 2011 (Geneva: OHCHR, 2011), available online:

<http://www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_report2011_web/allegati/31_Abbreviations.pdf>.

HR Committee:	Human Rights Committee
IACHR:	Inter-American Commission on Human Rights
IACtHR:	Inter-American Court of Human Rights
ICCPR:	International Covenant on Civil and Political Rights
ICERD:	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICRMW:	International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
OAS:	Organization of American States
OP-ICCPR:	Optional Protocol to the International Covenant on Civil and Political Rights
SPT:	UN Subcommittee on Prevention of Torture
SR:	Special Rapporteur
UDHR:	Universal Declaration of Human Rights
UN:	United Nations

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

I am satisfied that we have fallen from being a leader in legal aid provision to seriously lagging behind other jurisdictions. We can no longer avoid the fact that we are failing the most disadvantaged members of our community, those for whom legal aid exists within our province. – *Leonard T. Doust, QC, Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia, March 2011.*

Introduction

As a result of drastic reductions in funding for legal aid services in British Columbia (BC) over the past fifteen years, the province now fails to meet even the most basic legal aid needs of British Columbians² to the point that BC has attracted international criticism from UN human rights bodies. Once a leader within Canada in the provision of comprehensive legal aid programs, BC is now the third lowest province in Canada in per capita legal aid spending.³ While cuts and service reductions have impacted many people in BC, they have had the greatest impact on women and marginalized people.⁴ The impact of inadequate funding, including the elimination of poverty law services and the narrowed scope of family law services, continues to undermine the entire justice system⁵ and has far-reaching implications for the health, relationships and social fabric of British Columbians and their economy.⁶

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² See Public Commission on Legal Aid, *Report of the Public Commission on Legal Aid in British Columbia*, Leonard T. Doust, QC, (March 2011) (“Doust Report”), online: <http://www.publiccommission.org/media/PDF/pcla_report_03_08_11.pdf>.

³ Alison Brewin & Kasari Govender, *Rights-Based Legal Aid: Rebuilding BC’s Broken System*. (Vancouver: CCPA/LEAF, 2010), online: <http://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2010/11/CCPA_Legal_Aid_web.pdf>. Legal aid services are provided under the *Legal Services Society Act*, SBC 2002, c 30, online: <<http://www.legalaid.bc.ca/assets/aboutUs/LSSAct.pdf>>.

⁴ *Ibid* at 7, referring also to Alison Brewin & Lindsay Stephens, *Legal Aid Denied: Women and Cuts to Legal Services in B.C.*, Vancouver: CCPA-BC and West Coast LEAF (2004).

⁵ Brewin & Govender, *supra* note 3 at 8.

⁶ *Ibid* at 21.

This report reviews BC legislation and Canadian jurisprudence on legal aid and measures it against international human rights law binding throughout Canada.⁷ The report concludes with recommendations which, if implemented, would ensure that BC is meeting its international obligations to ensure legal aid for those who need it and are entitled to it.

In a 2012 report, the BC Legal Services Society (LSS) summarized legislative changes and funding reductions carried out in 2002 that dramatically transformed legal aid in BC:

The changes eliminated poverty law representation, restricted family law to child protection and emergency services in cases involving domestic violence, and decreased the society's budget by nearly 40% over three years. LSS reduced office and agency staff by 74%, and replaced its province-wide network of 60 branches, community law offices, Aboriginal community law offices, and area directors with a new delivery model using 7 regional centres, 22 local agents, and a centralized call centre. The restructuring represented a marked shift from a mixed staff/private bar model of service delivery to one that is almost exclusively private bar [footnotes omitted].⁸

Further funding cuts in 2009/10 resulted in more extensive reductions to operations and infrastructure.

West Coast LEAF documents the implications for massive funding cuts to legal aid for access to justice in family law in BC:

At present, LSS will refer a client to a family lawyer for advice and representation only in "serious family situations," such as when a protection order is needed to address violence or court-related harassment and abuse, when a serious denial of parenting time must be resolved, or when it is necessary to respond to a parent's threat to permanently remove a child from the province. Property division and divorce cases are not covered, even where there is violence in the relationship. The applicant's net income must fall below a very low threshold (currently \$2,070/month for a single parent of one child), regardless of the subject matter. This means that even where a woman needs a protection order to protect her from a violent ex-spouse, she must fall within the income requirements to qualify for legal aid [footnotes omitted].

⁷ See LRWC's report, *The Right to Legal Aid: A Handbook on International Law Rights to Legal Aid*, (Vancouver: LRWC, 2014), for a comprehensive review of States' international obligations to provide legal aid, online @ N.B. not posted yet.

⁸ Legal Services Society, "Making Justice Work: Improving access and outcomes for British Columbians" – Report to the Minister of Justice and Attorney General (1 July 2012) at 19, online: <<http://www.lss.bc.ca/assets/aboutUs/reports/submissions/makingJusticeWork.pdf>>.

In situations where legal aid is granted, the amount of time allocated for the lawyer to work on the file is severely limited.⁹

Serious concern about the deteriorating availability of legal aid in BC led to the 2010 Public Commission on Legal Aid (PCLA), funded by the Canadian Bar Association (CBA) BC Branch, the Law Society of BC, the Law Foundation of BC, the BC Crown Counsel Association, the Vancouver Bar Association and the Victoria Bar Association. In March 2011, the Commissioner released his report (*Doust Report*), finding it “clear that the inadequacies in the current legal aid system leaves the provincial and federal governments at risk to legal challenges that they are failing to meet their statutory, common law, constitutional and international obligations.”¹⁰

The *Doust Report* contains seven overarching findings, including that:

- the legal aid system is failing needy individuals and families, the justice system and our communities;
- legal information is not an adequate substitute for legal assistance and representation;
- timing of accessing legal aid is key;
- there is a broad consensus concerning the need for innovative, client-focused legal aid services;
- steps must be taken to meet legal aid needs in rural communities;
- more people should be eligible for legal aid; and
- legal aid should be fully funded as an essential public service.¹¹

The *Doust Report* makes nine recommendations designed to overcome the “deficiencies” that exist in the legal aid system in BC:¹²

- 1) amend the *Legal Services Society Act* to clearly recognize legal aid as an essential service and the entitlement to legal aid where an individual has a legal problem that puts into jeopardy their or their family’s security;
- 2) develop a new approach to define core public legal aid services and priorities;
- 3) modernize and expand financial eligibility;
- 4) establish regional aid centres and innovative service delivery modeled on evidence-based best practices, which take into account the needs of economically disadvantaged clients for lasting outcomes and the geographic and cultural

⁹ Laura Track et al, “Putting Justice Back on the Map: The Route to Equal and Accessible Family Justice” (West Coast LEAF: February 2014) at 12, online:

<<http://www.westcoastleaf.org/userfiles/file/FINAL%20REPORT%20PDF.pdf>>. The report notes, at page 13, that only 16% of LSS referrals in 2012/13 were for family law cases, while 72% were for criminal matters. Moreover, only 32% of those who received a referral to a legal aid lawyer on any matter were women.

¹⁰ “Doust Report”, *supra* note 2 at 45.

¹¹ *Ibid* at 7.

¹² *Ibid*. The recommendations are summarized at 9-11.

- barriers they face in accessing public services (there are nine features included in this recommendation);
- 5) expand public engagement and political dialogue on the urgent need to renew the legal aid system in BC;
 - 6) increase long-term, stable funding for legal aid;
 - 7) the legal aid system must be proactive, dynamic, and strategic;
 - 8) there must be greater collaboration between public and private service providers; and
 - 9) provide more support for legal aid providers.

The *Doust Report* does not provide recommendations stipulating how legislation, policies and practices need to be reformed so that access to legal aid in BC complies with international standards.

A further concern in BC is the loss of independence of the Legal Services Board. In 2003, the Board members were fired for refusing to carry out budget cuts ordered by the government. The Board was replaced by a trustee. The *BC Legal Services Society Act*¹³ was amended to provide for the majority of members to be appointed by government, to prohibit the Board from running a deficit and to require government approval of LSS budgets.

The Canadian Bar Association (CBA) confirms that the legal aid crisis in BC is not unique; underfunding, discrepancies in coverage among jurisdictions and fragmentation in legal aid services across Canada mean that Canadians do not enjoy equal protection under the law, with a disproportionate effect on women, people with disabilities, recent immigrants, members of racialized communities and indigenous people.¹⁴ A review of legal aid services in Ontario in 2008 revealed that Ontario's legal aid system had been chronically underfunded for decades, compromising commitment to access to justice and the rule of law.¹⁵ A 2007 review of New Brunswick legal aid services found legal aid to be a low priority of the government, covering barely the minimum of what is legally

¹³ *Legal Services Society Act*, SBC 2002, c 30, as am. SBC 2003, c 2, s 38; 2003, c 70, s 211; 2003, c 75, s 44; 2005, c 1, ss 5, 6; 2007, c 14, s 44.

¹⁴ Canadian Bar Association, "Legal Aid in Canada: The Crisis in Legal Aid Hurts Some Canadians More Than Other", online: <<http://www.cba.org/CBA/Advocacy/legalAid/>>. See also Canadian Bar Association, "Toward National Standards for Publicly-Funded Legal Services: Envisioning Equal Justice" (April 2013); Spyridoula Tsoukalas & Paul Roberts, "Legal Aid Eligibility and Coverage in Canada" (Department of Justice, October 2002). The federal government's Legal Aid Program, which provides some contribution funding to the provinces and territories, is limited to funding for the delivery of criminal legal aid services, immigration and refugee legal aid, public security and anti-terrorism legal aid services, and court-ordered counsel in federal prosecutions: Department of Justice, Legal Aid Program, Overview (date modified: 12 Feb 2014), online: <<http://www.justice.gc.ca/eng/fund-fina/gov-gouv/aid-aide.html>>.

¹⁵ Michael Trebilcock, "Report of the Legal Aid Review 2008", Submitted to the Honourable Chris Bentley Attorney General of Ontario, at 179.

required and falling far short of what is needed to ensure access to justice for all.¹⁶

Legal aid in BC—and other parts of Canada—also falls short of Canada’s international legal obligations. Canada has ratified most of the core United Nations (UN) human rights treaties, and the Canadian *Charter of Rights and Freedoms (Charter)*¹⁷ has roots in the *Universal Declaration of Human Rights (UDHR)* and the UN *International Covenant on Civil and Political Rights (ICCPR)*. However, in recent years, a number of UN treaty bodies have criticized Canada—and, in particular, BC—for failing to provide effective access to the courts and remedies for human rights violations because of inadequate legal aid or other mechanisms to ensure effective access to justice.¹⁸ The 2013 Universal Periodic Review (UPR) of Canada’s human rights record by the UN Human Rights Council (HRC) highlighted the need to ensure access to justice, particularly for indigenous women and members of minority groups.¹⁹ The international legal aid standards relevant to Canada are discussed in section II of this report.

CBA test case

In 2005, the Canadian Bar Association (CBA) initiated a test case in the Supreme Court of British Columbia (BCSC) claiming that the inadequacies of publicly funded and provided civil legal aid in BC (“BC Civil Legal Aid”) effectively deny access to justice to people who cannot afford legal counsel in matters that threaten their fundamental rights to life, liberty, livelihood, equality, health, housing, safety, security, and sustenance and therefore constitute a violation of the Canadian Constitution and Canada’s obligations

¹⁶ J Hughes & EL MacKinnon, “If there were legal aid in New Brunswick – A Review of Legal Aid Services in New Brunswick” (September 2007), submitted to the Minister of Justice and Consumer Affairs, at 1.

¹⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

¹⁸ See Concluding Observations of the Committee on the Elimination of Racial Discrimination, at paras 17, 21, UN Doc. CERD/C/CAN/C/119-20 (9 March 2012); Concluding Observations of the Human Rights Committee, at para 11, UN Doc. CCPR/C/CAN/CO/5 (20 April 2006); Concluding Observations of the Committee on the Elimination of Discrimination against Women, at paras 21-22, UN Doc. CEDAW/C/CAN/CO/7 (7 November 2008); Concluding Observations of the Committee on the Elimination of Racial Discrimination, at para 26, UN Doc. CERD/C/CAN/CP/18 (25 May 2007); Concluding Observations of the Human Rights Committee, at para 11, UN Doc. CCPR/C/CAN/CO/5 (20 April 2006); Concluding Observations of the Committee on Economic, Social and Cultural Rights, at paras. 11(b), 14, 43, UN Doc. E/C.12/CAN/CO/4, E/C.12/CAN/CO/5 (22 May 2006). See also Committee on the Elimination of Discrimination against Women, Communication No. 19/2008, Views adopted by the Committee at its fifty-first session, 13 February–2 March 2012, in which the CEDAW Committee found that Canada’s failure to ensure effective access to legal aid denied the complainant, Cecilia Kell, access to justice and an effective remedy. *Cecilia Kell v Canada*, CEDAW/C/51/D/19/2008

Communication No. 19/2008, Views adopted by the Committee at its fifty-first session, 13 February to 2 March 2012, available online: <<http://www2.ohchr.org/english/law/jurisprudence.htm>> (search for “Kell”)

¹⁹ Human Rights Council, Report of the Working Group on the Universal Periodic Review, at paras 128.54, 128.998, 128.102, UN Doc. A/HRC/24/11 (28 June 2013).

under international human rights law.²⁰ The CBA relied on the following international instruments in its submission:

- Universal Declaration of Human Rights;
- American Declaration of the Rights and Duties of Man;
- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;
- Charter of the Organization of American States;
- Convention on the Elimination of All Forms of Discrimination against Women;
- Convention relating to the Status of Refugees;
- Convention on the Rights of the Child;
- International Convention on the Elimination of All Forms of Racial Discrimination;
- Vienna Convention on the Law of Treaties; and
- Such other international human rights law as may be relevant.²¹

The CBA argued that the constitutionality of BC Civil Legal Aid must be assessed in light of Canada's obligations under international human rights law, "which inform the interpretation and application of foundational constitutional principles of the rule of law, the norm of equality and the independence of the judiciary."²²

The BCSC dismissed the case in September 2006 on a preliminary motion on the dual grounds of lack of standing and failure to plead a reasonable cause of action. In the view of the trial judge, Brenner J, a *Charter* violation must be pled for particular individuals in particular circumstances; otherwise "there is no basis on which to make the required causal connection between the government conduct and the alleged breach".²³ With respect to the CBA's arguments concerning the application of international law, Brenner J wrote that

[i]t 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...²⁴

²⁰ *Canadian Bar Association v British Columbia*, [2006] BCJ No 2015, 1 WWR 331, online: <<https://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc1342/2006bcsc1342.pdf>>; appeal denied [2008] BCJ No 350, 290 DLR (4th) 617 (BCCA), online: <<https://www.canlii.org/en/bc/bcca/doc/2008/2008bcca92/2008bcca92.pdf>>; leave to appeal to the Supreme Court of Canada denied [2008] SCCA No 185 (SCC), online: <<http://scc-csc.lexum.com/scc-csc/scc-l-csc-a/en/item/12050/index.do>>.

²¹ *Canadian Bar Association v British Columbia*, *supra* note 20 (Statement of Claim) at para 89.

²² *Ibid* at paras 88-89.

²³ *Ibid* (Reasons for Judgment) at para 114.

²⁴ *Ibid* at para 121.

The British Columbia Court of Appeal (BCCA) in March of 2008 dismissed the CBA's appeal on the grounds that the pleadings were too general to give rise to a triable claim. The BCCA rejected the CBA's arguments that individual "right to counsel" cases cannot address a systemic problem in that they do not challenge the constitutionality of the legal aid system. Madam Justice Saunders, writing the judgment for the Court, stated that "a s. 7 Charter challenge in respect to legal services must be brought in the context of specific facts of an individual's case because not every legal proceeding affecting a person's rights requires counsel."²⁵ The BCCA left the issue of standing open. The SCC denied leave to appeal in July 2008, without reasons, with costs to the respondent.

The CBA is continuing to pursue potential legal aid test cases supporting the CBA's position.²⁶ The next chapter in this manual discusses the international law listed in the CBA test case and explains the international standards relevant to legal aid in detail.

International Human Rights Obligations: The Foundation and Framework for Provision of Legal Aid throughout Canada

A. The Right to Legal Aid in International Law: An overview²⁷

The right to legal aid applies both to criminal and civil cases. The right to free legal assistance²⁸ for persons accused of crimes, who cannot afford a lawyer, is a widely accepted principle of law, which is expressly stated in a number of international instruments.²⁹ International tribunals and treaty-monitoring bodies have also interpreted

²⁵ *Canadian Bar Assn v British Columbia*, 2008 BCCA 92, *supra* note 20 at para 49.

²⁶ CBA, Legal Aid Test Case Litigation (CBA, Legal and Government Affairs: November 2013), retrieved: <<http://www.cba.org/cba/epigram/pdf/legal-aid-test.pdf>>.

²⁷ This section includes references to decisions of the ECtHR, which, while not binding on Canada, are instructive in that they demonstrate development of consistent international norms obligating States to provide effective legal aid. See LRWC's report, *The Right to Legal Aid: A Handbook on International Law Rights to Legal Aid*, *supra* note 7 for a more comprehensive review of the right to legal aid at international law. N.B. Not posted yet.

²⁸ Note that the right to "legal aid" is not synonymous with the right to "legal assistance." The right to "legal assistance" refers to the formal right to have legal assistance to protect one's rights in courts and tribunals. The right to "legal aid" refers to the right to free legal assistance.

²⁹ See e.g. ICCPR, Article 14(3)(d); *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*, Article 18; *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*, Guideline 5, para 45(c); *Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, para 18(a) (right to apply for free legal aid "where such aid is available"); *Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)* (right to apply for free legal aid "where such aid is available"); and *UN Standard Minimum Rules for the Treatment of Prisoners*, para 93 (right to apply for free legal aid "where such aid is available"). Regional human rights standards include: *European Convention on Human Rights*, Article 6(3); *Charter of the Organization of American States*, Article 45(i); *American Convention on Human Rights*, Article 8(2); *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

international law to include, in specific circumstances, an implied right to legal aid for criminal, civil and administrative proceedings in the effective exercise of due process rights and other internationally protected rights, including rights to non-discrimination, to equality before the law, and to an effective remedy. Under international law, legal aid should be provided to victims and witnesses of crimes in appropriate cases.³⁰

The right to legal aid at international law is subject to certain limitations. Under both the *International Covenant on Civil and Political Rights* (ICCPR) and the *European Convention on Human Rights* (ECHR), to be entitled to state-funded legal aid, persons must demonstrate that they lack the financial means to pay for their own lawyer and that the “interests of justice” demonstrate the need for legal assistance. Persons who are provided with legal aid are not necessarily entitled to choose which lawyer is appointed to them.

Legal aid must be effective and provided promptly at all stages of the criminal justice process.³¹ Prior to being questioned or at the time of detention, people must be promptly informed of their right to legal assistance and of the availability of legal aid. Information on the availability of legal aid services and how to gain access to them must be widely publicized and easily accessible by all.³² Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files, and adequate time and facilities to prepare their defence and to access the full range of services inherent in legal advice.³³

In civil and criminal cases, States must not only prohibit discrimination with regard to access to courts and tribunals, but may also need to take positive measures to ensure meaningful access for women, children and groups with special needs, including, but not limited to, the elderly, minorities, indigenous people, persons with disabilities, persons with mental illness, persons living with HIV and other serious diseases, drug users, stateless persons, asylum seekers, foreign citizens, migrants and migrant workers,

³⁰ See General Assembly resolution 67/187, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, A/RES/67/187, annex (28 March 2013) [“Principles and Guidelines”], online: <http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf>; also, UN Committee Against Torture (CAT), General Comment No. 3: Implementation of Article 14 by States Parties, 19 November 2012, CAT/C/GC/3 at para 30, online: <http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf>.

³¹ *CCPR General Comment No. 32*, para 34, provides that the right to communicate with counsel under *ICCPR* Article 14(3)(d) requires that the accused is granted prompt access to counsel. Violations of *ICCPR* Article 14(3)(d) will be found where a suspect is not provided legal aid during initial police detention and questioning: HR Committee: Communication No. 852/1999, *Borisenko v Hungary* at para 7.5; HR Committee: Communication No. 1402/2005, *Krasnova v Kyrgyzstan* at para 8.6; HR Committee: Communication No. 1412/2005, *Butovenko v Ukraine* at para 7.8; HR Committee: Communication No. 1545/2007, *Gunan v Kyrgyzstan* at para 6.3.

³² The ECtHR has ruled that early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination under the ECHR: *ECtHR, Case of Salduz v Turkey*, (Application No 36391/02), Judgment of 27 November 2008, at para 54.

³³ *CCPR General Comment No. 32*, at paras 32-34.

refugees and internally displaced persons.³⁴

In appointing a legal aid lawyer, the State must be diligent, fair and must avoid arbitrariness.³⁵ The State should also consider the wishes of the parties to the proceeding, suspect or accused person and any special needs they may have.³⁶ States should make appropriate budget provisions for legal aid services that are commensurate with their needs to ensure access to effective legal aid in criminal, civil and administrative cases.³⁷

States must ensure that legal aid providers possess qualifications and training appropriate for the services they provide, according to established criteria, and that they are subject to appropriate oversight mechanisms.³⁸

States are required to establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied, or if persons have not been adequately informed of their right to legal aid.³⁹ Legislation should describe the specific criteria to determine eligibility for legal aid, particularly with respect to the limits of the financial means that trigger eligibility, require the broad publication of such criteria, and provide for an appeal of a decision on legal aid.⁴⁰

B. Canada's International Law Obligations to Provide Legal Aid

As a member of the UN, Canada is bound by the treaties it has ratified and is expected to recognize and respect the norms articulated in Declarations, Principles and Resolutions adopted by the General Assembly. Canada is also bound by the provisions of instruments that have become widely accepted as representing customary international law, including many provisions of the *Universal Declaration of Human Rights*. As a member of the Organization of American States (OAS), Canada is bound by the *Charter of the*

³⁴ *Principles and Guidelines*, supra note 300, Principles 6 and 10; Guidelines 9 and 11.

³⁵ See e.g. *ECtHR, Case of Tabor v Poland* (Application No 12825/02), Judgment of 27 September 2006 at paras 44-46; *ECtHR, Case of Wersel v Poland* (Application No 30358/04), Judgment of 13 December 2011 at paras 52-54; *ECtHR, Case of AB v Slovakia* (Application No 41784/98), Judgment of 04 June 2003 at para 61; *ECtHR, Case of RD v Poland*, (Application Nos 29692/96 and 34612/97), Judgment of 18 March 2002 at paras 50-52.

³⁶ *Principles and Guidelines*, supra note 30, Principle 10; *ECtHR, Case of Croissant. Germany*, (Application No 13611/88) Judgment of 25 September 1992, at para 29.

³⁷ *Principles and Guidelines*, *ibid.* Guideline 12; *UN Basic Principles on the Role of Lawyers*, Principle 3; UN Human Rights Council. *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul*, 15 March 2013, A/HRC/23/43, at paras 73-74, online: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/119/35/PDF/G1311935.pdf?OpenElement>> [*Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul*].

³⁸ *Principles and Guidelines*, supra note 30, Guideline 13.

³⁹ *UDHR*, Article 8; *ICCPR*, Article 3; *CEDAW*, Article 2; *Principles and Guidelines*, Principle 9, Guideline 2; *ACHR*, Article 25; *ECHR*, Article 13.

⁴⁰ *ICCPR*, Article 2; *CRC*, Article 2; *Principles and Guidelines*, Principle 1; *ACHR*, Article 28.

Organization of American States.⁴¹ For OAS member states, the *American Declaration of the Rights and Duties of Man (American Declaration)*⁴² “constitutes a source of international obligations” and forms the “normative basis” for human rights protection in OAS states.⁴³ As a member of the Commonwealth, Canada has committed to the *Latimer Guidelines*,⁴⁴ which affirm the primacy of equal access to the justice system.

Once a State ratifies a treaty, its provisions are legally binding on the State as a matter of international law. This means the State has a binding international law obligation to ensure that the treaty is implemented throughout the State at every level. As Canadian legal scholar Gib van Ert states, “failure to give domestic legal effect to a binding treaty obligation that requires it is itself a breach of the treaty.”⁴⁵

The *Vienna Convention on the Law of Treaties*⁴⁶ (to which Canada acceded on 14 Oct 1970), specifies that States Parties are bound by their treaty obligations and all treaty obligations must be performed in good faith (the principle of *pacta sunt servanda*).⁴⁷ Article 27 of the *Vienna Convention* reads: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Thus, under international human rights law, Canada has both a negative obligation not to obstruct access to judicial and other remedies as well as a positive duty to organize its domestic law to ensure that all persons can access those remedies.

C. Implementation of Canada’s international human rights obligations

International human rights law is received in Canada in the following ways: in the interpretive presumption that domestic law conforms with the State’s international obligations;⁴⁸ through the incorporation of customary international law by the common law; and through the State’s acceptance of its legal obligation to implement treaties by passing primary or secondary legislation (regulations). As the power to enter into treaties

⁴¹ *Charter of the Organization of American States*, signed 1948, entered into force 13 Dec. 1951, as amended 1967, 1985, 1992, 1993, online: <http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.pdf>.

⁴² *American Declaration on the Rights and Duties of Man*, signed 2 May 1948, OEA/Ser.L/V/II.71, at 17 (1988), online: <<http://www.cidh.org/basicos/english/Basic2.American%20Declaration.htm>>.

⁴³ Inter-American Commission on Human Rights, Basic Documents Pertaining to the Human Rights in the Inter-American System, online: <<http://www.cidh.org/basicos/english/Basic1.%20Intro.htm>>.

⁴⁴ *Parliamentary Supremacy Judicial Independence: Latimer House Guidelines for the Commonwealth*, 19 June 1998. The guidelines were further refined and endorsed by Commonwealth Heads of Government in November 2003 as the *Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government* (the Principles), online: <<http://thecommonwealth.org/sites/default/files/history-items/documents/LatimerHousePrinciples.pdf>>.

⁴⁵ Gib van Ert, *Using International Law in Canadian Courts* (Toronto: Irwin Law, 2008) at 234.

⁴⁶ *Vienna Convention on the Law of Treaties*, adopted 23 May 1969, entered into force 27 Jan 1980, UN Doc A/CONF 39/26, reprinted in 8 ILM 679 (1969), online: <<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>>

[Vienna Convention].

⁴⁷ *Vienna Convention*, Article 26.

⁴⁸ *Daniels v White and the Queen*, [1968] SCR 517 at 541.

is a prerogative of the Crown,⁴⁹ and under Canada's system of constitutional monarchy, only Parliament and the provincial and territorial legislatures can generate legislation, treaties, unlike customary international law, only become part of Canadian domestic law if they are expressly implemented by statute.⁵⁰

Treaty making in Canada

As a matter of policy, the federal government tables treaties in Parliament after adoption "and prior to Canada formally notifying that it is bound by the Instrument."⁵¹ The provisions of treaties ratified by Canada become part of Canadian law through passage or amendment of laws by Parliament or provincial legislatures to incorporate the protected rights and ensure remedies for violation.⁵² As the subject matter of a human rights treaty may fall under both federal and provincial/territorial jurisdiction, a treaty may be implemented in Canada through a combination of federal and provincial/territorial legislation.⁵³ To ensure compliance with its international legal obligations, it is Canada's practice to ratify treaties only after securing the support of the provinces.⁵⁴ This ensures that provincial governments have agreed to take on the international legal obligation to implement provisions of treaties within their exclusive jurisdiction.

Despite these international obligations and Canada's policies for ensuring federal-provincial cooperation on ratification of treaties, Canada often fails to enact specific

⁴⁹ The executive branch of the federal government of Canada has the power to enter into international treaties. For more detail, see Laura Barnett, "Canada's Approach to the Treaty-making Process", *Legal and Legislative Affairs Division, Parliament of Canada* (24 November 2008) at 1-2, online: Parliament of Canada, online: <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0845-e.htm>>.

⁵⁰ *Re Regina and Palacios*, (1984) 45 OR (2d) 269, CanLII 1870 (Ont CA).

⁵¹ *Policy on Tabling of Treaties in Parliament* (January 2008), s 6.3, online: Government of Canada <<http://www.treaty-accord.gc.ca/procedures.aspx>>.

⁵² For more detail see Amissi M Manirabona & François Crépeau, "Enhancing the Implementation of Human Rights Treaties in Canadian Law: The Need for a National Monitoring Body" (2012) 1:1 Canadian Journal of Human Rights 25, online: CJHR <<http://cjhr.ca/wp-content/uploads/2012/05/Manirabona-and-Crepeau-Enhancing-Implementation-with-Human-Rights-Treaties.pdf>>. Also see Barnett, *supra* note 2; Raynell Andreychuk & Sheila Finestone, *Promises to Keep: Implementing Canada's Human Rights Obligations. Report of the Standing Senate Committee on Human Rights* (Ottawa: Government of Canada, 2001), online: Parliament of Canada <<http://www.parl.gc.ca/Content/SEN/Committee/371/huma/rep/rep02dec01-e.htm>>. Regarding justiciability of economic, social and cultural rights in Canada, see Martha Jackman & Bruce Porter, "Justiciability of Social and Economic Rights in Canada" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in Comparative International Law* (Cambridge: Cambridge University Press, 2008), pre-publication draft online: Social Rights Accountability Project (SRAP) <http://www.srap.ca/publications/porter_justiciability_of_social_and_economic_rights_in_canada.pdf>; Bruce Porter, "Homelessness, Human Rights, Litigation and Law Reform: A View from Canada" (2004) 10 Australian Journal of Human Rights 133, online: SRAP, online: <http://www.srap.ca/publications/porter_homelessness_human_rights.pdf>.

⁵³ In Canada, the power to make laws is divided between the federal government and the provinces pursuant to sections 91 and 92 of the *Constitution Act, 1867: The Constitution Act, 1867*, 30 & 31 Vict, c 3, online: Government of Canada <<http://laws-lois.justice.gc.ca/eng/const/page-4.html#docCont>>.

⁵⁴ See Annex A to the *Policy on Tabling of Treaties in Parliament* (January 2008), online: Government of Canada <<http://www.treaty-accord.gc.ca/procedures.aspx>>.

legislation to implement treaties. Canada has no legislation that mandates Parliament or the provincial legislatures to incorporate treaties into federal or provincial laws.⁵⁵ Canada also has no effective mechanism to ensure federal, provincial and territorial cooperation to implement international human rights obligations.⁵⁶ Often, the text of an implementing enactment does not refer to the treaty, particularly when Canada relies on existing legislation, such as the *Charter*, for ratification purposes.⁵⁷

Presumption of conformity with international law

The Supreme Court of Canada (SCC) has confirmed that international treaties are not part of Canadian law unless they have been incorporated into Canadian law by statute.⁵⁸ This leads many Canadian jurists to an incorrect perception that international treaties are rarely relevant in Canadian courts.⁵⁹ In fact, treaties to which Canada is a party and other international law instruments are frequently important for legal argument in Canada's courts and tribunals.

The SCC has ruled that Canada's *Charter* "should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human

⁵⁵ Manirabona & Crépeau, *supra* note 52 at 30.

⁵⁶ Canada has a federal-provincial Continuing Committee of Officials on Human Rights (CCOHR) that meets in person twice a year and engages in monthly telephone conference calls to consult and share information on international human rights instruments. Online: CCOHR <<http://www.pch.gc.ca/pgm/pdp-hrp/canada/cmtt-eng.cfm>>. The CCOHR is not an implementation body: The mid-level officials participating in the CCOHR have no decision-making power, and the CCOHR has limited financial resources and no accountability to elected legislative assemblies or Parliament. No political level meeting of federal, provincial and territorial ministers responsible for human rights has occurred since 1988. Human rights treaty bodies and non-governmental organizations have criticized Canada for its failure to have an effective implementation mechanism and for ignoring key recommendations that have been made repeatedly to Canada. See e.g. Amnesty International et al, *Promise and Reality: Canada's International Human Rights Implementation Gap. Joint NGO Submission to the United Nations Human Rights Council in relation to the February 2009 Universal Periodic Review of Canada* (Canada: Amnesty International, 2008) at 2-3, online: AI <http://www.amnesty.ca/themes/resources/canada/Canada_un_upr_joint_ngo_submission.pdf>; Lawyers' Rights Watch Canada, "Implementation of CERD and CAT Recommendations on Violence against Aboriginal Women and Girls," Submission to Continuing Committee of Officials on Human Rights 4 November 2012, online: <<http://www.lrwc.org/implementation-of-cerd-and-cat-recommendations-regarding-murders-and-disappearances-of-aboriginal-women-and-girls/lrwc-bccedaw-on-cerd-implementation-to-ccohr-1-11-12/>>.

⁵⁷ For example, section 269.1 and 7(3.7) of the *Criminal Code* were passed for the purpose of complying with CAT but do not refer specifically to that Convention. By contrast, the *Crimes against Humanity and War Crimes Act*, SC 2000, c 24 specifically refers to the Rome Statute; the subtitle of the *Geneva Conventions Act*, RSC, c G-3 is "An Act respecting the Geneva Conventions". The problem with relying on existing legislation for the purpose of giving effect to Canada's international human rights obligations is that the legislation may not contain the precise detail of the right at international law, leaving it to the courts to interpret the scope of the right, without reference to the international law provisions. New legislation may not refer to or fully comply with relevant Conventions internationally required to be implemented.

⁵⁸ *Baker v Canada*, [1999] 2 SCR 817 (available on CanLII) [*Baker*].

⁵⁹ See e.g. Catherine Morris & Gail Davidson, *The Right to Know Our Rights: International Law Obligations to Ensure International Human Rights Education and Training* (Vancouver: Lawyers' Rights Watch Canada, 2012) at 75-83, online: LRWC <<http://www.lrwc.org/?p=2930>>.

rights documents which Canada has ratified.”⁶⁰ In the 1999 decision of *Baker v Canada*, the SCC affirmed this principle, ruling that international human rights law is “a critical influence on the interpretation of the scope of the rights included in the *Charter*.”⁶¹ The Court also stated that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review”⁶² and cited with approval the well-established principle of statutory interpretation that:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. *In so far as possible, therefore, interpretations that reflect these values and principles are preferred* [emphasis added by the SCC in *Baker*].⁶³

Where *Charter* decisions are concerned, the SCC decision in *R v Hape*⁶⁴ seems to strengthen this principle. The Court held that “[i]n interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada’s binding obligations under international law where the express words are capable of supporting such a conclusion.”⁶⁵

In *Hape*, the SCC also refers, albeit in *obiter dicta*, to Canada’s general approach to customary international law:⁶⁶

[F]ollowing the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate

⁶⁰ *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1056-67 [*Slaight*].

⁶¹ *Baker*, *supra* note 58 at para 70. It should be noted that *Baker* considered the application of the presumption of conformity to administrative decision making. Thus, it applies to tribunals as well as courts. See Gib van Ert, “Canada,” Chapter 6 in David Sloss, ed, *The Role of Domestic Courts in Treaty Enforcement* (Cambridge, UK: Cambridge University Press, forthcoming March 2014) 166, see draft Chapter online at <<http://www.litigationchambers.com/pdf/vanErt-domestic-courts.pdf>>.

⁶² *Ibid*. For more detail see Anne F Bayefsky, “International Human Rights in Canadian Courts,” in Benedetto Conforti & Francesco Francioni, eds, *Enforcing International Human Rights in Domestic Courts* (Leiden, Netherlands: Martinus Nijhoff, 1997) 295.

⁶³ Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed, (1994) at 330, cited with approval by the SCC in *Baker*, *supra* note 58.

⁶⁴ *R v Hape*, [2007] 2 SCR 292 (available on CanLII) [*Hape*].

⁶⁵ *Ibid* at para 56.

⁶⁶ Customary international law “arises when consistent state practice is joined with the belief that such practice is required by law (*opinio juris*).” See Gib van Ert, “Using Treaties in Canadian Courts” (2000) *Canadian Yearbook of International Law* 3 at 5, which has a brief explanation, or read “The Incorporation of Custom, Chapter 7,” in Gib van Ert, *Using International Law in Canadian Courts*, 2d ed (Toronto: Irwin, 2008).

international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law [per LeBel J].⁶⁷

International instruments that do not have treaty status may also be legally relevant in Canadian tribunals and courts. In *Canada (Human Rights Commission) v Canada (Attorney General)*⁶⁸ the Federal Court of Canada (FCC) noted that

where there is more than one possible interpretation of a provision in domestic legislation, tribunals and courts will seek to avoid an interpretation that would put Canada in breach of its international obligations. Parliament will also be presumed to respect the values and principles enshrined in international law, both customary and conventional.

The FCC also extended the interpretive presumption to non-treaty instruments, saying that the UN *Declaration on the Rights of Indigenous Peoples* “may also inform the contextual approach to statutory interpretation.”⁶⁹

Despite the importance of international human rights law to Canadian law, to date, Canada’s courts have not provided clear guidance as to the nature and scope of the interpretive presumption arising from unincorporated treaties or customary international law, nor have courts always interpreted domestic law in accordance with the plain meaning of international human rights treaties binding on Canada.⁷⁰

⁶⁷ *Hape*, *supra* note 64 at para 39. For a brief discussion of ambiguities in the law regarding Canada’s reception of customary international law, see Craig Forcese, “Supreme Court of Canada Clouds Rules Governing Role of Customary International Law in Domestic Law and of International Law in Interpreting Canadian Charter”, blog post at *International Law: Doctrine Practice and Theory*, 1 February 2009, online: <<http://craigforcese.squarespace.com/public-international-law-blog/2009/2/1/supreme-court-of-canada-clouds-rules-governing-role-of-custo.html>>.

⁶⁸ *Canada (Human Rights Commission) v. Canada (Attorney General)* (2012 FC 445) T-578-11, April 18, 2012, at paras 155, 351, 353, online: Federal Court <<http://decisions.fct-cf.gc.ca/en/2012/2012fc445/2012fc445.html>>.

⁶⁹ *Ibid* at para 353.

⁷⁰ An example is the Supreme Court of Canada’s decision in *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 (available on CanLII). The UN Committee Against Torture in 2005 criticized “the failure of the Supreme Court of Canada, in *Suresh v Minister of Citizenship and Immigration*, to recognize at the level of domestic law the absolute nature of the protection of article 3 of the Convention, which is not subject to any exception whatsoever.” *Consideration of Reports Submitted by States Parties under Article 19 of the Convention. Conclusions and Recommendations of the Committee against Torture: Canada*, Thirty-Fourth Session, 2-20 May 2005, CAT/C/CR/34/CAN, 7 July 2005, at para 4(a), online:

<<http://www.unhcr.org/refworld/publisher,CAT,CONCOBSERVATIONS,CAN,43f2fe460,0.html>>.

D. International Standards on Legal Aid Applicable to Canada

Universal Declaration of Human Rights

The *Universal Declaration of Human Rights* (UDHR)⁷¹ was initially a non-binding declaration of the UN General Assembly. Many international law scholars are now of the view that “[t]he provisions of the Universal Declaration of Human Rights are for the most part considered declarative of customary international law”.⁷² Most scholars and jurists acknowledge that some parts of the UDHR have the status of customary international law, such as the UDHR’s articles on the right to life (Article 3), which prohibits genocide and mass killings, and the prohibitions against slavery (Article 4), torture (Article 5), prolonged arbitrary imprisonment (Articles 9, 10, 11), and systematic racial discrimination (Article 2).

The UDHR is premised on the necessity of human rights being protected by the rule of law.⁷³ Of relevance to Canada’s obligations to provide legal aid are provisions guaranteeing the right to equality and non-discrimination, the right to a fair trial and to an effective remedy for breach of fundamental rights.

2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.
7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

⁷¹ *Universal Declaration of Human Rights*, adopted 10 Dec. 1948, UN Doc A/810, at 71 (1948), online: <<http://www.un.org/en/documents/udhr/>>.

⁷² Lawyers Committee for Human Right, “What Is a Fair Trial? A Basic Guide to Legal Standards and Practice” (New York, NY: March 2000) at n 7 online: https://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf. See also *Beharry v Reno*, 183 F Supp 2d 584, 604 (EDNY 2002), noting that several international human rights agreements “such as the United Nation’s Universal Declaration of Human Rights” have attained the status of customary international law because of their widespread nature.

⁷³ The Preamble to the UDHR confirms the principle of the rule of law as the alternative to recourse to violence: “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”.

10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.⁷⁴

11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

United Nations Treaties

International Covenant on Civil and Political Rights

The *International Covenant on Civil and Political Rights* (ICCPR)⁷⁵ and the *Optional Protocol to the International Covenant on Civil and Political Rights*⁷⁶ were ratified by Canada on 19 May 1976. Under the Optional Protocol, Canada recognizes the competence of the Human Rights Committee to receive and consider inter-state complaints against it. As a State Party to the ICCPR, Canada has a duty to guarantee, *inter alia*, equal access to effective remedies for human rights violations.

2. (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

...

(3) Each State Party to the present Covenant undertakes:

(a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all person equal and effective protection against discrimination on any ground such as race, colour, sex,

⁷⁴ See Judge Patrick Robinson, “The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY” (2009) 3 Berkeley JL Int’l L Publicist 1 (asserting that the right to a fair trial has achieved the status of international customary law).

⁷⁵ *International Covenant on Civil and Political Rights*, adopted 16 Dec. 1966, entered into force 23 March 1976, UN Doc A/6316, 999 UNTS 171 [“ICCPR”], online: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

⁷⁶ *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted 16 Dec. 1966, entered into force 23 March 1976, UN Doc A/6316, 999 UNTS 171, online: <http://www1.umn.edu/humanrts/instree/b4ccprp1.htm>.

language, religion, political or other opinion, national or social origin, property, birth or other status.

The right to legal aid in criminal matters is specifically provided in ICCPR, Article 14:

14. (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

[...]

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it [emphasis added];

The HR Committee has confirmed that the right to counsel guaranteed by Article 14 of the ICCPR applies to the determination of both criminal charges and to “rights and obligations” in civil proceedings.⁷⁷

The HR Committee, in its April 2006 review of Canada’s performance ensuring rights protected by the ICCPR, noted the inadequacy of remedies for violations of Article 2, 3, and 26 equality and non-discrimination rights.⁷⁸ Expressing a particular concern about the significant number of violent deaths of indigenous women in Canada, the HR Committee noted that “legal aid for access to courts may not be available”⁷⁹ to seek redress for violations of the rights provided in the Convention.⁸⁰

International Covenant on Economic, Social and Cultural Rights

Canada is among the 160 nations that have ratified the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)⁸¹ (ratified by Canada 19 May 1976). The UDHR, ICCPR and ICESCR together form the International Bill of Human Rights. Canada has not ratified the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*.⁸²

⁷⁷ Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994) at para 2.

⁷⁸ International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee, Canada CCPR/C/CAN/CO/5, 20 April 2006, at para 11, online: <<http://www.refworld.org/docid/453777a50.html>>.

⁷⁹ *Ibid.*

⁸⁰ *Ibid* at para 23.

⁸¹ *International Covenant on Economic, Social and Cultural Rights*, adopted 16 Dec. 1966, entered into force 3 Jan. 1976, UN Doc A/6316, 999 UNTS 3 [“ICESC”], online: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>>.

⁸² *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*: resolution/adopted by the General Assembly, 10 December 2008, entered into force 5 May 2013, GA Res. 832, UN GAOR, 63rd Session, UN Doc A/RES/63/117 (2008), online: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx>>.

The ICESCR outlines basic social, economic and cultural rights, including the rights to equality and non-discrimination, work, just and favourable working conditions, union membership, social security, protection and assistance to family, an adequate standard of living, adequate clothing, food, water and sanitation, adequate housing, the highest level of mental and physical health possible, education, culture and access to scientific progress benefits.

Under the ICESCR, Canada undertakes to guarantee equality of access to the rights guaranteed by the Convention.

2. (2) The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

In May 2006, the Committee on Economic, Social and Cultural Rights (CESCR), reviewing Canada's fulfillment of Covenant rights, noted "inadequate availability of civil legal aid," particularly for economic and social rights, as a contributing factor to lack of redress available to victims of violations. The CESCR expressed particular concern with cuts to civil legal aid in BC, concluding, "This leads to a situation where poor people, in particular single women, who are denied benefits and services to which they are entitled to under domestic law, cannot access domestic remedies"⁸³ [emphasis added].

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Convention against Torture)⁸⁴ was ratified by Canada June 24, 1987. On 13 November 1989 Canada made a declaration under Article 22 of the Convention that the CAT "may receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation" of the Convention against Torture.

The Convention against Torture provides for a right to a fair trial and other due process rights and the right to a remedy.

⁸³ Consideration of Reports Submitted by States Parties under Articles 16 and 17 of The Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights Canada, E/C.12/CAN/C0/4, E/C.12/CAN/C0/5, 22 May 2006, at para 14, online: <http://www.refworld.org/pdfid/45377fa30.pdf>.

⁸⁴ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted 10 Dec. 1984, entered into force 26 June 1987, UN Doc A/39/51, at 197 (1984) ["CAT"], online: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

13. Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

14. (1) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

Convention on the Elimination of All Forms of Discrimination against Women

The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)⁸⁵ is the main convention ensuring protection and promotion of the rights of women. CEDAW has 178 States Parties. Canada ratified CEDAW on 10 December 1981 and the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*⁸⁶ on 18 October 2002. The Optional Protocol authorizes the Committee on the Elimination of Discrimination against Women (CEDAW) to 1) receive and consider communications from individuals or groups of individuals who claim that their rights have been violated by a State that is a party to the treaty, and 2) initiate an inquiry when it receives “reliable information indicating grave or systematic violations.”

Under CEDAW, Canada is obliged to ensure the legal protection of women on an equal basis, without discrimination, including “accord[ing] to women equality with men before the law” (Article 15).

2. States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: [...]

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

⁸⁵ *Convention on the Elimination of All Forms of Discrimination against Women*, adopted 18 Dec. 1979, entered into force 3 Sept. 1981, U.N. Doc. A/34/46, at 193 (1979) [“CEDAW”], online: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>>.

⁸⁶ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 6 October 1999, entered into force on 22 Dec 2000, United Nations, Treaty Series, vol 2131, at 83, online: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/774/73/PDF/N9977473.pdf?OpenElement>>.

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

15. (1) States Parties shall accord to women equality with men before the law.

In 2008, the CEDAW Committee, reviewing Canada's implementation and enforcement of rights protected by CEDAW, noted that cuts to civil legal aid—particularly in BC—effectively deny equality rights to low-income women.

21. The Committee is concerned at reports that financial support for civil legal aid has diminished and that access to it has become increasingly restricted, in particular in British Columbia, consequently denying low-income women access to legal representation and legal services. The Committee also notes with concern the fact that the State party's Court Challenges Programme, which facilitated women's access to procedures to review alleged violations of their right to equality, was cancelled, and it regrets the absence of concrete reasons in the budget review and assessment that led to that cancellation.⁸⁷

The CEDAW Committee urged Canada to act to improve legal aid throughout Canada, particularly for family and poverty law, to ensure access to remedies for discrimination on the basis of sex, especially in family and poverty law.

International Convention on the Elimination of All Forms of Racial Discrimination

The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)⁸⁸ was ratified by Canada on 14 October 1970. Under ICERD, Article 14, a State Party may at any time declare that it recognizes the competence of the CERD to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in the Convention. Canada has not yet made a declaration under ICERD, Article

⁸⁷ Concluding observations of the Committee on the Elimination of Discrimination against Women: Canada, CEDAW /C/CAN/CO/7, 7 November 2008, at para 21, online: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/602/42/PDF/N0860242.pdf?OpenElement>>.

⁸⁸ *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted 21 Dec. 1965, entered into force 4 Jan. 1969, UN Doc A/6014 (1966) ["ICERD"], online: <<http://www1.umn.edu/humanrts/instree/d1cerd.htm>>.

14.

ICERD creates obligations on Canada to guarantee the right of freedom from discrimination and the right to equality before the law.

5. In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice; [...]

6. States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

The CERD has determined that ICERD also imposes a duty to provide legal aid when it is necessary to do so to ensure the enjoyment by all of protected rights. The CERD, in its May 2007 review of Canada's compliance with ICERD, expressed concern "about difficulties with access to justice for aboriginal peoples, African Canadians and persons belonging to minority groups", particularly in view of the September 2006 cancellation of the Court Challenges Program that had enabled test cases on issues involving the equality of disadvantaged groups.⁸⁹

Convention on the Rights of the Child

Under the *Convention on the Rights of the Child* (CRC),⁹⁰ ratified by Canada on 13 December 1991, Canada ensures the rights under the Convention without discrimination, including the right to prompt access to legal and other appropriate assistance.

2. (1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race,

⁸⁹ Committee on the Elimination of Racial Discrimination, Seventieth session, 19 February - 9 March 2007, CERD/C/CAN/CO/18, 25 May 2007, at para 26, online:

<<http://www.unhcr.org/refworld/publisher,CERD,,CAN,465fe0082,0.html>>.

⁹⁰ *Convention on the Rights of the Child*, adopted 20 Nov. 1989, entered into force 2 Sept. 1990, UN Doc A/44/49, at 166 (1989) ["CRC"], online: <<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>.

In 2000, the UN General Assembly adopted two Optional Protocols to the *Convention on the Rights of the Child* to increase the protection of children from involvement in armed conflicts and from sexual exploitation. On 14 April 2014, a third Optional Protocol was adopted, allowing children to bring complaints directly to the Committee on the Rights of the Child.

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colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

(2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

12. (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

37. States Parties shall ensure that: [...]

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

40. (2) To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: [...]

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: [...]

(ii) ...to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance...

Convention relating to the Status of Refugees

The *Convention Relating to the Status of Refugees (Refugee Convention)*,⁹¹ and the *1967 Protocol Relating to the Status of Refugees (1967 Protocol)*⁹² are grounded in Article 14

⁹¹ *Convention relating to the Status of Refugees*, adopted 28 July 1951, entered into force 22 April 1954, United Nations, Treaty Series, vol 189, at 137, online:

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx>>.

of the UDHR, which recognizes the right of persons to seek asylum from persecution in other countries. Canada acceded to the *Refugee Convention* and to the 1967 *Protocol* on 4 June 1969. The *Refugee Convention* guarantees to refugees, on a basis equal to nationals, free access to the courts, including legal assistance and exemption from requirements concerning the payment of security for costs.

16. (1) A refugee shall have free access to the courts of law on the territory of all Contracting States.

(2) A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi* [payment of security for legal costs].

(3) A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

A 2012 report commissioned by the Office of the United Nations High Commissioner for Refugees (UNHCR) found that recent changes to Canada's asylum procedures, together with cuts in legal aid funding across Canada, have resulted in an increase in unrepresented claims by persons seeking asylum in Canada. The report noted that not only does a lack of representation have a major impact on fairness of the refugee determination procedures, but also the overall acceptance rate for unrepresented claimants was found to be significantly lower than for represented claimants.⁹³

United Nations Declarations and Statements of Principles

While UN Declarations and Statements of Principles are not binding on UN member States, they provide important sources for interpreting and understanding States' international legal obligations as well as important normative guidance for States in developing domestic public policy that complies with generally accepted international human rights standards and principles.

The Basic Principles on the Role of Lawyers

The UN *Basic Principles on the Role of Lawyers*⁹⁴ provide specific substance to the due

⁹² UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, entered into force 4 October 1967, United Nations, Treaty Series, vol 606, at 267, online: <<http://www1.umn.edu/humanrts/instree/v2prsr.htm>>.

⁹³ UN High Commissioner for Refugees (UNHCR), *The Impact of the Lack of Legal Representation in the Canadian Asylum Process*, 6 November 2012, online: <http://unhcr.ca/resources/documents/RPT-2012-06-legal_representation-e.pdf>.

⁹⁴ *Basic Principles on the Role of Lawyers*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc A/CONF.144/28/Rev.1 at 118 (1990), online: <<http://www1.umn.edu/humanrts/instree/i3bprl.htm>>. The General Assembly "welcomed" the Basic Principles in its resolution adopted without a vote (by consensus) on 18 December 1990.

process guarantees recognized in the UDHR and the ICCPR. The Preamble and Articles 1, 2, 3 & 6 of the *Basic Principles on the Role of Lawyers* articulate the duty to ensure equal access to lawyers and provide sufficient funding for legal services to the poor and other disadvantaged persons as part of States' duties to ensure adequate human rights protection.

[...]

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession [...]

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

6. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

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

The *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (Principles and Guidelines)*⁹⁵ represent the first international instrument dedicated exclusively to the provision of legal aid. Drawn from international standards and recognized good practices, the *Principles and Guidelines* are intended to provide guidance to States on the “fundamental principles on which a legal aid system in criminal justice should be based” and to “outline the specific elements required for an effective

⁹⁵ *Principles and Guidelines*, supra note 30.

and sustainable national legal aid system, in order to strengthen access to legal aid.”⁹⁶ The *Principles and Guidelines* have been interpreted as fully applicable to civil and administrative law cases.⁹⁷

The *Principles and Guidelines* are “primarily concerned with the right to legal aid, as distinct from the right to legal assistance as recognized in international law.” The *UN Principles and Guidelines* are ground-breaking in that they define and clarify the right to “legal aid” as distinguished from the more general right to “legal assistance.” The *UN Principles and Guidelines* also set out conditions under which legal aid is required so as to give practical effect to the right to legal assistance for those who cannot themselves afford to pay for it. Legal aid is defined under the *Principles and Guidelines* to include

legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require. Furthermore, “legal aid” is intended to include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.⁹⁸

In adopting the *Principles and Guidelines*, the UN General Assembly recognizes

that legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law and that it is a foundation for the enjoyment of other rights, including the right to a fair trial, as a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process.⁹⁹

In her report¹⁰⁰ to the twenty-third session of the Human Rights Council (HRC), which included a thematic section on legal aid, Special Rapporteur on the Independence of judges and lawyers, Gabriela Knaul, called on States to build on the *Principles and Guidelines*. Noting that the aim of legal aid is “to contribute to the elimination of obstacles and barriers that impair or restrict access to justice,” the SR called for the broadest definition of legal aid possible, which should include

not only the right to free legal assistance in criminal proceedings, as defined in article 14 (3) (d) of the International Covenant on Civil and Political Rights, but

⁹⁶ *Ibid* at para 6.

⁹⁷ UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul*, *supra* note 37 at para 25.

⁹⁸ *Principles and Guidelines*, *supra* note 30 at para 8.

⁹⁹ General Assembly resolution 67/187, *supra* note 30, *Preamble*.

¹⁰⁰ *Supra* note 37 at para 48.

also the provision of effective legal assistance in any judicial or extrajudicial procedure aimed at determining rights and obligations.¹⁰¹

The SR advised that the *Principles and Guidelines* “may also be applied, mutatis mutandis, in civil and administrative law cases where free legal assistance is indispensable for effective access to the courts and a fair hearing, as well as for access to legal information and counsel and to mechanisms of alternative dispute resolution.”¹⁰²

Key provisions of the *Principles and Guidelines* can be summarized under the following themes:

Guaranteeing the right to legal aid in national constitutions

Principle 1 provides that “States should guarantee the right to legal aid in their national legal systems at the highest possible level, including where applicable, in the constitution.” Principle 2 stipulates that specific legislation and regulations should be enacted to “ensure that a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible. States should allocate the necessary human and financial resources to the legal aid system.” Guidelines 11-18 outline measures to ensure a functioning nationwide legal aid system.

Application of the right to legal aid

Principles 3 provides that “anyone who is detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice system.” Legal aid should also be provided, regardless of a person’s means, where the interests of justice so require. Principles 4 and 5 state that legal aid should, where appropriate, be provided to victims and witnesses of crime. Guideline 1 provides guidance on the use of means test, where applied, including requirements that children always be exempt from such a test and allowing the courts to order that a person be provided with legal aid, where the interests of justice require, with or without financial contribution. Persons urgently requiring legal aid at police stations, detention centres or courts should be provided preliminary legal aid while their eligibility is being determined.

Non-discrimination

Under Principle 6, legal aid should be provided to “all persons regardless of age, race, colour, gender, language, religion or belief, political or other opinion, national or social origin or property, citizenship or domicile, birth, education or social status or other status.”

Prompt and effective provision of legal aid

Principle 7 requires that effective legal aid be “provided promptly at all stages of the criminal justice process.” Effective legal aid includes, but is not limited to, “unhindered access to legal aid providers for detained persons, confidentiality of communications,

¹⁰¹ *Ibid* at para 27.

¹⁰² *Ibid* at para 48.

access to case files and adequate time and facilities to prepare their defence.” Guidelines 4-6 outline measures to ensure effective legal aid at all stages of the proceedings, including appeals and other related proceedings, and to ensure that the counsel for the accused is present at all critical stages of the proceedings. Under Guideline 6, with respect to the post-trial stage, States should ensure that imprisoned persons and children deprived of their liberty have access to legal aid and where legal aid is not available must ensure that such persons are held in prison in conformity with the law. Guideline 7 includes measures to ensure the “[a]ppropriate advice, assistance, care, facilities and support are provided to victims of crime, throughout the criminal justice process, in a manner that prevents repeat victimization and secondary victimization.” Guideline 8 deals with the provision of legal aid to witnesses of crimes.

Guideline 11 identifies a number of measures to encourage the functioning of a nationwide legal aid system. A legal aid system should include the provision of legal aid to persons who have been unlawfully arrested or detained or who have received a final judgment of the court as a result of a miscarriage of justice, in order to enforce their right to retrial, reparation including compensation, rehabilitation and guarantees of non-repetition.

Right to be informed

Under Principle 8, States should ensure that persons are informed of their right to legal aid and other procedural safeguards “prior to any questioning and at the time of deprivation of liberty.” Guideline 2 outlines measures States should take to guarantee the right to be informed of the right to legal aid, including making information available to isolated and marginalized groups.

Right to a remedy

Principle 9 provides that States should establish “effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid.” Under Guideline 2, such remedies may include “a prohibition on conducting procedural actions, release from detention, exclusion of evidence, judicial review and compensation”.

Equity in access to legal aid

Under Principle 10, special measures should be taken to ensure meaningful access to legal aid for women, children and groups with special needs¹⁰³ and for persons living in rural, remote and economically and socially disadvantaged areas or members of economically and socially disadvantaged groups. Such measures should address the special needs of those groups, including gender-sensitive and age-appropriate measures. Guideline 9 outlines a number of measures to ensure the right of women to equal and fair access legal aid, such as introducing an active policy of incorporating a gender perspective into all policies, laws, procedures, programmes and practices relating to legal aid and providing legal aid, advice and court services to female victims of violence in all

¹⁰³ Groups with special needs are outlined under Principle 10 as “including, but not limited to, the elderly, minorities, persons with disabilities, persons with mental illnesses, persons living with HIV and other serious contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons.”

legal proceedings. Guideline 11 states that nationwide legal aid schemes should be designed taking into account the needs of specific groups (as listed), and be in line with guidelines addressing the rights of women and children to effective access to legal aid.

Legal aid in the best interests of the child

The *Principles and Guidelines* build on the CRC and the *Beijing Rules*, to address the legal aid needs of children in conflict with the law.¹⁰⁴ Principle 11 states that the best interests of the child are the primary consideration in all legal aid decisions affecting children. Legal aid provided to children should be “accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.” Under Principle 3, children should have access to legal aid under the same or more lenient conditions than adults. Guideline 10 sets out measures to ensure children’s effective access to justice and to prevent stigmatization and other adverse effects as a result of their being involved in the criminal justice system, including access to diversion and the use of alternative measures and sanctions, where appropriate. Because deprivation of liberty is considered a measure of last resort that should only be imposed for the shortest appropriate period of time, access to legal aid is critical when there is a risk of loss of liberty. States should ensure that children have the right to have counsel assigned to represent the child in his or her own name in proceedings where there is or could be a conflict of interest between the child and his or her parents or other parties involved.

Independence and protection of legal aid providers

Under Principle 12, legal aid providers should be able to carry out their work effectively, freely and independently “without intimidation, hindrance, harassment or improper interference.” Guideline 11 provides that a legal aid body or authority be established to provide, administer, coordinate and monitor legal aid services. Such a body should be “free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid” and have the necessary powers to provide effective legal aid.

Competence and accountability of legal aid providers

Principle 13 states that mechanisms should be put in place to ensure that all legal aid providers possess education, training, skills and experience commensurate with the nature of their work. Disciplinary complaints against legal aid providers should be promptly investigated and adjudicated in accordance with professional codes of ethics before an impartial body and subject to judicial review. Guideline 15 outlines mechanisms to ensure standards, apply appropriate sanctions for infractions, and prevent corruption.

Coordination between justice agencies and partnerships with lawyers’ associations

Principle 14 encourages States to establish public-private and other forms of partnerships to extend the reach of legal aid. Guideline 11 encourages States to promote coordination

¹⁰⁴ Principles 4 and 5 and Guidelines 7 and 8, as they apply to child victims and witnesses, should also be read together with the *Convention on the Rights of the Child* and other UN instruments providing special protection, e.g., *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes*, (Economic and Social Council resolution 2005/20, annex).

between justice agencies and other professionals and to establish partnerships with bar or legal associations to ensure the provision of legal aid at all stages of the criminal justice process.

Body of Principles for the Protection of All Persons under Any Form of Detention of Imprisonment

The *Body of Principles for the Protection of All Persons under Any Form of Detention of Imprisonment*¹⁰⁵ include the right to legal representation provided by the State.

11. (1) ...A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

17. (1) A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

(2) If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice

The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules)¹⁰⁶ provide that juveniles have a right to counsel throughout the proceedings, including free legal aid where that is available.

7.1. Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

15.1. Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.

¹⁰⁵ *Body of Principles for the Protection of all Persons under any Form of Detention of Imprisonment*: resolution/adopted by the General Assembly, 9 December 1988, A/RES/43/173, online: <<http://www.un.org/documents/ga/res/43/a43r173.htm>>.

¹⁰⁶ UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules"): resolution/adopted by the General Assembly, 29 November 1985, A/RES/40/33, online: <<http://www.un.org/documents/ga/res/40/a40r033.htm>>.

United Nations Rules for the Protection of Juveniles Deprived of their Liberty

The *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (Havana Rules)¹⁰⁷ contain a similar provision regarding the right to counsel, including the right to legal aid, where available.

18. The conditions under which an untried juvenile is detained should be consistent with the rules set out below, with additional specific provisions as are necessary and appropriate, given the requirements of the presumption of innocence, the duration of the detention and the legal status and circumstances of the juvenile. These provisions would include, but not necessarily be restricted to, the following:

(a) Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers...

78. Every juvenile should have the right to request assistance from family members, legal counsellors, humanitarian groups or others where possible, in order to make a complaint. Illiterate juveniles should be provided with assistance should they need to use the services of public or private agencies and organizations which provide legal counsel or which are competent to receive complaints.

Standard Minimum Rules for the Treatment of Prisoners

The *Standard Minimum Rules for the Treatment of Prisoners*¹⁰⁸ include the right to counsel, including the right to apply for free legal aid, where available.

93. For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions...

95. Without prejudice to the provisions of article 9 of the International Covenant on Civil and Political Rights, persons arrested or imprisoned without charge shall be accorded the same protection as that accorded under part I and part II, section C. Relevant provisions of part II, section A, shall likewise be applicable where their application may be conducive to the benefit of this special group of persons in custody, provided that no measures shall be taken implying that re-education or rehabilitation is in any way appropriate to persons not convicted of any criminal offence.

¹⁰⁷ *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* ("Havana Rules"), GA Res 45/113, UN Doc A/RES/45/113 (Dec. 14, 1990), online: http://www.unodc.org/pdf/criminal_justice/United_Nations_Rules_for_the_Protection_of_Juveniles_Deprived_of_their_Liberty.pdf.

¹⁰⁸ United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955, online: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx>.

United Nations Declaration on the Rights of Indigenous Peoples

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)¹⁰⁹ was adopted by the General Assembly on 13 September 2007 by a majority of 144 states in favour, four votes against (Australia, Canada, New Zealand and the U.S.A.) and 11 abstentions. Canada and the other three States who voted against the Declaration have all since reversed their position.¹¹⁰

According to then Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, the UNDRIP “represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law.” The UNDRIP does not create new or special rights for indigenous peoples; rather, it “reflects and builds upon human rights norms of general applicability, as interpreted and applied by United Nations and regional treaty bodies, as well as on the standards advanced by ILO Convention No. 169 and other relevant instruments and processes.” The standards “share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous people have faced in their enjoyment of basic human rights.”¹¹¹

Of relevance to Canada’s obligation to provide legal aid are the following provisions:

Preamble. ...Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,...

1. Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

2. Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

40. Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or

¹⁰⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 2 October 2007 A/RES/61/295, online: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement>>.

¹¹⁰ Canada announced its support of UNDRIP on 12 November 2010. See, online: <<http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>>.

¹¹¹ UN Human Rights Council. *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya*, 11 August 2008, A/HRC/9/9 at paras 85-86, online: <http://unsr.jamesanaya.org/docs/annual/2008_hrc_annual_report_en.pdf>.

other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

44. All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Other UN Declarations

Other UN Declarations that address the rights of specific groups, including the right to equality and equal protection of the law, include:

- The *United Nations Declaration of Commitment on HIV/AIDS: Global Crisis – Global Action*¹¹²
- *Declaration on the Rights of Mentally Retarded Persons*¹¹³
- *Declaration on the Rights of Disabled Persons*.¹¹⁴

Inter-American Human Rights System

The Organization of American States, comprised of 35 member states, was formed in April 1948. Canada became a permanent observer in 1972 and joined as a member State on 8 January 1990.

Charter of Organization of American States (OAS)

Canada has not ratified the *American Convention on Human Rights (ACHR)*¹¹⁵ but is bound by the *American Declaration on the Rights and Duties of Man (American Declaration)*¹¹⁶ and by the legal norms and provisions required under the *Charter of the Organization of American States (OAS Charter)*.¹¹⁷ Canada ratified the OAS Charter on

¹¹² *United Nations Declaration of Commitment on HIV/AIDS*, A/RES/S-26/2, annex, particularly paragraph 58, online: <<http://www.un.org/ga/aids/docs/aress262.pdf>>.

¹¹³ *Declaration on the Rights of Mentally Retarded Persons*, resolution 2856 (XXVI) of 20 December 1971, online: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightsOfMentallyRetardedPersons.aspx>>.

¹¹⁴ *Declaration on the Rights of Disabled Persons*, resolution 3447 (XXX) of 9 December 1975, particularly para 11: "Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account", online: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightsOfDisabledPersons.aspx>>.

¹¹⁵ Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969, entered into force 18 July 1978, online: <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm>.

¹¹⁶ *American Declaration on the Rights and Duties of Man*, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948, online: <<http://www.oas.org/dil/1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf>>. Both the IACHR and the IACtHR have established that despite having been adopted as a declaration and not as a treaty, today the American Declaration constitutes a source of international obligations for the Member States of the OAS: OAS, Inter-American Commission on Human Rights, *Basic Documents Pertaining to Human Rights in The Inter-American System*, online: <http://www.cidh.org/basicos/english/Basic1.%20Intro.htm#_ftn4>.

¹¹⁷ Organization of American States (OAS), *Charter of the Organisation of American States*, 30 April 1948, *The Right to Legal Aid: How British Columbia's Legal Aid System Fails to Meet International Human Rights Obligations*

20 December 1989 (deposited January 8, 1990). Under Article 45 of the OAS Charter, member states agree to dedicate every effort to the adequate provision for all persons to have due legal aid in order to secure their rights.

45. The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: [...]

(i) Adequate provision for all persons to have due legal aid in order to secure their rights.

American Declaration on the Rights and Duties of Man

The *American Declaration* provides, *inter alia*, for the right to a fair trial and equality before the law:

Article II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

Article XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Article XXVI. Every person is presumed to be innocent until proved guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

Individual Canadians may not petition the Inter-American Court on Human Rights (IACtHR) (since Canada has not ratified the Convention), though Canadians may petition the Inter-American Commission on Human Rights (IACHR) for violations of the *American Declaration*. Exhaustion of domestic remedies is a requirement. However, the IACtHR confirmed in 1990 that indigence and the inability to access effective legal representation may enable a petitioner to establish that they have been unable to invoke and exhaust their domestic remedies, such that their petitions should be found admissible.¹¹⁸

OAS Treaty Series No 36, 1144 UNTS 123, entered into force 13 Dec 1951, amended 1967, 1985, 14 Dec 1992, 10 June 1993.

¹¹⁸ IACtHR, *Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46(1), 46(2) (a) and 46(2) (b) American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990. Series A No 11 at para 31.

American Convention on Human Rights

Although Canada is not a State Party to the ACHR, the IACHR has ruled that the *American Declaration* must be interpreted in light of developments in the *corpus juris gentium* of international human rights law, including the Inter-American human rights system and, specifically, the ACHR and jurisprudence of the IACtHR.¹¹⁹ The IACHR has described the ACHR as representing “an authoritative expression of the fundamental principles set forth in the *American Declaration*.”¹²⁰ Therefore, it is important to examine the provisions of the ACHR, which recognizes States’ obligations to respect the full and free exercise of the rights of all subject to their jurisdiction, as well as the right to equal protection of the law (Article 1, Article 24):

1. (1) The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for the reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition

24. All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

The Convention also provides due process guarantees (Article 8) and effective recourse through the right to judicial protection (Article 25):

8. (1) Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

¹¹⁹ *Mary and Carrie Dann v United States* (2002), Case No 11.140, Report No 75/02, at paras 96-97, Annual Report of the Inter-American Commission on Human Rights: 2002 [*Dann*]:

96. In addressing the allegations raised by the Petitioners in this case, the Commission also wishes to clarify that in interpreting and applying the Declaration, it is necessary to consider its provisions in the context of the international and inter-American human rights systems more broadly, in the light of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged. The Inter-American Court of Human Rights has likewise endorsed an interpretation of international human rights instruments that takes into account developments in the *corpus juris gentium* of international human rights law over time and in present-day conditions.

97. Developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments. This includes in particular the American Convention on Human Rights which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration.

¹²⁰ *Ibid* at para 97.

(2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

- a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
- b. prior notification in detail to the accused of the charges against him;
- c. adequate time and means for the preparation of his defense;
- d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
- f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
- g. the right not to be compelled to be a witness against himself or to plead guilty;
- and
- h. the right to appeal the judgment to a higher court.

25. (1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

(2) The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.

Inter-American Court of Human Rights

Decisions of the IACtHR are likely to be applied by the IACHR in relevant cases concerning Canada (including BC). The IACtHR has determined that a State's failure to provide the legal aid necessary to enable the effective exercise of a form of legal recourse renders that recourse illusory and constitutes a violation by the State of Article 8 duties to ensure fair trial rights and Article 25 duties to ensure judicial protection, in conjunction with Article 1.1.¹²¹

¹²¹ *IACtHR, Case of Hilaire, Constantine and Benjamin et al v Trinidad and Tobago*, Judgment of June 21, 2002 at para 152(b) [*Case of Hilaire, Constantine and Benjamin et al*].

The IACtHR has also ruled that to achieve “due process of law,” a defendant “must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants.”¹²² The IACtHR further recognized in the aforementioned Advisory Opinion that:

[t]o accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one’s interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.¹²³

Drawing on these principles to reach its finding that Articles 8 and 25 were violated, the IACtHR in *Hilaire* concluded:

In order to protect the right to effective recourse, established in Article 25 of the Convention, it is crucial that the recourse be exercised in conformity with the rules of due process, protected in Article 8 of the Convention, which include access to legal aid.¹²⁴

Commonwealth Secretariat¹²⁵

Latimer House Guidelines

The *Latimer House Guidelines for the Commonwealth* were developed to renew and expand on the commitments made by Canada and other Commonwealth countries to the rule of law and the attendant safeguards and restrictions set out in the Harare Declaration.¹²⁶

On 19 June 1998, Canada approved the Latimer House Guidelines that include a resolution that member governments have a responsibility to provide legal aid to indigent litigants and to fund public interest advocates.

VIII.4 Adequate legal aid schemes should be provided for poor and

¹²² IACtHR, *The Right To Information on Consular Assistance in The Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999, at paras 117.

¹²³ *Ibid* at para 119.

¹²⁴ *Case of Hilaire, Constantine and Benjamin et al*, *supra* note 121 at para 148.

¹²⁵ The Commonwealth Secretariat is a voluntary association of 54 countries mandated to work together towards shared goals of democracy and development. Canada has been a member since 1931.

¹²⁶ The Harare Declaration is the Commonwealth’s second general statement of beliefs and was issued by Commonwealth Heads of Government at their meeting in Zimbabwe in 1991.

disadvantaged litigants, including public interest advocates.

Other Regional International Human Rights Law

Other regional human rights law demonstrates the development of consistent international legal norms requiring States to provide adequate legal aid for the protection of internationally protected human rights. The *European Convention for the Protection of Human Rights and Fundamental Freedoms*¹²⁷ and the *African Charter on Human and People's Rights*¹²⁸ contain provisions guaranteeing rights to equality before the law, effective remedies for human rights violations, and fair trials in the determination of rights. The jurisprudence from the African Commission of Human Rights and the European Court of Human Rights confirms that for the State to safeguard these fundamental rights the State must provide adequate funding for legal services to ensure that impecunious and disadvantaged litigants have equality before the law and equal access to the protection of the law.

III. Statutory authority for provision of legal aid in BC

In BC, as in other Canadian provinces and territories, legal aid is provided in accordance with provincial legislation. Under the *BC Legal Services Society Act*, legal aid is defined as “legal and other services provided under this Act.” There is no explicit right to legal aid provided by the current Act.¹²⁹ The Legal Services Society (LSS) has authority under the Act, subject to the regulations and a memorandum of understanding with government, to:

- (a) establish priorities for the types of legal matters and classes of persons for which it will provide legal aid;
- (b) establish policies for the kinds of legal aid to be provided in different types of legal matters;

¹²⁷ *European Convention on Human Rights* (ECHR), Nov 4, 1950, 213 UNTS 222, entered into force 3 September 1953, online: <http://www.echr.coe.int/Documents/Convention_ENG.pdf>.

¹²⁸ *African (Banjul) Charter on Human and Peoples' Rights* (“Banjul Charter”), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986, online: <<http://www.achpr.org/instruments/achpr/>>.

¹²⁹ From 1979 to 2002, in British Columbia, the *Legal Service Society Act*, RSBC 1979, c 227 required that legal services be available in specific circumstances: (i) criminal proceedings that could lead to imprisonment; (ii) civil proceedings that could lead to confinement or imprisonment; (iii) domestic disputes that affected the individual’s physical or mental safety or health or that of the individual’s children; (iv) legal problems that threatened (1) the individual’s family’s physical or mental health or safety; (2) the individual’s ability to feed, clothe, or provide shelter for himself or herself and the individual’s dependents; or (3) the individual’s livelihood. Today, coverage is determined by a memorandum of agreement between the government and LSS: CBA, “Toward National Standards for Publicly-Funded Legal Services”, *supra* note 14 at n 25.

- (c) determine the method or methods by which legal aid is to be or may be provided, with power to determine different methods for different types of legal matters and different classes of persons;
- (d) determine who is and who is not eligible for legal aid based on any criteria that the society considers appropriate;
- (e) undertake, inside or outside British Columbia, commercial activities that it considers appropriate for the purposes of obtaining funds for the pursuit of its objects;
- (f) recover, through client contributions or any other methods it considers appropriate, its costs of providing legal aid; and
- (g) facilitate coordination among the different methods, and the different persons and other entities, by which legal aid is provided.¹³⁰

The LSS must obtain government approval of its budget and may not run a deficit. Neither the eligibility rules nor an appeal process from decisions on legal aid applications are set out in the Act.

The LSS, in outlining when a child qualifies for the services of a lawyer without charge in the context of child protection law, notes that “[a] child who is 12 years or older has a right to have his or her own lawyer if the judge decides the child is a party to the case.”¹³¹ A parent, the child, or the child protection worker can request that the child be made a party. The LSS also outlines that young persons charged with a federal offence have a right to legal representation.¹³²

The *BC Legal Services Society Act* does not comply with the international law requirements for legal aid legislation.

The *UN Principles and Guidelines* provide:

Principle 1. 14. Recognizing that legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process, [footnote omitted] States should guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution.

Principle 2. 15. States should consider the provision of legal aid as their duty and responsibility. To that end, they should consider, where appropriate, enacting specific legislation and regulations and ensure that a comprehensive legal aid

¹³⁰ *Legal Services Society Act*, *supra* note 3, s 10(1).

¹³¹ Legal Services Society, “A Parent’s Guide to Child Protection Law in BC”, 8th ed (British Columbia: March 2013), online: <<http://resources.lss.bc.ca/pdfs/pubs/Parents-Rights-Kids-Rights-eng.pdf>>.

¹³² Legal Services Society, “Criminal Charges” (Updated 2014), online: http://www.lss.bc.ca/legal_aid/criminalLaw.php.

system is in place that is accessible, effective, sustainable and credible. States should allocate the necessary human and financial resources to the legal aid system.

Guideline 11. 58. States should take appropriate measures to establish child-friendly [footnote omitted] and child-sensitive legal aid systems, taking into account children's evolving capacities and the need to strike an appropriate balance between the best interests of the child and children's right to be heard in judicial proceedings, including:...

(b) Adopting legal aid legislation, policies and regulations that explicitly take into account the child's rights and special developmental needs, including the right to have legal or other appropriate assistance in the preparation and presentation of his or her defence; the right to be heard in all judicial proceedings affecting him or her; standard procedures for determining best interest; privacy and protection of personal data; and the right to be considered for diversion;

The SR on the independence of judges and lawyers, Gabriela Knaul, in her 2013 report identifies elements of the right to legal aid that should be set out in domestic legislation:

Legislation on legal aid should ensure that effective legal assistance is provided at all stages of the justice process, at the pretrial stage, as well as in any judicial or extrajudicial procedure aimed at determining rights and obligations, provided that the person does not have sufficient means to pay for legal aid and, in criminal cases, that the interest of justice so require. In particular, legislation should ensure that effective legal aid is provided to victims of human rights violations in order to ensure that they have access to an effective remedy by the competent national tribunals for acts violating the fundamental rights set out in international treaties, the Constitution or the law.

National legislation should also include specific criteria to determine eligibility for legal aid, particularly with regard to the limits of the financial means that trigger eligibility. Moreover, persons who are denied legal aid on the basis of the criteria set out in national legislation should have the right to appeal the decision.

...

[N]ational legislation on legal aid should ensure that professionals working for the legal aid system possess the qualifications and training appropriate for the services they provide.¹³³

¹³³ *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, supra* note 37 at paras 53-56.

Canadian jurisprudence

This section considers Canadian jurisprudence regarding legal aid and measures it against Canada's international law obligations.

There is currently no broad constitutional "right to counsel" in Canada.¹³⁴ Under s. 10(b) of the *Canadian Charter*, persons arrested or detained have a constitutional right to retain and instruct counsel, without delay, and to be informed of that right.¹³⁵ The courts have found this provision to include a requirement that police inform accused persons of the existence and availability of legal aid.¹³⁶ Canadian courts have ruled that the *Charter* recognizes the right of a person to receive a fair hearing when confronted by the State, which, in some cases, will require the assistance of counsel. In cases where a court decides that a person requires the assistance of a lawyer to ensure a fair hearing, a limited right to State-funded counsel arises under s. 7 of the *Charter* where life, liberty and security of the person are affected. This right provides for the services of publicly funded counsel to guarantee a fair trial in serious and complex cases where the accused cannot afford to pay and has been refused legal aid. This right has been extended to civil proceedings in limited circumstances. Where the courts have determined that the inability of an accused to fund his or her own defence would result in a violation of his or her right to a fair trial, the response is generally to order a judicial stay of proceedings pursuant to s. 24(1) of the *Charter* rather than to order the government to pay for counsel. The courts have cautioned that a stay of proceedings is an extraordinary remedy and is to be used in the clearest of cases.

Canadian jurisprudence tends to focus consideration of the right to legal aid primarily on *Charter* rights, with little, if any, consideration of Canada's international law obligations to provide legal aid or of accepted international law principles and standards. A selected analysis of the case law suggests that the right to legal aid recognized in Canadian domestic law falls short of existing and emerging standards in international human rights law.

A. No general constitutional right to counsel

Canadian jurisprudence has not recognized a general constitutional right to counsel. The only explicit mention of the right to counsel in the *Charter* is contained in section 10(b):

¹³⁴ In the United States, the US Supreme Court has held that the Sixth Amendment's guarantee of counsel is a fundamental right essential to a fair trial and includes the right to have counsel provided at public expense, at least where an accused persons is unable to afford counsel and the offence charged carries the penalty of imprisonment: *Gideon v Wainwright*, 372 US 335 [1963]; *Argersinger v Hamlin* (1972), 407 US 25.

¹³⁵ *Charter*, *supra* note 17, s 10(b).

¹³⁶ See *R v Brydges* (1991), SCR 190 at 215, 53 CCC (3d) 330. See also *R v Bartle*, [1994] 3 SCR 173 at 201, 92 CCC (3rd) 289 (SCC) (holding that police authorities are required to inform detainees about the existence and availability of legal aid in the jurisdiction at the time of detention, and the basic information about how to access free preliminary legal advice should be included in the standard of s. 10(b)).

10. Everyone has the right on arrest or detention

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

Beyond the right to counsel upon arrest or detention, the courts have recognized a right to counsel in criminal proceedings and, in certain limited situations, in civil proceedings, where representation by a lawyer is necessary to guarantee the right to a fair trial.¹³⁷

In *British Columbia (Attorney General) v Christie*,¹³⁸ the SCC held that there is no general constitutional right to counsel in court proceedings to determine rights and obligations. The respondent, who provided legal services *pro bono* to low-income individuals who were ineligible for legal aid, had brought a “test case” challenging the constitutionality of the *Social Service Tax Amendment Act (No. 2), 1993*, SBC 1993, c 24 to the extent that it imposes a tax on legal services thereby restricting the right to hire counsel. Citing the BCCA decision in *John Carten Personal Law Corp v British Columbia (Attorney General)*,¹³⁹ which determined that there is a fundamental constitutional right to access to justice, the BCSC found the Act to be “*ultra vires* the Province of British Columbia to the extent that it applies to legal services provided for low income persons.”¹⁴⁰ The majority of the BCCA upheld the decision.¹⁴¹ Newbury J cited the following text by Professor Monahan:

[T]he rule of law encompasses the right of citizens to a "separate and independent branch of government" — the judiciary — for the determination of rights and obligations. Therefore, to deprive citizens of access to the courts for the determination of their rights, even if this is accomplished through legislation, must be inconsistent with the rule of law [emphasis in original].¹⁴²

The SCC allowed the appeal by the Attorney General of BC and ruled that the constitutional right to access the courts, affirmed by the SCC in *BCGEU v British Columbia*,¹⁴³ is not absolute. The provinces have the power to pass laws in relation to the administration of justice, which implies the power to impose conditions on access to the courts. While the SCC agreed that access to legal services is fundamentally important in any free and democratic society and, in some cases, essential to due process and a fair trial, their review of the constitutional text, the jurisprudence, and the history of the concept of the rule of law failed to support Mr. Christie’s contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law. In the

¹³⁷ Both common law and statutory authority existed pre-*Charter* for the provision of legal aid to accused persons in Canada. The *Criminal Code*, sections 684(1) and 694.1, give the Court of Appeal and the Supreme Court of Canada or a judge of those courts the authority to order legal assistance for an accused who cannot afford a lawyer.

¹³⁸ *British Columbia (Attorney General) v Christie*, [2007] 1 SCR 873, 2007 SCC 21 (CanLII).

¹³⁹ (1997), 40 BCLR (3d) 181.

¹⁴⁰ *Christie v AG of BC et al*, 2005 BCSC 122 (available on CanLII) at para 94.

¹⁴¹ *Christie v British Columbia*, 2005 BCCA 631 (available on CanLII).

¹⁴² *Ibid* at para 75.

¹⁴³ [1988] 2 SCR 214.

SCC's view, if the reference to the rule of law implied the right to counsel in relation to all proceedings where rights and obligations are at stake, s. 10(b) of the *Charter* would be redundant.¹⁴⁴

In *obiter dicta*, the Court discussed what the right proposed by Mr. Christie would entail:

This general right to be represented by a lawyer in a court or tribunal proceedings where legal rights or obligations are at stake is a broad right. It would cover almost all — if not all — cases that come before courts or tribunals where individuals are involved. Arguably, corporate rights and obligations would be included since corporations function as vehicles for individual interests. Moreover, it would cover not only actual court proceedings, but also related legal advice, services and disbursements. Although the respondent attempted to argue otherwise, the logical result would be a constitutionally mandated legal aid scheme for virtually all legal proceedings, except where the state could show this is not necessary for effective access to justice.

This Court is not in a position to assess the cost to the public that the right would entail. No evidence was led as to how many people might require state-funded legal services, or what the cost of those services would be. However, we do know that many people presently represent themselves in court proceedings. We also may assume that guaranteed legal services would lead people to bring claims before courts and tribunals who would not otherwise do so. Many would applaud these results. However, the fiscal implications of the right sought cannot be denied. What is being sought is not a small, incremental change in the delivery of legal services. It is a huge change that would alter the legal landscape and impose a not inconsiderable burden on taxpayers.¹⁴⁵

International law rights to legal aid were not referred to at any level of court in the *Christie* case. While international treaties are silent on the express question of the right to counsel in civil cases, UN treaty bodies, experts, and courts have found a right to legal aid in civil proceedings, in certain circumstances, based on the right of access to justice.¹⁴⁶

Nor has the Canadian jurisprudence established that s. 10(b) of the *Charter* includes a general right to counsel. Moreover, the courts have determined that the right to counsel

¹⁴⁴ The decision has been criticized by counsel who acted for Mr. Christie for not addressing the “very legitimate” core argument that the unwritten constitutional principles of “access to justice” should be used to strike down a tax on legal services that impede such access, particularly for people with low incomes”: Cristin Schmitz, “Top court rejects legal aid right”, *The Lawyers Weekly* (8 June 2007), online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=489>>. See also *British Columbia (Minister of Forests) v Okanagan Indian Band* (2001), 95 BCLR (3d) 273 (CA) at para 28.

¹⁴⁵ *British Columbia (Attorney General) v Christie* (SCC), *supra* note 138 at paras 13-14.

¹⁴⁶ See e.g. ECtHR, *Case of Airey v Ireland* (Application no. 6289/73), Judgment of 9 October 1979 [*Airey*]. See also footnote 7 above for a sampling of comments by treaty bodies concerning a lack of judicial access for women and vulnerable groups in Canada and BC, in violation of Canada's treaty obligations.

upon arrest or detention in s. 10(b) does not, in itself, entail a right to free legal aid. The SCC has found that s. 10(b) of the *Charter* requires law enforcement officers to inform persons who are arrested or detained of the availability of free duty counsel and legal aid,¹⁴⁷ and to provide telephone numbers by which duty counsel may be contacted.¹⁴⁸ The right to counsel includes an information component and an implementation component: the information component requires the State authority to inform the detainee of the right to retain counsel and of the existence of legal aid and duty counsel.¹⁴⁹ The implementation component requires the State authority to implement that right if the detainee chooses to exercise it.¹⁵⁰

In *R v Prosper*, the SCC considered whether section 10(b) of the *Charter* imposes an obligation on government to make available the free service of duty counsel to those detained outside normal business hours. Relying on the legislative history of s. 10(b) and the desire to avoid the far-reaching implications of imposing such an obligation, the Court held that section 10(b) of the *Charter* does not impose a substantive constitutional obligation on governments to provide an accused person with free and immediate 24-hour duty counsel service upon their arrest or detention.¹⁵¹ While dissenting from the majority on other grounds, Madame L'Heureux-Dubé J. agreed with the Chief Justice that there is no such constitutional obligation under s. 10(b) of the *Charter*, stating:

I am particularly persuaded by the fact that the drafters of the *Charter* left out the following proposed section:

(d) if without sufficient means to pay for counsel and if the interests of justice so require, to be provided with counsel;

...

[Section 10 (d)] was rejected after the joint committee heard evidence and weighed the competing articles found in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Fundamental Freedoms and the Sixth Amendment to the United States Constitution. It cannot be assumed that the committee was unmindful of the extended right-to-counsel jurisprudence of the U.S. federal courts that is relied upon by the applicants in this case, but which, as a Constitutional safeguard, has been consistently refused in Canada.¹⁵²

Apart from the references to the ICCPR and ECHR made by L'Heureux-Dubé J, the courts in the *Prosper* case did not refer to Canada's international law obligations or

¹⁴⁷ *R v Bridges*, [1990] 1 SCR 190.

¹⁴⁸ See also *R v Bartle* [1994] 3 SCR 173 [*Bartle*]; *R v Pozniak* [1994] 3 SCR 310; *R v Harper* [1994] 3 SCR 343; *R v Cobham* [1994] 3 SCR 360.

¹⁴⁹ *Bartle*, *ibid.*

¹⁵⁰ *R v Martens*, 2008 BCSC 780 at para 20.

¹⁵¹ *R v Prosper*, [1994] 3 SCR 236 [*Prosper*]. See also *R v Matheson*, [1994] 3 SCR 328.

¹⁵² *Prosper*, *ibid.*

discuss the presumption of conformity¹⁵³ in making their decisions. Nor did L'Heureux-Dubé J (or any other judge) point out that Canada is bound by its obligations under the ICCPR, in particular, Article 14(3), which guarantees to everyone, in the determination of any criminal charge against them, the following minimum guarantees, in full equality:

(d)...to have legal assistance assigned to him in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it...¹⁵⁴

B. Right to a fair trial and right to life, liberty and security of the person (*Charter*, ss. 7 and 11(d))

An implied right to legal aid in Canada has been recognized in criminal law cases and in some limited civil proceedings flowing from the right to liberty and security of the person, under s. 7 of the *Charter*, and from the right to a fair trial, under s. 11(d) of the *Charter*. Under s. 7, a deprivation of life, liberty or security is a breach of the *Charter* only when the deprivation is not in accordance with the “principles of fundamental justice”. The “principles of fundamental justice are to be found in the basic tenets of the legal system” and extend to substantive as well as procedural justice,¹⁵⁵ including the requirement of a fair hearing.

Those *Charter* provisions state:

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.

11. 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;...

Criminal proceedings: legal aid integral to rights to a fair trial and to liberty and security

The Court of Appeal for Ontario (ONCA) decision in *R v Rowbotham*¹⁵⁶ is commonly cited as authority for the existence of a right to funded legal aid where representation is necessary to ensure a fair trial. In *Rowbotham*, the accused was denied legal aid on the grounds that her income of \$24,000 disqualified her, though the trial was expected to take months. The trial ultimately lasted 12 months, during which time the accused was unrepresented. In finding that the accused lacked the means to employ counsel to conduct a 12-month trial, the ONCA ruled that compelling her to proceed without counsel contravened her right to a fair trial and her right not to be deprived of liberty, except in

¹⁵³ Please see chapter II of this manual at page 12.

¹⁵⁴ *ICCPR*, Article 14(3)(d).

¹⁵⁵ *Reference re BC Motor Vehicle Act*, [1985] 2 SCR 486.

¹⁵⁶ (1988), 63 CR (3d) 113 (Ont CA) [*Rowbotham*]. In its decision, the Ontario Court of Appeal cited *ICCPR*, Article 14(3)(d) and ECHR, Article 6(3)(c).

accordance with the principles of fundamental justice, in violation of ss. 7 and 11(d) of the *Charter*. The ONCA stated:

The right to retain counsel, constitutionally secured by s. 10(b) of the Charter, and the right to have counsel provided at the expense of the state are not the same thing. The Charter does not *in terms* constitutionalize the right of an indigent accused to be provided with funded counsel. At the advent of the Charter, legal aid systems were in force in the provinces, possessing the administrative machinery and trained personnel for determining whether an applicant for legal assistance lacked the means to pay counsel. In our opinion, those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, *in cases not falling within provincial legal aid plans*, ss. 7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial.¹⁵⁷

The ONCA acknowledged that legal aid authorities are entitled to deference in their findings that an accused has the means to employ counsel. However, the court asserted that

there may be rare circumstances in which legal aid is denied but the trial judge, after an examination of the means of the accused, is satisfied that the accused, because of the length and complexity of the proceedings or for other reasons, cannot afford to retain counsel to the extent necessary to ensure a fair trial. In those circumstances, even before the advent of the Charter, the trial judge had the power to stay proceedings until counsel for the accused was provided. Such a stay is clearly an appropriate remedy under s. 24(1) of the Charter. Where the trial judge exercises this power, either Legal Aid or the Crown will be required to fund counsel if the trial is to proceed.

While the court referred to Article 14 (3)(d) of the ICCPR and Article 6(3)(c) of the ECHR in its discussion concerning the evolution of the right to counsel,¹⁵⁸ it did not base its finding of a right to legal aid on international law principles or Canada's international law obligations.

The courts have cautioned that a stay of proceedings is an extraordinary remedy and is to be used in the clearest of cases and that this "is even more true when it is combined with

¹⁵⁷ *Ibid* at para 156.

¹⁵⁸ *Ibid* at para 148.

a court's inducing or coercing the Crown to spend funds which the Commons has never even heard of."¹⁵⁹

The ONCA in *R v Rushlow* ruled that in considering whether to appoint counsel, the trial judge is required to consider the seriousness of the charges, the length and complexity of the proceedings and the accused's ability to participate effectively and defend the case.¹⁶⁰ The ONCA suggested that it will be the "rare and exceptional case where the court will find it necessary to appoint counsel," not because counsel is only required in exceptional cases, but because of the "pervasiveness of legal aid."¹⁶¹

Onus on accused to establish inability to obtain a lawyer

The BCSC in *United States of America v Akrami* ruled that the onus is on applicants to establish, on a balance of probabilities, that they do not have the means to retain counsel and that they have made every attempt to apply for legal aid and, if initially denied, have exhausted all appeals available.¹⁶² The court has flexibility in assessing an accused person's financial situation and is not bound by the criteria set by the legal aid system.¹⁶³

The level of financial disclosure necessary for the applicant to demonstrate financial eligibility was described in by the BCSC in *R v Black Pine Enterprises Ltd*:

The applicant must establish first to the court's satisfaction that he or she is not able to afford to retain counsel. In the course of this investigation, the case law has settled that the applicant must provide detailed evidence of his or her financial circumstances and their attempts to obtain legal representation, including such matters as property and financial statements, statements of expenses and income, affidavit evidence with respect to the possibility of additional sources of income having been investigated and found wanting, possible sources of economy not being available, for example, in relation to matters of discretionary spending.

The applicant must show that he or she has made efforts to obtain counsel at reasonable rates. The applicant must show planning and foresight at least from the stage of arrest so that it is not enough to come to court and say that today my expenses exceed my income. There must be evidence of efforts to organize the financial affairs to accommodate the retaining of counsel. The cases have said that the applicant's financial circumstances must be truly extraordinary in order to justify the extraordinary remedy of a conditional stay. The applicant must show that he or she has made efforts to save and to earn additional income, and finally the applicant must show either that he or she has no assets which can be utilized

¹⁵⁹ *R v Cai*, 2002 ABCA 299, 170 CCC (3d) 1 at para 94 [*Cai*].

¹⁶⁰ *R v Rushlow*, 2009 ONCA 461 at para 19 (available on CanLII) [*Rushlow*].

¹⁶¹ *Ibid.*

¹⁶² *United States of America v Akrami*, [2001] BCSC 165 at para 32 [*Akrami*]; *R v Keating* (1977), 159 NSR (2d) 357 (NSCA) at para 28; *R v Drury*, [2001] 1 WWR 455 (Man CA) at para 35.

¹⁶³ *Akrami, ibid.*

or that every effort has been made to utilize what assets are available to raise funds.¹⁶⁴

Seriousness and complexity of the case

Once the accused meets the onus of establishing diligent attempts to obtain counsel, the court moves to a consideration of the seriousness and complexity of the charge facing the accused. The courts will consider the complexity of the evidence; the procedural, evidentiary and substantive law that applies to the case; the likelihood of especially complex procedures such as a *voir dire*; the seriousness of the charges; the expected length of the trial; and the likelihood of imprisonment.¹⁶⁵ Representation will generally be required, for example, where there are challenges to the admissibility of evidence, defences requiring expert testimony, and *Charter* arguments.¹⁶⁶

The accused's ability to participate effectively and defend the case

In assessing whether an accused is able to effectively represent herself, the court will inquire into the personal abilities of the accused such as her educational and employment background and whether she is able to read, understand the language, and make herself understood.¹⁶⁷

In considering an accused's fair trial interests, the benchmark "is not a perfect trial, nor even removing all risk of an unfair trial."¹⁶⁸ The essence of the test for a prospective *Charter* breach is "a very real likelihood that in the absence of that relief an individual's *Charter* rights will be prejudiced."¹⁶⁹ The ONCA ruled in *Rushlow* that "[i]n considering whether counsel is essential, the court will also take into account the prosecution's duty to make full disclosure and the trial judge's obligation to assist the unrepresented accused".¹⁷⁰

An application by an accused for *Charter* relief (normally a stay of the proceedings) alleging that denial of legal aid in a criminal proceeding has jeopardized the applicant's right to a fair trial has become known as a "*Rowbotham* application".¹⁷¹ Such applications normally arise where an accused is not eligible for legal aid under the financial eligibility criteria or because legal aid does not cover the matter or proceeding. An accused person's right to a fair hearing at a pre-trial proceeding can result in an order for the remedy of a conditional stay of proceedings if a breach of that right is proven.¹⁷² In *R v Peterman*, the ONCA explained that when a court makes a *Rowbotham* order, "it is not conducting

¹⁶⁴ *R v Black Pine Enterprises Ltd*, [2001] BCJ No 2926 (BCSC) at paras 3-4 [*Black Pine Enterprises*].

¹⁶⁵ *Rushlow*, *supra* note 160 at para 20.

¹⁶⁶ *Black Pine Enterprises*, *supra* note 164 at para 7.

¹⁶⁷ *R v Wood*, 2001 NSCA 38 at para 23 (available on CanLII).

¹⁶⁸ *Cai*, *supra* note 159 at para 66.

¹⁶⁹ *Ibid* at para 6.

¹⁷⁰ *Rushlow*, *supra* note 160 at paras 20-21. See also *R v Rain*, 1998 ABCA 315 (available on CanLII).

¹⁷¹ See Legal Services Society, British Columbia, "If You Can't Get a Lawyer for Your Criminal Trial: How to Make a Rowbotham Application" (December 2012), online: <http://resources.lss.bc.ca/pdfs/pubs/If-You-Cant-Get-a-Lawyer-for-Your-Criminal-Trial-eng.pdf>.

¹⁷² *R v Edgars*, 2010 BCPC 148 (available on CanLII) at para 39.

some kind of judicial review of decisions made by legal aid authorities. Rather, it is fulfilling its independent obligation to ensure that the accused receives a fair trial.”¹⁷³

A second category of *Rowbotham* applications arises where the accused is eligible for legal aid, or the Crown agrees to extend funding, but there is a dispute over the rate to be paid to counsel or other terms of the funding and the accused asserts that the funding is not adequate to ensure a fair trial.¹⁷⁴ As indicated by the BCCA in *R v Ho*, the appellate courts are reluctant to direct the rate of compensation to be paid to state-funded counsel.¹⁷⁵

A variant of the second category of applications is a “*Fisher* application”, in which the applicant asserts the amount available under legal aid is insufficient to retain counsel of choice.¹⁷⁶ In *R v Fisher*,¹⁷⁷ the Court of Queen’s Bench for Saskatchewan held that the unique facts of that case required that the applicant’s lawyer of choice be appointed in order to guarantee the applicant’s right to a fair trial. The Court cautioned that such circumstances were rare and unlikely to create a precedent that would affect the legal aid tariff.¹⁷⁸ Courts in most, if not all, jurisdictions have declined to follow *Fisher*. In *R v Bacon*,¹⁷⁹ the BCSC stated that

[w]ith respect to *Fisher* applications, this court is bound by *R. v. Ho*, 2003 BCCA 663 (CanLII), 2003 BCCA 663, [2004] 2 W.W.R. 590 leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 57. This court is not entitled to review the reasonableness of decisions made by the LSS and the conditions attached to legal aid certificates. The focus of the court is whether there is a very real likelihood that the accused person's right to a fair trial will be in prejudiced.¹⁸⁰

Similarly, in *R v Peterman*, the ONCA confirmed that the right of an accused person to be free of unreasonable state or judicial interference in his or her choice of counsel does not impose a positive obligation on the state to provide funds for counsel of choice.¹⁸¹

In cases where an appellant court determines that a *Rowbotham* order should have been made, it is not necessary for the accused to demonstrate prejudice to obtain a new trial.¹⁸² Rosenberg JA wrote, in *R v Rushlow*,

¹⁷³ *R v Peterman*, 2004 CanLII 39041 (ONCA) at para 22 [*Peterman*].

¹⁷⁴ *R v Ho*, 2003 BCCA 663 (available on CanLII).

¹⁷⁵ *Ibid* at para 73. See also *Cai*, *supra* note 159 at para 9; *Peterman*, *supra* note 173 at para 30; *Quebec (Attorney General) v RC*, 2003 CanLII 33470 (QC CA) at paras 163-65.

¹⁷⁶ Named for the judgment in *R v Fisher* [1997] SJ No 530 (QB).

¹⁷⁷ *R v Fisher*, [1997] SJ No 530 (QB), online: <http://www.canlii.org/en/sk/skqb/doc/1997/1997canlii9647/1997canlii9647.html>.

¹⁷⁸ *Ibid*.

¹⁷⁹ 2011 BCSC 135 (CanLII), online: <http://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc135/2011bcsc135.html>.

¹⁸⁰ *Ibid* at para 34.

¹⁸¹ *Peterman*, *supra* note 173 at para 28. See also *R v Drury (LW)* 2000 MBCA 100, 150 Man R (2d) 64; *R v Howell* (1995), 103 CCC (3d) 302, 1995 CanLII 4282 (NSCA), *aff'd* 1996 CanLII 145 (SCC).

¹⁸² *Rushlow*, *supra* note 160 at para 37.

The purpose of the right to counsel in the context of a Rowbotham case is reflected in the nature of the test itself. Counsel is appointed because their assistance is essential for a fair trial. In my view, fair trial in this context embraces both the concept of the ability to make full answer and defence and the appearance of fairness. In the context of ability to make full answer and defence, the court must, however, be wary of speculating as to how the case might have been different had counsel been appointed.

The ONCA noted that there may be cases in which a new trial is not required where there has been no damage to the “appearance of fairness.”¹⁸³

The right to counsel embodied in s. 7 of the Charter is not absolute

Although effective representation does not mean the best possible, state-funded counsel, whether through legal aid or otherwise, the lawyer appointed must be suitable and effective. That is, the lawyer “must be sufficiently qualified to deal with the issues with a reasonable degree of skill”, this being a requisite element of a fair trial.¹⁸⁴ Competent counsel means counsel with the necessary experience to ensure a fair trial.¹⁸⁵

No right to legal aid at all stages of proceedings

The courts in Canada have not required the appointment of counsel at all stages of a proceeding, contrary to international standards.¹⁸⁶ In *R v Nicolier*, the BCSC held that, despite “unquestionably serious” charges of sexual assault and sexual touching, the fact that the applicant was facing “only the preliminary inquiry” and that key credibility witnesses would be cross-examined by state-appointed counsel supported a finding that the applicant failed to establish a significant risk of an unfair trial if he was denied counsel.¹⁸⁷ The applicants in *R v Robinson*,¹⁸⁸ Robinson and Dolejs—convicted and serving sentences for armed robbery and other related offences, and for murder, respectively—were denied legal aid to appeal their convictions. In refusing their application for relief, the ABCA held that “[t]here is no *Charter* protected right of appeal, let alone a *Charter* protected right to appeal at government cost.”¹⁸⁹

Civil proceedings: legal aid integral to right to security of the person

Whereas the right to legal aid in criminal proceedings in Canada has been grounded in the constitutional rights to a fair trial (*Charter*, s. 11(d)) and to the rights to liberty and security of the person (*Charter*, s. 7), the right to civil legal aid has primarily been found

¹⁸³ *Ibid* at para 51.

¹⁸⁴ *Winnipeg Child and Family Services v A(J)*, 2003 MBCA 154 (available on CanLII) at para 45. See also *R v R(P)* (1998), 132 CCC (3d) 72 (Que CA).

¹⁸⁵ *R v Whaling*, 2010 BCSC 41 (available on CanLII) at para 9.

¹⁸⁶ *Principles and Guidelines*, *supra* note 30, Principle 7; see also, for example, HR Committee: Communication No. 852/1999, *Borisenko v Hungary* at para 7.5.

¹⁸⁷ *R v Nicolier*, 2011 BCSC 211 at para 39.

¹⁸⁸ *R v Robinson*, 1989 ABCA 267 (available on CanLII).

¹⁸⁹ *Ibid* at para 11. The ABCA referred to the ICCPR and the ECHR (wrongly implying that Canada is a signatory to the latter) in discussing the evolution of the right to counsel and in justifying its finding that there is no constitutional right to appeal.

in the s. 7 right to security of the person. In these cases, the right to a fair trial flows not from s. 11(d) of the *Charter*, but from the requirement under s. 7 that a person must not be deprived of the rights to life, liberty and security of the person “except in accordance with the principles of fundamental justice,” which require a fair proceeding. The requirement that there be a violation of the right to security in order to justify a right to legal aid in civil proceedings is a much narrower base than that found in international law, which recognizes a right to legal aid flowing from the right to a fair trial itself.¹⁹⁰ As discussed below, the courts have further narrowed the foundation of a s. 7 right to civil legal aid by requiring that the civil proceeding be triggered by government action which threatens an individual’s right to security of the person.

The SCC recognized a right to legal aid, under some conditions, in a civil proceeding, based on s. 7 of the *Charter* in *New Brunswick (Minister of Health and Community Services) v G(J)*.¹⁹¹ In that case, the province attempted to extend a temporary custody order over the appellant’s three children. The appellant, who was indigent and receiving social assistance at the time, was denied legal aid to assist her in the custody hearing on the basis that custody applications were not covered under the province’s legal aid guidelines.

Finding that the Minister’s application to extend the original custody order threatened to restrict the appellant’s right to security of the person guaranteed by s. 7 of the *Charter*, Lamer CJC, writing for the majority, confirmed that the right to security of the person protects “both the physical and psychological integrity of the individual” and that “the right extends beyond the criminal law and can be engaged in child protection proceedings.”¹⁹² For a restriction of security of the person to be made out, “the impugned state action must have a serious and profound effect on a person’s psychological integrity.” In the Chief Justice’s view, there was little doubt that “state removal of a child from parental custody pursuant to the state’s *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent.”¹⁹³

The SCC held that a combination of stigmatization, loss of privacy, and disruption of family life are sufficient to constitute a restriction of “security of the person” implicated by the custody proceedings. Such a restriction would not be in accordance with “the principles of fundamental justice” if the appellant was denied the right to be represented effectively in the hearing by state-funded counsel. Lamer CJC stated that “[e]ffective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child.”¹⁹⁴ The

¹⁹⁰ United Nations, Int’l Human Rights Instruments, *Human Rights Comm. General Comment No. 13*, art. 14 (21st sess, 1984) at para 2: “In general, the reports of States parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law.” See also, for example, *Airey*, *supra* note 146.

¹⁹¹ *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 [G(J)].

¹⁹² *Ibid* at para 58.

¹⁹³ *Ibid* at para 61.

¹⁹⁴ *Ibid* at para 73.

Court held that, while a parent need not always be represented by counsel in order to ensure a fair custody hearing, in some circumstances—depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent—the government may be required to provide an indigent parent with state-funded counsel.¹⁹⁵

Lamer CJC noted that section 7 violations are not easily saved under section 1 of the *Charter*. In this case, the objective of limiting legal aid expenses was not of sufficient importance to justify denying the appellant a fair hearing. Lamer CJC stated that “a parent’s right to a fair hearing when the state seeks to suspend such parent’s custody of his or her child outweighs the relatively modest sums, when considered in light of the government’s entire budget, at issue in this appeal.”¹⁹⁶

Lamer CJC emphasized that a legal aid scheme is not the only mechanism by which government may fulfill its constitutional obligations in such a case and that the courts should not dictate to the provinces what specific delivery system should have been employed.¹⁹⁷

In addition to the right to security, the SCC indicated that the right to liberty interest of s. 7 is also implicated by wardship proceedings. In the concurring judgment in *G(J)*, L’Heureux-Dubé J concluded that

The result of the proceeding may be that the parent is deprived of the right to make decisions on behalf of children and guide their upbringing, which is protected by s. 7. Though the state may intervene when necessary, liberty interests are engaged of which the parent can only be deprived in accordance with the principles of fundamental justice. Interpreting the interests here as protected under s. 7 also reflects...equality values...¹⁹⁸

Right to legal aid under s. 7 triggered by “government action”

To date, the courts have interpreted the right to civil legal aid under s. 7 of the *Charter* as flowing from government action which threatens a person’s s. 7 rights and which is the subject of the proceeding. Subsection 32(1) of the *Charter* states that the Charter applies “a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.” The meaning of subsection 32(1) was examined by the Supreme Court of Canada in *RWDSU v Dolphin Delivery Ltd*, in which McIntyre J noted that “the *Charter* does not apply to private litigation.”¹⁹⁹

¹⁹⁵ *Ibid* at para 86.

¹⁹⁶ *Ibid* at para 100.

¹⁹⁷ *Ibid* at para 92.

¹⁹⁸ *Ibid* at para 118.

¹⁹⁹ *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 1986 CanLII 5 at para 33.

As the *Charter* only applies to government action, the courts have indicated that section 7 cannot be invoked in claiming a right to legal aid in private disputes. In *PD v British Columbia*²⁰⁰ the plaintiff was denied legal aid in her ongoing matrimonial proceedings, which were likely to involve questions of custody and access, allegations of abuse, allegations of parental alienation, immigration issues, interjurisdictional issues, and issues of property division. The plaintiff claimed that the government's failure to provide the plaintiff with state-funded legal representation and failure to establish and maintain a legal aid regime that ensures meaningful and effective access to justice by women in family law proceedings violated her rights under ss. 7 and 15 of the *Charter*.²⁰¹ In dismissing her application for an interim order for state-funded counsel on the basis, *inter alia*, that the claim involved a private dispute not involving the state, the BCSC wrote:

Furthermore, there are a significant number of decisions, from numerous courts, which confirm that a private dispute cannot support a s. 7 claim. The following cases establish the following propositions:

- a) There is no constitutional right to provincially-funded legal fees and the courts do not have jurisdiction to order such funding. In addition, there is no authority for the proposition that the "principle of access to justice means more than a duty on the government to make courts of law and judges available to all persons or that it includes an obligation to fund a private litigant who is unable to pay for legal representation in a civil suit...": *Okanagan Indian Band* at para. 28.
- b) The *Charter* does not apply to civil disputes and, therefore, cannot require the state to fund legal counsel in civil disputes: *Lawrence v. British Columbia (Attorney General)*, 2003 BCCA 379 (CanLII), 2003 BCCA 379, 184 B.C.A.C. 26. Significantly, the Court of Appeal in *Lawrence* decided the question in the context of an application for leave to appeal where the applicant, as in an injunction application, needed only to meet the relatively low threshold of a reasonably arguable case.
- c) Section 7 does not apply to cases where there is no state action, including an application for state-funded counsel in a private family law dispute: *DeFehr v. DeFehr*, 2002 BCCA 139 (CanLII), 2002 BCCA 139, 167 B.C.A.C. 235; *J.L.G. v. D.W.M.*, 2002 BCSC 1727 (CanLII), 2002 BCSC 1727; *G.(J.)*; *Miltenberger v. Braaten*, 2000 SKQB 443 (CanLII), 2000 SKQB 443, [2000] S.J. No. 599; *S.A.K. v. A.C.*, 2001 ABCA 205 (CanLII), 2001 ABCA 205, 19 R.F.L. (5th) 1; *Ryan v. Ryan*, 2000 NSCA 10 (CanLII), 2000 NSCA 10, 181 N.S.R. (2d) 255. See also: *Blencoe* at para. 57.²⁰²

²⁰⁰ *PD v British Columbia*, 2010 BCSC 290.

²⁰¹ *Ibid* at para. 3.

²⁰² *Ibid* at para 148; See also *Sahyoun v Ho*, 2011 BCSC 567 (available on CanLII).

In *Blencoe v British Columbia (Human Rights Commission)*,²⁰³ the SCC commented that not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress."²⁰⁴ Bastarache J wrote that

[i]t is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. While these fundamental personal choices would include the right to make decisions concerning one's body free from state interference or the prospect of losing guardianship of one's children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings.²⁰⁵

C. Right to Equality (*Charter*, ss. 15, 28)

Section 15 of the *Charter* provides a further basis for a constitutional right to legal aid in Canada. That section guarantees the right of everyone to equality before and under the law and equal protection and equal benefit of the law without discrimination. Under s. 28 of the *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights to equality and freedom from discrimination are enshrined in a number of international instruments binding on Canada, including UDHR, Article 7; ICCPR, s. 2(1), 3, 14 and 26; ICESCR, s. 2 and 3; CEDAW, s. 2 and 15.(1); ICERD, s. 5; and CRC, s. 2. The HR Committee has found that the

notion of equality before the courts and tribunals encompasses the very access to the courts and that a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of [ICCPR] article 14, paragraph 1.²⁰⁶

In the concurring judgment in *New Brunswick (Minister of Health and Community Services) v G(J)*, L'Heureux-Dubé J found that, in addition to s. 7 rights, the case also raised equality rights, guaranteed under s. 15 of the *Charter*.²⁰⁷ Issues of gender equality were implicated because women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings. As well as affecting women in particular, issues of fairness in child protection hearings also have particular importance for the interests of women and men who are members of other disadvantaged and vulnerable groups, particularly visible minorities, indigenous people, and persons with disabilities. Madam Justice L'Heureux-Dubé concluded, therefore, that the rights in s. 7

²⁰³ *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, 2000 SCC 44 (available on CanLII).

²⁰⁴ *Ibid* at para 57.

²⁰⁵ *Ibid* at para 83.

²⁰⁶ HR Committee Communication No 468/1991, *Oló Bahamonde v Equatorial Guinea* at para 9.4.

²⁰⁷ *New Brunswick (Minister of Health and Community services) v G(J)*, *supra* note 191 at paras 112-15.

must be interpreted through the lens of ss. 15 and 28 in order to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society.

The courts in Canada have, however, indicated a reluctance to interpret the *Charter* in such a way as to determine priorities for government funding of legal aid to address issues of inequality. In the case of *Winnipeg Child and Family Services v A(J)*, the appellant claimed she was denied her right to a fair trial because she was unable to obtain competent counsel due to the low rates paid by Legal Aid Manitoba. While acknowledging funding struggles that were being faced by Legal Aid Manitoba, the Court found that governments “routinely struggle with the policy choices implicit in funding decisions” and “unless those policy choices interfere with a constitutionally guaranteed right, a court cannot and should not intervene.”²⁰⁸ The Court held that the presumption that a reasonable legal aid scheme would, on its face, seem to comply with the requirement to provide effective representation, but that “presumption may be rebutted where an individual who is eligible for the benefits of legal aid can convince a court that no lawyer employed by Legal Aid can provide adequate representation.”²⁰⁹ In the result, the appellant failed to establish a “satisfactory evidentiary foundation” or legal argument “to connect the impugned sections of the legislation or Legal Aid funding rates with evidence that the appellant was unable to obtain competent counsel or that Legal Aid policies in the appointment of counsel affected her case and impaired her right to a fair trial.”²¹⁰

In *PD v British Columbia*, the BCSC cited the decision in *Winnipeg (Child and Family Services) v A(J)* in reference to the difficulties the plaintiff would have in making an argument—under the *Charter*, Article 15(1), and in terms of a s.1 analysis—for increased levels of legal aid assistance to enable women to gain effective and meaningful access to the courts.²¹¹

On the other hand, there is evidence of frustration among some lower court judges in BC over the restricted access to the courts as a result of inadequate legal aid budgets. In *De Kova v De Kova*, for example, the trial judge observed:

[14] This case points out the difficulty in which parties who are “middle class” but do not have substantial earnings find themselves when they must rely on the courts to resolve their problems. They do not qualify for the almost non-existent legal aid available and yet they cannot afford to use lawyers. This means they come before the court with little idea of what they need to do, what documents they ought to produce and what evidence they should place before the court. With all the good will in the world, the court cannot lead their cases for them, cross-examine for them, argue for them and thus ensure their cases have been properly put forward.

²⁰⁸ *Winnipeg Child and Family Services v A(J)*, *supra* note 184 at para 22.

²⁰⁹ *Ibid* at para 46.

²¹⁰ *Ibid* at para 56.

²¹¹ *PD v British Columbia*, *supra* note 200 at para 153.

[15] It is shameful that in our wealthy province we no longer have resources available which would give real help to parties in this situation. In my view, a case like this demonstrates a failure to improve access to justice.²¹²

The HR Committee, commenting on Article 3 of the ICCPR in *CCPR General Comment No. 28*, requests States Parties to provide information on whether access to justice and the right to a fair trial, provided for in Article 14, are enjoyed by women on equal terms with men, and whether “measures are taken to ensure women equal access to legal aid, in particular in family matters.”²¹³

As noted in section II above, numerous treaty bodies have commented on Canada’s failure to ensure legal aid is available to address issues of unequal access to justice for women and vulnerable groups. In *Kell v Canada*, the CEDAW Committee found, *inter alia*, that the failure of legal aid lawyers assigned to the complainant to provide effective legal assistance in her efforts to regain property rights, and thereby denying her access to an effective remedy, resulted in a violation of Articles 2(d) and 2(e) of CEDAW.²¹⁴

D. Right to a Remedy (*Charter*, s. 24)

Section 24(1) of the *Charter* provides:

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.

Under international law, States have an obligation to guarantee equal access to effective remedies by the competent national tribunals for acts violating the fundamental rights granted by the Constitution or by law.²¹⁵ Equal access to legal aid is an essential precondition for exercising the right to an effective remedy for persons who require legal assistance to pursue such remedies, but who lack the financial means to hire legal counsel. The UN SR on independence of judges and lawyers stated that “a remedy must be real, not merely theoretical; be available to the person concerned; be capable of restoring the enjoyment of the impaired right; and ensure the effectiveness of the judgment.”²¹⁶

²¹² *DeKova v DeKova*, 2011 BCSC at paras 14-15; see also *Villardell v Dunham*, 2012 BCSC 748, varied on appeal (2013 BCCA 65).

²¹³ *CCPR General Comment No 28, Article 3 (The equality of rights between men and women)*, 29 March 2000, HRI/GEN/1/Rev.9 (vol I) at para 18, online: <http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.I%29_%28GC28%29_en.pdf>.

²¹⁴ *Cecilia Kell v Canada*, *supra* note 18 at para 10.5.

²¹⁵ See e.g. UDHR, Article 8; ICCPR, Article 3; CEDAW, Article 2; ICERD, Article 6.

²¹⁶ *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, 13 May 2008, A/HRC/8/4 at para 23, online: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/134/14/PDF/G0813414.pdf?OpenElement>>. See also, for example, HR Committee: Communication No. 377/1989, *Currie v Jamaica* at para 13.4.

The IACHR has found that a denial of access to pursue a constitutional motion in relation to a criminal proceeding because of the absence of legal aid violates, *inter alia*, the right to an effective remedy under ACHR, Article 25.²¹⁷

Under Principle 31 of the *Principles and Guidelines*, States should establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed, or denied, or if persons have not been adequately informed of their right to legal aid. Such remedies may include a prohibition on conducting procedural actions, release from detention, exclusion of evidence, judicial review and/or compensation.

The remedies available to the court where legal aid has been refused, and where the court is of the opinion that representation of the accused by counsel is essential to a fair trial, were reviewed in *Rowbotham*:

- An appellate court in Canada is empowered to quash a conviction where it is of the opinion that the lack of representation of an accused by counsel at the trial has resulted in a miscarriage of justice.²¹⁸
- Also, a trial judge has inherent power, in order to ensure a fair trial, to appoint counsel to defend an indigent accused. The ONCA noted that counsel appointed in such circumstances in the past frequently acted without remuneration but, in view of length and complexity of modern trials, the appointment of counsel to act without remuneration is not longer feasible or fair to counsel.²¹⁹
- A trial judge may, upon being satisfied that the accused lacks the means to employ counsel, order a stay of proceedings against the accused until the necessary funding of counsel is provided.²²⁰

Obiter dicta in a recent split decision of the SCC appears to leave the door open for possible judicial intervention to order the government to pay specific monies out of public funds in order to remedy a *Charter* violation resulting from the absence of legal representation. In the cases involved in *Ontario v Criminal Lawyers' Association of Ontario*,²²¹ trial judges appointed *amici curiae* to assist the accused parties, who had discharged counsel of their choice. The judges did so in order to maintain the orderly conduct of the trials or to avoid delay in the complex, lengthy proceedings. The cases were not decided under the *Charter* and did not proceed on the basis that the accused individuals could not have fair trials without the assistance of counsel. When the *amici* refused to accept legal aid rates, the judges fixed rates that exceeded the tariff and ordered the Attorney General to pay. The Crown appealed the decisions on the basis that the courts lacked jurisdiction to set the rates of the *amici*. In a 5:4 decision, the SCC

²¹⁷ See IACHR, Report No 41/04, Case 12.417, Merits, *Whitley Myrie*, Jamaica, October 12, 2004.

²¹⁸ *Rowbotham*, *supra* note 156 at para 165.

²¹⁹ *Ibid* at para 166.

²²⁰ *Ibid* at para 167. The number of *Rowbotham* applications has increased dramatically over the last few years: Michael Spratt, "Criminal Justice Fairness: Government Funded Counsel, Rowbotham Applications and Legal Aid" (January 14, 2014), online: <<http://www.michaelspratt.com/law-blog/2014/1/13/fairness-and-criminal-justice-funding>>.

²²¹ *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 SCR 3.

rejected the notion that the jurisdiction to fix the fees of *amici curiae* is necessarily incidental to a court's power to appoint them.²²² Karakatsanis J, writing for the majority, stated:

The scope of a superior court's inherent power, or of powers possessed by statutory courts by necessary implication, must respect the constitutional roles and institutional capacities of the legislature, the executive and the judiciary. As the Chief Law Officers of the Crown, responsible for the administration of justice on behalf of the provinces, the Attorneys General of the provinces, and not the courts, determine the appropriate rate of compensation for *amici curiae*.²²³

While noting the attitude of restraint confirmed by the experience with *Rowbotham* applications over the last two and a half decades, the SCC stressed, however, that its decision in this case does not preclude an order fixing rates of remuneration under the *Charter*,

as s. 24(1) "should be allowed to evolve to meet the challenges and circumstances of [the case]"... It remains open to a court of competent jurisdiction to award such a remedy where a *Charter* right is at stake and it is appropriate and just to do so [citations omitted].²²⁴

Conclusions and Recommendations

LRWC recommends the enactment of legislation creating a provincial duty to ensure the right to legal aid in civil, administrative and criminal law matters in cases where the individual or individuals involved cannot afford access to justice to seek a remedy for rights guaranteed by international human rights law binding on Canada.²²⁵

The legislation recommended above should ensure that:

1. legal aid is available to all people—regardless of economic, social, or any other status—to access the courts in all matters—including civil, administrative and criminal cases—to ensure a right to a remedy for protection not only of the civil and political rights and freedoms enshrined in the *Charter*, but also of internationally protected economic, social, and cultural rights;
2. legal aid is provided, regardless of a person's means, where the interests of justice so require;

²²² *Ibid* at para 15.

²²³ *Ibid* at para 5.

²²⁴ *Ibid* at paras 66-67.

²²⁵ These recommendations are based in part on the recommendations of Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers. See *supra* note 37.

3. “legal aid” is defined broadly, including, *inter alia*, legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes, and any judicial or extrajudicial procedure aimed at determining rights and obligations;
4. effective legal aid is provided promptly at all stages of the judicial process;
5. particular attention is paid to the improvement of legal aid in the areas of family and poverty law;
6. particular attention is paid to the needs of marginalized, vulnerable and historically oppressed groups regarding effective access to the justice system—this includes an emphasis on ensuring meaningful access to legal aid for women, children, indigenous peoples, individuals subjected to torture, and groups with special needs;
7. leadership from an independent legal profession is involved in determining methods of delivery;
8. information on the right to legal aid is made available to the general public through all appropriate means;
9. legal aid is provided, where appropriate, to victims and witnesses of crime, including crimes of domestic violence.
10. persons are informed of their right to legal aid and other procedural safeguards prior to any questioning and at the time of deprivation of liberty;
11. persons urgently requiring legal aid at police stations, detention centres or courts are provided preliminary legal aid while their eligibility is being determined;
12. the right to a remedy is guaranteed in the event that access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid;
13. minimum qualifications and training of professionals and paralegals working for the legal aid system are established and maintained;
14. legal protection of the rights of women is guaranteed on the basis of functional equality with men and ensure effective protection of women against all forms of discrimination;
15. legal aid is accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children, and that children are always exempt from any “means test”;
16. specific criteria are listed to determine eligibility for legal aid, particularly with respect to the limits of the financial means that trigger eligibility;

17. sufficient budgetary and human resources are allocated to ensure the maintenance of a comprehensive legal aid system that is accessible, effective, sustainable and credible;
18. where responsibilities to provide legal aid are shared among government and non-government legal aid providers, appropriate mechanisms are in place to facilitate effective coordination;
19. individuals have the right to appeal to an independent tribunal a decision on legal aid; and
20. the effectiveness and comprehensiveness of the legal aid system in British Columbia is consistently monitored, regularly reviewed, and continually improved.

LRWC also recommends the following:

1. British Columbia should fund efforts of non-government organizations providing human rights advocacy, especially those working in cooperation with an independent legal profession;
2. British Columbia should engage in national and international dialogue and expand public engagement on the topic of legal aid;
3. British Columbia should establish public-private and other forms of partnerships to extend the reach of legal aid; and
4. In future cases concerning the right to legal aid, counsel should make submissions on international treaties, customary international law, and other international law obligations in connection with the right to legal aid.