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International Law Obligations to Provide Legal Aid

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Lawyers' Rights Watch Canada

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INTERNATIONAL LAW OBLIGATIONS to PROVIDE LEGAL AID¹

“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.”²

INTRODUCTION

The purpose of this submission is to lay out the basic international human rights law concerning the responsibility of states to ensure access to justice for everyone without discrimination as to economic, social, ethnic, racial, sexual, religious or other status. Internationally, the state responsibility to provide legal aid is affirmed by UN and regional instruments, jurisprudence and rulings. Lawyers' Rights Watch Canada (LRWC) recommends that the following principles be the foundation of policy for provision of legal aid in British Columbia. The Public Commission on Legal Aid has asked for responses to four questions.

- **In what circumstances should legal aid be provided in BC?** As a minimum standard, BC has a legal obligation to provide legal aid in all circumstances in which citizens cannot afford to access the legal system for the protection of human rights protected by treaties ratified by Canada.
- **For what legal issues should legal aid be provided in BC?** Legal aid must be provided in all circumstances in which people in BC cannot afford to access the legal system for the protection of their rights protected by treaties ratified by Canada. Legal aid should be provided for all criminal, family, administrative law and other civil matters in which people, including women, children, elderly people, minorities or indigenous peoples cannot afford to access courts and other bodies to seek protection of the rights to which they are legally entitled.
- **How should legal aid in BC be funded?** LRWC recommends that BC pass legislation to bring the provision of legal aid to the standards prescribed in international human rights conventions, principles and jurisprudence as indicated in this submission. Legislation should also ensure leadership from an independent legal profession in determining methods of delivery. LRWC also recommends that BC fund efforts of other organs of society to provide human rights advocacy, including NGOs and particularly in cooperation with an independent legal profession. While civil society groups have been active in trying to provide legal

¹ These submissions were prepared by Gail Davidson LLB, Catherine Morris, BA, LLB, LLM and Heather Neun, BA, M.Phil, LLB who are members of the Law Society of BC and of Lawyers' Rights Watch Canada.

² From the Preamble to the *Universal Declaration of Human Rights* adopted by the United Nations General Assembly December 1948, available at <http://www.un.org/en/documents/udhr/index.shtml>.

assistance and advocacy to those in need, the primary responsibility for these activities falls to the Province in all areas of its provincial jurisdiction.

- **What should be the priorities of the legal aid system in BC?** A legal aid system in BC that fulfils Canada’s international human rights obligations must assure that that all people, no matter what their economic status, are in a position to access the courts for protection not only of the limited civil and political rights protected in Canada’s Charter of Rights and Freedoms, but also of their internationally protected economic, social and cultural rights, including the rights to housing, subsistence and other necessities for all people in Canada including men, women, children, minorities, indigenous individuals, and indigenous peoples.

The priority for legal aid is currently on certain civil and political rights for those charged with serious criminal offences as well as some other categories of civil and political rights. The emphasis on civil and political rights in the Canadian Charter of Rights has made it difficult to for people to access legal aid seek enforcement of economic, social and cultural rights. BC is responsible for ensuring that all people, no matter what their economic status, are in a position to access the courts for protection of their economic, social and cultural rights, including their rights to housing, food and other necessities.

INTERNATIONAL HUMAN RIGHTS OBLIGATIONS: THE FOUNDATION AND FRAMEWORK FOR PROVISION OF LEGAL AID

In general, discussions of legal aid in British Columbia are framed by domestic considerations rather than by international human rights law. The discourse of British Columbia policy makers seems generally bound by the idea that Canadian and British Columbia laws provide the framework for understanding citizens’ rights and government responsibilities. The legal obligation to provide legal aid in Canada seems, in general, to be framed narrowly in terms of what Canada’s *Charter of Rights and Freedoms* or other domestic laws³ require. Since domestic legislation is limited, the policy considerations tend to be framed in terms of charitable “*pro bono*” services, social justice or efficiency.

This submission demonstrates that Canada, including British Columbia, is bound by international law to provide whatever funding for legal aid is necessary to ensure the equal enjoyment of protected rights by all people including those without the money and other resources needed to determine or enforce rights or seek remedies for violations.

Even when a right to legal aid—civil or criminal—is not specifically articulated in domestic law, the duty to provide legal aid is a critical part of the duty to ensure three fundamental rights guaranteed by all international and regional human rights instruments, namely, rights to:

- equality before the law,
- the equal protection of the law, and
- An effective remedy, by a competent tribunal, for human rights violations.

³ E.g. *Legal Services Society Act*, [SBC 2002] Chapter 30, available at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_02030_01.

International Human Rights Law begins with the proposition that justice, freedom and peace depend on the universal recognition and enforcement of human rights and the rule of law. This truism is articulated in the Preamble to the 1948 Universal Declaration of Human Rights UN human rights bodies continually point out the close link between poor access to justice and human rights violations.

As a member of the United Nations, Canada is bound by the Conventions and treaties it has ratified and recognizes the normative and persuasive importance of Declarations, Principles and Resolutions adopted by the General Assembly. As a member of the Organization of American States (OAS), Canada is bound by the OAS Charter. For OAS member states, the American Declaration of the Rights and Duties of Man⁴ “constitutes a source of international obligations” and forms the “normative basis” for human rights protection in OAS states.⁵ As a member of the Commonwealth, Canada has committed to the Latimer Guidelines⁶ which affirms the primacy of equal access to the justice system.

All international and regional international human rights instruments and jurisprudence confirm that, in the absence of access to justice to necessary legal representation by the poor and disadvantaged through publicly funded legal aid, there are no human rights, only privileges. Rights are illusory in the absence of the state providing adequately for the legal representation of indigent litigants in disputes involving the determination of rights. Simply put, in order to guarantee protected rights the government must maintain adequate funding for legal aid.

Failure to provide adequate legal aid violates the international law obligations of Canada and British Columbia to:

- ensure equality before the law;
- give effect to rights and to provide access to a remedy for rights violations;
- provide equal and effective access to legal services provided by an independent legal profession;
- ensure that all people, irrespective of economic status, have effective and equal access to legal representation;
- ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons;
- provide each person in custody with a lawyer of his/her choice;
- provide for the ‘inalienable’ right of each accused person to be represented by a lawyer provided by the state in all cases where the interests of justice so require and without payment if the person does not have the means to pay for it;
- allocate adequate resources for the provision of legal-aid services with a view to promoting and protecting human rights.

⁴ *American Declaration on the Rights and Duties of Man*, OAS, Bogotá (1948), available at <http://www.cidh.org/basicos/english/Basic2.American%20Declaration.htm>.

⁵ Inter-American Commission on Human Rights, Basic Documents Pertaining to the Human Rights in the Inter-American System. Website of the Inter-American Commission on Human Rights, accessed 6 October 2010 from <http://www.cidh.org/basicos/english/Basic1.%20Intro.htm>.

⁶ The *Latimer House Guidelines for the Commonwealth*, published June, 1998, available at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BACC9270A-E929-4AE0-AEF9-4AAFE68479C%7D_Latimer%20House%20Booklet%20130504.pdf, discussed below.

These submissions examine British Columbia's legal aid obligations arising under specific treaties and rulings on the failure to fulfill those obligations as well as declarations and statements of principals confirming the duty to provide adequate legal aid.

Following are some examples of the applicable international and regional law.⁷

A. Universal Declaration of Human Rights⁸

The Universal Declaration of Human Rights (UDHR) is premised, as is the Canadian *Charter*, on the necessity of human rights being protected by the rule of law. 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.”

Although there is no explicit right to be represented contained in the UDHR, equal access to legal representation is fundamental to the enforcement of fundamental freedoms to equality before the law, effective remedies for human rights violations and fair trials in the determination of rights.

B. United Nations Treaties

B.1 *Vienna Convention on the Law of Treaties*

The *Vienna Convention on the Law of Treaties* 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*).⁹ 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.” Article 27 is particularly relevant to Canada, in which provinces have exclusive jurisdiction in many matters. UN human rights treaty bodies have consistently taken the position that all levels of government in Canada are responsible to implement international Conventions ratified by Canada on matters within their jurisdiction.

B.2 *International Covenant on Civil and Political Rights (ICCPR)*

The *International Covenant on Civil and Political Rights (ICCPR)* entered into force on 23 March 1976, and 166 countries have ratified it. Canada ratified the ICCPR on 19 May 1976. As a State Party, Canada has a duty to guarantee, *inter alia*, equal access to effective remedies for human rights violations.

Article 2, paragraph 3 Each State Party to the present Covenant undertakes:

⁷ Note that the instruments selected for summary purposes are not exhaustive. Virtually all Conventions provide that States must provide remedies to assure rights. We have selected Conventions or mechanisms whose jurisprudence singles out Canada's or British Columbia's failures in respect to access to justice or legal aid.

⁸ G.A.Res. 217A (III), U.N. GAOR. 3rd Sess., Supp. No. 13, UN Doc. 1/810 (1948) 71.

⁹ Article 26 of the Vienna Convention on the Law of Treaties, entered into force on 27 January 1980. U.N.T.S. Vol. 1155, p. 331 [Vienna Convention].

(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. (emphasis added)

Article 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.

Article 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, language, religion, political or other opinion, national or social origin, property, birth or other status. (emphasis added)

The right to legal aid in criminal matters is specifically provided in Article 14.

Article 14.3 “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (emphasis added)
[...]

(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 ICCPR protects not only the rights of those charged with offences: it protects many other rights including the right to life, the right to security of the person and other civil and political rights. Canada and British Columbia are obligated to provide civil legal aid where it is necessary to enable equal access to actions to enforce protected rights or to secure remedies for violations. The Human Rights Committee in its April 2006 review of Canada’s performance ensuring rights protected by the ICCPR noted the inadequacy of remedies for violations of articles 2, 3 and 26 (above). Of particular concern to the Committee was the significant number of violent deaths of Aboriginal women in Canada. In this context, the Committee expressed concern about Canada, saying “...that legal aid for access to courts may not be available”¹⁰ to access the courts to seek redress for violations of the rights provided in the Convention.¹¹ The Committee expressed concern at the economic and social marginalization of Aboriginal women and their heightened risk of suffering violent deaths and recommended that Canada ensure Aboriginal women, “...effective access to the justice system.”¹²

¹⁰ International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee CANADA CCPR/C/CAN/CO/5, 20 April 2006, para. 11.

[http://www.unhchr.ch/tbs/doc.nsf/0/7616e3478238be01c12570ae00397f5d/\\$FILE/G0641362.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/7616e3478238be01c12570ae00397f5d/$FILE/G0641362.pdf)

¹¹ *Ibid.*

¹² *Ibid.*, para. 23.

B.3 *International Covenant on Economic, Social and Cultural Rights (ICESCR)*

Canada is among the 160 nations that have ratified the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). British Columbian poverty advocates, Gwen Brodsky and Shelagh Day, in a 2002 letter to the UN Committee on Economic Social and Cultural Rights, reported the B.C. government's planned legal aid cutbacks as a violation of the ICESCR.

“Changes to legal aid violate Article 2(2) [of the ICESCR]. ...the targeted elimination of legal aid for most family law matters and for poverty law, as well as the elimination of funding to community advocates for women and low-income people, and the cut to the budget of the BC Human Rights Commission, deprives members of the most disadvantaged groups of the means to seek remedies for social rights violations. ...If members of the most socially and economically disadvantaged groups cannot effectively exercise their rights before human rights...because there is no legal representation available to them, the central obligation to give effect to the rights is contravened.”¹³

Four years later the Committee agreed. In May 2006, the Committee on Economic, Social and Cultural Rights, reviewing Canada's fulfillment of rights enshrined in Covenant, noted “inadequate availability of civil legal aid” particularly for economic and social rights as a contributing factor to lack of redress available to individuals. The Committee expressed particular concern with cuts to civil legal aid in British Columbia concluding, “This leads to a situation where poor people, in particular poor single women, who are denied benefits and services to which they are entitled to under domestic law, cannot access domestic remedies.” The Committee recommended

43. ... that [Canada] ensure that civil legal aid with regard to economic, social and cultural rights is provided to poor people in the provinces and territories, and that it be adequate with respect to coverage, eligibility and services provided.¹⁴

B.4 *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*

The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) was ratified by Canada 10 December 1981.¹⁵ CEDAW has been ratified by 186 States Parties. Under CEDAW Canada and British Columbia are obliged to ensure the legal protection of women on an equal basis (Article 2) and must provide civil legal aid necessary to the fulfilling of that obligation.

¹³ Gwen Brodsky and Shelagh Day of the Poverty and Human Rights Project in a February 11, 2002 letter to the Chairperson Virginia Dandan of the U.N. Committee on Economic, Social and Cultural Rights.

¹⁴ 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

¹⁵ Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, entry into forces, 3 September 1981, UN *Treaty Series*, vol. 1249, p. 13.

The UN Committee on the Elimination of Discrimination Against Women in its 2008 review of Canada's 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.

The Committee urged Canada 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.

B.5 *International Convention on the Elimination of All Forms of Racial Discrimination*

The *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD)¹⁶ has been ratified by 173 States Parties, including Canada which ratified it 14 October 1970. The CERD 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 UN Committee on the Elimination of Racial Discrimination, in its May 2007 review of Canada's compliance with CERD noted the failure to adequately provide 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.¹⁷

C. United Nations Declarations and Statements of Principles

While UN Declarations and Statements of Principles are not binding on United Nations 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.

C.1 The Basic Principles on the Role of Lawyers¹⁸

These Principles provide specific substance to the due process guarantees recognized in the *Universal Declaration of Human Rights* and in Covenants Canada has ratified, such as the

¹⁶ *International Convention on the Elimination of All Forms of Racial Discrimination*

Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19

¹⁷ Committee on the Elimination of Racial Discrimination Seventieth session 19 February - 9 March 2007,

CERD/C/CAN/CO/18, 25 May 2007, <http://www.unhcr.org/refworld/publisher,CERD,,CAN,465fe0082,0.html>

¹⁸ Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana 27 August to 7 September 1990. U.N. Doc. A/CONF. 144/28/Rev. 1 at 188. (1990),

<http://www2.ohchr.org/english/law/lawyers.htm>

International Covenant on Civil and Political Rights. The Preamble and Articles 2, 3 & 6 of the Basic Principles on the Role of Lawyers articulate the duty to protect human rights, ensure equal access to lawyers and provide sufficient funding for legal services to the poor.

“Whereas adequate protection of 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.”(emphasis added)

Access to Lawyers and legal services

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. (emphasis added.)

[...]

Special safeguards in criminal matters

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.

C.2 Body of Principles for the Protection of all Persons under any Form of Detention of Imprisonment¹⁹

These principles were adopted by the General Assembly of the United Nations by resolution on 9 December 1988 and include the right to legal representation provided by the state.

Principle 17

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.”

C.3 General Assembly Resolution on Human Rights in the Administration of Justice

In 2002 the United Nations General Assembly passed a resolution affirming the responsibility of governments to adequately fund legal aid in order to promote and protect human rights. The resolution emphasized,

¹⁹ G.A.res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

“...that right to access to justice as contained in applicable international human rights instruments forms an important basis for strengthening the rule of law through the administration of justice,

and called on governments to

“...allocate adequate resources for the provision of legal-aid services with a view to promoting and protecting human rights, and invites the international community to respond favourably to requests for financial and technical assistance for the enhancement and strengthening of the administration of justice;”²⁰(emphasis added)

It is noteworthy that this resolution passed in the General Assembly “without a vote,” which means there was no dissent by any Member State of the United Nations.

D. Universal Periodic Review by the United Nations Human Rights Council (UNHRC)

The Universal Periodic Review (UPR) is a process adopted in 2006 by which the UN Human Rights Council conducts a quadrennial review of each Member State’s fulfillment of human rights obligations and commitments arising from the UN Charter, the Universal Declaration of Human Rights and the instruments to which each State is a party. The UPR review is based on three reports: the state's report, the report of nongovernmental organizations (NGOs) as summarized by the Office of the High Commissioner for Human Rights (OHCHR) and a summary of information prepared by the OHCHR. The Report of the Working Group on the UPR of Canada conducted in 2009, noted access to justice problems for victims of domestic violence and for aboriginal people and recommended that Canada,

“Take effective measures to combat and put an end to discrimination against indigenous population and...ensure effective access to justice, establish immediate means of redress and protection of rights of ethno minorities, in particular, Aboriginals.”²¹

E. 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 8 January 1990.

E.1` Charter of Organization of American States (OAS)

Canada has not ratified the *Inter-American Convention on Human Rights*,²² but is bound by the *American Declaration on the Rights and Duties of Man* and by the legal norms and provisions required to conform to the Charter of the OAS.²³ Canada ratified the OAS Charter on January 8, 1990, and under Article 45, 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.

²⁰ General Assembly Resolution on Human rights in the administration of justice 20 February 2002, A/RES/56/161.
²¹ Report of the Working Group on the Universal Periodic Review Canada, A/HRC/11/17, 5 October 2009, para. 28.
²² American Convention on Human Rights, OAS. San Jose, (1969)
²³ Charter of the Organization of American States, as amended 1967, 1985, 1992, 1993.

Article 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.

E.2 *American Declaration on the Rights and Duties of Man*

The *American Declaration on the Rights and Duties of Man*, adopted by the member states of the OAS in 1948, provides, *inter alia*, for the right to a fair trial:

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 provides for due process guarantees, and Article II guarantees 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. (emphasis added)

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.

While individual Canadians may not petition the Inter-American Court on Human Rights (since Canada has not ratified the Convention), Canadians may petition the American Commission on Human Rights for violations of the *Declaration of the American Declaration on the Rights and Duties of Man*. Exhaustion of domestic remedies is a requirement. However, the Court 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.²⁴ .

E.3 *American Convention on Human Rights*

While Canada has not ratified the *American Convention on Human Rights*, its provisions are worth examining. The Convention entered into force 18 July 1978 and recognizes States' obligation under Article 1 to respect the full and free exercise of the rights and of all subject to their jurisdiction, as well as the right to equal protection of the law (Article 24):

²⁴ I/A Court H.R., 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

Article 1. Obligation to Respect Rights

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. (emphasis added)

Article 24. Right to Equal Protection

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):

Article 8. Right to a Fair Trial

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.
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 (emphasis added)

Article 25. Right to Judicial Protection

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.

E.4 Inter-American Court of Human Rights

Decisions of the Inter-American Court of Human Rights (IACtHR) are instructive and are likely to be applied by the Inter-American Commission of Human Rights in relevant cases concerning Canada (and 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 that this constitutes a violation by the state of Articles 8 and 25, in conjunction with Article 1.1.²⁵

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".²⁶ The Court 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.

Drawing on these principles to reach its finding that Articles 8 and 25 were violated, the IACtHR in *Hilaire*²⁷ 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.

F. Commonwealth Secretariat²⁸

F.1 Latimer House Guidelines

²⁹

The Latimer House Guidelines for the Commonwealth were developed to renew and enlarge 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 Declaration³⁰.

²⁵ *Case of Hilaire, Constantine and Benjamin et al., v. Trinidad and Tobago*, Judgment of June 21, 2002

²⁶ I/A Court H.R., *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. Series A No. 16, paras. 117 and 119

²⁷ *Supra* footnote 25 at para. 148.

²⁸ The Commonwealth Secretariat is a voluntary association of 54 countries mandated to work together towards shared goals in democracy and development. Canada has been a member since 1931.

²⁹ The Latimer House Guidelines for the Commonwealth published June, 1998.

³⁰ 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.

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.

Article VII.4 “Adequate legal aid schemes should be provided for poor and disadvantaged litigants, including public interest advocates.”

G. Other Regional International Human Rights Law

There is other regional law which is instructive to demonstrate 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* and the *African Charter on Human and People’s Rights* contain provisions guaranteeing rights to equality before the law, effective remedies for human rights violations and to 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 ensure 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.

CONCLUSION

Our conclusions reiterate, for emphasis, the recommendations in the introduction. This submission identifies the basic international human rights law establishing the responsibility of states to ensure access to justice for everyone without discrimination as to economic, social or other status. The references cited amply demonstrate that the state’s responsibility to provide legal aid as affirmed by UN and regional instruments, jurisprudence and rulings. By way of answering the four questions posed by the Public Commission on Legal Aid, Lawyers’ Rights Watch Canada recommends that the following principles be affirmed as the foundation of policy for provision of legal aid in British Columbia.

- **In what circumstances should legal aid be provided in BC?** As a minimum standard, BC has a legal obligation to provide legal aid in all circumstances in which citizens cannot afford to access the legal system for the protection of human rights protected by treaties ratified by Canada.
- **For what legal issues should legal aid be provided in BC?** Legal aid must be provided in all circumstances in which people in BC cannot afford to access the legal system for the protection of their rights protected by treaties ratified by Canada. Legal aid should be provided for all criminal, family, administrative law and other civil matters in which people, including women, children, elderly people, minorities or indigenous peoples cannot afford to access courts and other bodies to seek protection of the rights to which they are legally entitled.
- **How should legal aid in BC be funded?** LRWC recommends that BC pass legislation to bring the provision of legal aid to the standards prescribed in international human rights

conventions, principles and jurisprudence as indicated in this submission. Legislation should also ensure leadership from an independent legal profession in determining methods of delivery. LRWC also recommends that BC fund efforts of other organs of society to provide human rights advocacy, including NGOs and particularly in cooperation with an independent legal profession. While civil society groups have been active in trying to provide legal assistance and advocacy to those in need, the primary responsibility for these activities falls to the Province in all areas of its provincial jurisdiction.

Delivery of legal aid by members of an independent legal profession is an essential part of the administration of justice as indicated in the UN Basic Principles on the Role of Lawyers. BC's current *Legal Services Society Act*³¹ provides no guarantees that legal aid is to be provided in accordance with international human rights conventions and standards, nor does the Act guarantee cooperation with BC's independent legal profession. Even though the statute provides that the Legal Services Society (LSS) is "not an agent of the government or of the law society," the statute explicitly ensures that the government will always control the Board of Directors of the LSS, since a majority of directors of the LSS are to be appointed by the Lieutenant Governor in Council. Thus, the statute provides virtually unfettered discretion of a government-dominated Board of Directors to establish priorities, policies and eligibility for legal aid in accordance with the wishes of the cabinet of the day.

Lawyers Rights Watch Canada recommends that legal aid delivery must be at arm's length from the government, and that, accordingly, the legislation must be amended to ensure that the LSS Board of Directors is accountable not to the executive branch of government, but to Parliament as a whole, and that delivery of legal aid, including funding, priorities, policies and eligibility criteria are subject to international human rights law and principles by which Canada and BC are bound.

- **What should be the priorities of the legal aid system in BC?** A legal aid system in BC that fulfils Canada's international human rights obligations must assure that that all people, no matter what their economic status, are in a position to access the courts for protection not only of the limited civil and political rights protected in Canada's Charter of Rights and Freedoms, but also of their internationally protected economic, social and cultural rights, including the rights to housing, subsistence and other necessities for all people in Canada including men, women, children, minorities, indigenous individuals, and indigenous peoples.

The priority for legal aid is currently on certain civil and political rights for those charged with serious criminal offences as well as some other categories of civil and political rights. The emphasis on civil and political rights in the Canadian Charter of Rights has made it difficult to for people to access legal aid seek enforcement of economic, social and cultural rights. BC is responsible for ensuring that all people, no matter what their economic status, are in a position to access the courts for protection of their economic, social and cultural rights, including their rights to housing, food and other necessities.

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

³¹ *Legal Services Society Act* [SBC 2002] Chapter 30, available at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_02030_01

Lawyers Rights Watch Canada (LRWC) is a committee of lawyers who promote human rights and the rule of law internationally by protecting advocacy rights. LRWC campaigns for advocates in danger because of their human rights advocacy, engages in research and education and works in cooperation with other human rights organizations. LRWC has Special Consultative status with the Economic and Social Council of the United Nations.