

# **Legislators, Poor People and the Courts: An Increasingly Urgent Conversation**

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## **PART 1. LEGAL AID AND THE RIGHTS OF POOR PEOPLE TO ACCESS JUSTICE**

I'm going to speak to you about how the poor get access to justice.

Let me begin by saying that, in general terms, legal aid has been treated by governments as simply another form of social assistance or welfare. In the same way that the provinces are supposed to cover the cost of poor people's basic needs like food, clothing and shelter, they also claim to provide assistance for the poor when they are involved in the justice system.

The purpose of legal aid is seen as an attempt to ensure that the poor, too, have a shot at getting justice. However, there has never been a claim that the poor will receive *equal* justice to that available to the wealthy and certainly not "equality of arms" in terms of having the same resources as would be available to government counsel.<sup>1</sup> At a minimum, however, the poor need to be able to access justice with self-respect and dignity.

From July of 1980, half of the costs incurred by provinces when they provided civil legal aid in family law, poverty law, immigration law or any civil area to people in need were reimbursed by the Federal government under the *Canada Assistance Plan*.<sup>2</sup> The more the provinces spent on social services, including legal aid, the more the Federal government spent

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<sup>1</sup> The concept of "equality of arms" has been developed in the jurisprudence of the European Court of Human Rights interpreting article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, 213 U.N.T.S. 221 (the "right to a fair trial").

<sup>2</sup> R.S.C. 1985, c. C-1, as amended [hereinafter *CAP*]. Inclusion of legal aid as a cost-shareable service was provided pursuant to amendments to the *Canada Assistance Plan Regulations*, S.O.R./80-542.

on reimbursements—with no real limits. And that is a good part of the reason why the Feds scrapped *CAP* in 1995.<sup>3</sup>

On the other hand, poorer provinces never really had a lot of money to put up in the first place—regardless of the availability of 50% federal reimbursement. As a result, legal aid in the Atlantic provinces has never been in the same league as exists elsewhere in Canada. That's how you end up with *Charter* judgments like that of the Supreme Court of Canada in *J.G.*<sup>4</sup> which is a nice example of what the judicial side of the legislative-judicial dialogue can look like when a legislative statement regarding legal aid is found to be constitutionally offensive by the courts.

With the repeal of the *CAP* in 1995, legal aid programs went into a funding crisis. While funding on the criminal side of legal aid has been eroded by successive federal-provincial agreements, all hell broke loose on the civil side with the disappearance of the ear-marked dollars from *CAP*. The federal money that used to arrive from the Feds under *CAP* was now consolidated into the Canada Health and Social Transfer.<sup>5</sup>

Under the CHST, federal transfers are now a block fund which, while intended for health, post-secondary education and social assistance (*including* civil legal aid) are, in reality, entirely free to be disbursed according to any priorities the provinces may choose. Therefore, on receipt by each province, attempts to get a piece of the Federal CHST transfer for legal aid means that legal aid is in direct competition with the more popular government priorities (BIG ticket items like health care, post-secondary education and, indeed, tax cuts).

This little tidbit in the minutiae of fiscal federalism is revealing and profoundly important as it reflects my more general point about legal aid. In the context of scarce resources—made all the more scarce by governments whose hands are increasingly tied by their own tax cuts—

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<sup>3</sup> The repeal of *CAP* was provided for in the *Budget Implementation Act, 1995*, S.C., 1995, c. 17, s. 32. *CAP*'s demise was announced by the then Minister of Finance, The Honourable Paul Martin, in his Budget Speech delivered in the House of Commons on February 27th, 1995. See also National Council of Welfare, *The 1995 Budget and Block Funding* (Ottawa: Minister of Supply and Services Canada, 1995).

<sup>4</sup> See *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 [hereinafter *J.G.*].

<sup>5</sup> Hereinafter "CHST". The legislative framework for the CHST is located in Part V of the *Federal-Provincial Fiscal Arrangements Act*, R.S.C., c. F-8, ss. 13-25.

funding available for legal aid is symptomatic of funding for the poor more generally.

Basic social assistance budgets for the poor *across* Canada leave them unable to properly care for themselves and their families without resort to soup kitchens, food banks and other charities. This is a reality.<sup>6</sup>

Similarly, government budgets for legal aid permit only a core of services to be covered—a core that continues to shrink. In Nova Scotia, matters involving child custody/child protection and support basically constitute the civil legal aid program. On the criminal side, less serious matters are going completely without counsel. Money for disbursements such as hiring necessary experts is frequently unavailable. Elsewhere, it is understood that British Columbia's dramatically reduced program will soon resemble that of New Brunswick.<sup>7</sup>

These are the legal-aid reflections of homelessness and food banks in the social assistance arena.

I believe that the inadequacies in both social assistance and legal aid funding have their common roots in the comparative indifference, and occasional hostility which political leaders and policy shapers hold toward the poor. It is a view of the poor which largely holds them responsible for their own situation. Whatever assistance is extended is grudging, inadequate and expressly transitional.

## **PART 2. THE JUDICIARY WEIGHS IN**

In the face of inadequate legal aid, Courts have now gained some experience and comfort with the idea of making governments understand that the Constitution (and, importantly, the *Charter*) places expectations, no, *obligations* on them to ensure that state-funded counsel is available. Courts have with some regularity told governments that serious criminal charges require that an accused person who cannot afford counsel must

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<sup>6</sup> See any of the fine reports by the National Council of Welfare regarding "Welfare Incomes" or the annual surveys published by the Canadian Association of Food Banks, online: Canadian Association of Food Banks <http://www.cafb-acba.ca>.

<sup>7</sup> While now slightly dated, a National Council of Welfare publication is still worthwhile reading on this topic National Council of Welfare, "Legal Aid and the Poor", Winter 1995, online: National Council of Welfare <http://www.ncwcnbes.net/htmldocument/reportlegalaid/reportlegalaid.htm>. See also Canadian Bar Association, "The Legal Aid Crisis: Time for Action", discussion paper, June 2000.

have counsel made available to them.<sup>8</sup> Either charges will be stayed or, as the Chair of our panel has done, simply order that private counsel will be paid a reasonable fee.<sup>9</sup> I think this is an important *conversation* between the judiciary and legislators and, as the *cliché* goes; it “needs to happen”.

And, just to be clear, I am not here to discuss whether private counsel acting on a tariff or a staff lawyer system is preferable. While governments may get better value for their money out of a salaried lawyer system in some civil law contexts,<sup>10</sup> I think it is an open question as to which system provides better representation for any individual client.

However, what I do want to suggest to you is that when it comes to the requirement for state-funded counsel, courts need to begin “conversing” with governments in other settings including, for example, family law, poverty law, immigration law. I think judges need to begin to move away from a narrow approach which looks for a lynchpin-interest under section 7 to find *Charter* applicability which, in turn, triggers the procedural protections of the “principles of fundamental justice”.

Leaving aside whatever may be the outcome of the Supreme Court of Canada’s judgment in the *Gosselin* case<sup>11</sup>—in terms of the scope of protected interests under section seven of the *Charter*—it seems to me that the equality guarantee in section 15 of the *Charter*, together with the emerging “unwritten principles of the Constitution”, form a sturdy foundation on which to hold that poor people need to be awarded counsel by the Courts in order to ensure that they enjoy “equal benefit of the law”.

Bearing in mind that the purpose of the equality guarantee in the *Charter* “encompasses both the prevention of discrimination *and* the amelioration of the conditions of disadvantaged persons”<sup>12</sup>, it must be the case that inadequate legal aid undermines this purpose. Using the Supreme

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<sup>8</sup> See *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.). At the Supreme Court of Canada, the line of cases beginning with *R. v. Brydges*, [1990] 1 S.C.R. 190 and continuing through *R. v. Prosper*, [1994] 3 S.C.R. 236 provides clear and authoritative judicial pronouncements concerning the inadequacy of provincial legal aid schemes and the remedies that will flow therefrom.

<sup>9</sup> See *R. v. Gero*, [2002] O.J. No. 3409 (Ont. S.C.J.), Chadwick J. wherein the Ontario government was ordered to pay private counsel’s fee at the rate of \$140.00 per hour.

<sup>10</sup> See Ontario Legal Aid Review, *A Blueprint for Publicly Funded Legal Services* (Toronto: Publications Ontario, 1997).

<sup>11</sup> *Gosselin v. Quebec*, 2002 SCC 84.

<sup>12</sup> *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at para. 60 [emphasis added].

Court of Canada's own metaphor, we can say that the characteristics of poverty "act as headwinds to the enjoyment of society's benefits."<sup>13</sup> Among those benefits must, at a minimum, be included the justice system encompassing both family law and social welfare programs. To fail to scrutinize these legislative and judicial systems for the ways in which they effectively exclude the unrepresented poor is tantamount to entrenching a justice system for the wealthy.<sup>14</sup>

In addition, the unwritten constitutional principles of "protection of minorities" and the promotion of "social justice" were taken up in recent jurisprudence from the Supreme Court of Canada and the Ontario Court of Appeal. This case law confirms that the unwritten constitutional principles which underlie Canadian constitutional democracy can be used to both (i) substantively fill the gaps left by the written constitutional texts and (ii) assist in the interpretation of the written constitutional instruments including the *Charter*.<sup>15</sup>

Thus, in the *Quebec Secession Reference*, the Supreme Court stated that Canadian constitutionalism is underwritten by at least "four fundamental and ongoing principles: federalism, democracy, constitutionalism and the rule of law, and protection of minorities."<sup>16</sup>

In its review of these principles, the Court refers to the third principle, *i.e.* "democracy" and stated that "Democracy is not simply concerned with the process of government [...] [it] is fundamentally connected to substantive goals."<sup>17</sup> The Court then referred to *Oakes*<sup>18</sup> to particularize the "values inherent in the notion of democracy" which include "respect

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<sup>13</sup> *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 67, Sopinka J.

<sup>14</sup> The Supreme Court of Canada's analysis in *Meiorin* of the ways in which apparently "neutral" standards become entrenched in systemic operations and, thereby, become seen as normal or natural—even though they are in fact discriminatory—is illuminating: *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at para. 39-42.

<sup>15</sup> See, for example, Sujit Choudhry, "Unwritten Constitutionalism in Canada: Where Do Things Stand?" (2001) 35 *Can. Bus. L. J.* 113.

<sup>16</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 49 *et seq.*

<sup>17</sup> *Ibid.*, at para. 64.

<sup>18</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103.

for the inherent dignity of the human person [and] commitment to social justice and equality.”<sup>19</sup>

It should also be noted that three members of the Court subsequently referred to these same unwritten principles when they stated, “the twin considerations of social justice and equality warrant society’s *active protection* of its vulnerable members. Democratic and constitutional principles *dictate* that every member of society be treated with dignity and respect and accorded full participation in society.”<sup>20</sup>

The Ontario Court of Appeal recently applied these unwritten principles of the constitution in the Monfort Hospital case to hold that the tribunal charged with making decisions about which hospitals should be closed, erred when it failed to give proper consideration to how the closure would impact on the constitutional principle of respecting minorities.<sup>21</sup> In the course of its reasons, the Court of Appeal confirmed that the unwritten “constitutional principles may in certain circumstances give rise to substantive legal obligations because of their powerful normative force.”<sup>22</sup>

## CONCLUSION

If the powerful remedial orientation of the equality guarantee in the *Charter* is used by the Courts together with the unwritten constitutional principles to award state-funded counsel in proper cases (and I would rely here on the criteria identified in *J.G.* as to the settings when state-funded counsel would be appropriate), poor people must be entitled to state-funded counsel if their access to justice is to be real and meaningful.

Conversely, for courts to fail to hold this conversation with legislators in the current context of a crisis in legal aid, will mean that too often poor peoples’ experience of the justice system will be a hollow and degrading experience.

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<sup>19</sup> *Reference re Secession of Quebec*, *supra* note 17.

<sup>20</sup> *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 133 [emphasis added].

<sup>21</sup> *Lalonde v. Ontario (Commission de restructuration des services de santé)*, (2001), 208 D.L.R. (4th) 577 (Ont. C.A.) at para. 103 *et seq.*

<sup>22</sup> *Ibid.*, at para. 143.