



**LAW, DISABILITY
AND
SOCIAL CHANGE**

***Article 13 of the CRPD: Access to Justice and Access to Legal Aid for
Persons with Disabilities in Canada***

**Submission to the UN Special Rapporteur- Ms Catalina Devandas Aguilar, Special
Rapporteur on the rights of persons with disabilities**

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A. The Law, Disability & Social Change Project

The Law, Disability & Social Change (LDSC) Project team conducts research into current legal and policy issues to help empower people with disabilities to fully achieve their rights and, more generally, to foster and develop inclusive communities. The Project aims to further the motto “nothing about us without us”. The LDSC Project team undertakes a variety of projects that feed grounded research and theory into policy development and legal decision-making. Current projects include research on accessibility legislation, consent and capacity, transportation inequality, legal aid, general disability discrimination and more.

Additional information about the LDSC Project may be found at: <https://lawdisabilitysocialchange.com/about/>

B. Introduction and Issues

The Law, Disability & Social Change Project appreciates the opportunity to make this submission to the United Nations Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar, on her visit to Canada.

This submission focuses on two principal and related issues, as follows:

1. Access to justice for people with disabilities, particularly relating to access to legal aid; and
2. Canada's federal accessibility legislation (and indeed accessibility legislation more generally in Canada) and their connected access to justice issues.

Article 13 - Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

The promise of access to justice for people with disabilities as guaranteed under Article 13 of the CRPD has met with an extremely rocky road in terms of its realization in Canada. For litigants, the guarantee of access to justice should mean that people with disabilities have accessible complaint processes that make it possible for them to make their claims. We want to bring your attention to the two very significant public legal cases that are putting the concept of access to justice for people with disabilities to the test. Both cases are being brought by women with disabilities and they represent structural or systemic issues faced by people with physical and mental disabilities. We have been in regular contact with the women who are at the centre of each of these two cases for a number of years. In preparation for this submission, they have provided us with experiences that they would like me to share with you as Special Rapporteur. We have incorporated what they have stressed to the Founding Director as being important to them (to the best of our ability) into this submission to honour their experiences.

C. Access to justice for people with disabilities, particularly relating to access to legal aid

i. The *Portman Case (GNWT v Portman, 2018 NWTCA 4)*¹

Ms. Portman is a disabled woman who lives in Yellowknife. She sought legal aid to assist her with an ongoing claim relating to disability and employment before the Northwest Territories Human Rights Tribunal. She was denied legal aid based on a blanket policy by the Board responsible for distributing legal aid services. This policy excluded legal aid for any human rights matters. She has continued to fight and to find ways to pursue an appeal trying desperately to obtain *pro bono* services wherever possible and sometimes simply sitting out. However, her case is representative of a much larger systemic issue and voices a concern by many people with disabilities for greater recognition of their need for legal aid. Her argument hinges on a request that those applying for legal aid be assessed on a case-by-case basis, and accommodated for disability, where necessary,

She has tried many avenues to receive a decision from the courts that affirm the difficulties that a person with disability may have in bringing a case forward on their own when they have been denied legal aid. This is not to say that everyone with a disability should automatically be provided with legal aid. Rather, what is being argued is that the decision to provide legal aid or not should be made on a case-by-case basis, taking into account the circumstances of the individuals and any accommodations that need to be made to support them.

In our opinion, there is a legal obligation that already stems from our human rights statutes and their interpretation at the Supreme Court level which supports the argument for each applicant to be accommodated to the point of undue

¹ Please see links to the entire suite of decisions relating to Ms. Portman's fight for legal aid: *Portman v Northwest Territories (Department of Justice)*, 2016 CanLII 47992 (NT HRAP) (July 25/17) - <https://www.canlii.org/en/nt/nthrap/doc/2016/2016canlii47992/2016canlii47992.html?resultIndex=8> ; *GNWT v Portman*, 2017 NWTSC 61 (Aug 29/17) - <https://www.canlii.org/en/nt/ntsc/doc/2017/2017nwtsc61/2017nwtsc61.pdf> ; *Northwest Territories v Portman* 2018 NWTCA 4 - <http://canlii.ca/t/hs8gz> .

hardship. But this argument seems to come against one of two barriers. The first being that governments seek to argue and are sometimes successful in arguing that their decision to provide legal aid to certain cases is a policy decision and therefore not subject to review by the courts. The second barrier is that this policy argument is at times actually buttressed by the framing of legislation that should be protective of people with disabilities. For example, some human rights legislation states that it will only protect what is “customarily provided to the public” and has been interpreted to mean that once a discretionary decision not to provide legal aid in certain areas has been made, that decision is not subject to any scrutiny through human rights legislation.

In our opinion, it’s necessary to push policymakers to use their discretion to the benefit of those requiring disability accommodations. In this case we are speaking of the legal aid boards and commissions who are often given the discretion to determine the areas of law in which they will provide legal aid and the process they will follow to decide if applicants are successful.

There is also an issue of legislative design to be fixed. It’s necessary to encourage legislatures to ensure that legislation they provide in the human rights context does not allow for government to hide behind barriers it’s allowed to create. And thirdly, more funding is simply needed for legal aid to assist with human rights matters which is where we see a large number of people with disabilities in claims. (There may be other areas as well)

As Ms. Portman has stated and asked us to share:

"The CRPD hangs on article 13, for without access to justice through reasonable accommodations, the provision is just words. 20% of Canadians have a disability yet we're over 50% of all human rights complaints year after year."

ii. Ms. Gayton's case²

Ms. Gayton had been deemed legally incapable to present her own case in court and in need of a litigation representative or litigation guardian. Ms. Gayton was provided with legal aid for several years. The legal aid protection that she was receiving met the requirement of a litigation guardian. However, when her legal aid lawyer left her, she was left with no representation. She went back to the board responsible for legal aid. But, the board revised its policies and denied her representation by referring to the new revised policy. She states that she was not alerted to the changes to the policy at the time the changes were made.

Ms. Gayton was therefore caught. She could not bring her own case forward but could not get representation required under the law to do so either. Eventually, the court made an exception so that she could argue for an adjournment but instead of being adjourned, her case was dismissed very quickly.

In our opinion, it is important to note that article 13 speaks of “effective access to justice”. The principles discussed in relation to the first case also apply here. However, we would also add that a legal aid board should also be cognizant of the implications stemming from the ways in which they administer legal aid funding. One might argue that there should be an obligation on legal aid boards to inform persons with disabilities of changes in policy in a way that is understandable to the individual, and to maintain oversight of their legal aid lawyers to ensure that clients with disabilities are not left in the lurch, are adequately served etc.

Ms. Gayton has asked us to share that women with disabilities in particular may be affected by the access to the courts issue that she is facing.

² For an overview of Ms. Gayton's ordeal, see CBC news, " Brain-injured woman denied legal aid calls her ordeal 'frighteningly unfair'" (December 7, 2016), online: <https://www.cbc.ca/news/canada/calgary/brain-injured-legal-aid-trial-dismissed-1.3884756> .

D. Accessibility legislation in Canada and connected access to justice issues

In the legislation that's currently going through the Senate Bill C-81 indicates that an individual may complain to the Accessibility Commissioner if they have been adversely affected by a contravention of the [standards]. The Accessibility Commissioner will determine whether to investigate the complaint. The applicable section reads:

Right to file complaint

94(1) Any individual that has suffered physical or psychological harm, property damage or economic loss as the result of — or that has otherwise been adversely affected by — a contravention by a regulated entity of any provision of regulations made under subsection 117(1) may file with the Accessibility Commissioner a complaint that is in a form acceptable to the Accessibility Commissioner.

This amounts to a public enforcement mechanism as the Accessibility Commissioner will investigate the complaint, provide a determination and compensation or other remedies if the complaint is well-founded. If the complaint is not well founded, the complainant has the opportunity to appeal before the Canadian Human Rights Tribunal.

Our concern is that support is often needed for people with disabilities to bring forward complaints and the Act is not clear whether complainants will have support at the very initial stage bringing a matter to the Accessibility Commissioner. It is also unclear whether there will be supports at other stages such as before other regulated entities if this provision of the statute stays and not all matters go to the Accessibility Commissioner or, secondly, at the stage of appealing the decision of the Accessibility Commissioner before the Canadian Human Rights Tribunal.

Conclusion

The Law, Disability & Social Change Project appreciates the opportunity to make this submission to the United Nations Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar, on her 2019 visit to Canada. We appreciate any efforts made to ameliorate the situation of access to justice for people with disabilities in Canada.