**Access to Justice for Persons with Disabilities**

**in Canada**

**Submission to:**

**Office of the High Commissioner for Human Rights**

**For its thematic study on**

**access to justice for persons with disabilities,**

**under article 13 of the**

***Convention on the Rights of Persons with Disabilities***

**Submitted by:**

**ARCH Disability Law Centre**

**Council of Canadians with Disabilities**

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**Introduction**

In accordance with Human Rights Council resolution 31/6, the UN Human Rights Council requested the Office of the High Commissioner for Human Rights (OHCHR) prepare a study on article 13 of the *Convention on the Rights of Persons with Disabilities* (*Convention*), in consultation with relevant stakeholders. The study will be presented to the Human Rights Council before its thirty-seventh session.

Article 13 of the *Convention* provides for the right to access to justice for persons with disabilities, as follows:

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.

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.

ARCH Disability Law Centre (ARCH) and the Council of Canadians with Disabilities (CCD) thank the OHCHR for the opportunity to provide the information in this submission. We hope our submission will assist the OHCHR in preparing its thematic study on access to justice for persons with disabilities, and we welcome any questions or further consultation from the OHCHR in relation to access to justice for persons with disabilities in Canada.

**About the CCD and ARCH**

The Council of Canadians with Disabilities is a national human rights organization of people with disabilities working for an inclusive and accessible Canada. CCD's priorities include: disability-related supports; poverty alleviation; increased employment for persons with disabilities; promotion of human rights; implementation of the *Convention*; technology developed according to the principles of universal design; and air, rail, bus and marine transport that is accessible to persons with all types of disabilities. CCD seeks to achieve these priorities through law reform, litigation, public education and dialogue with key decision-makers. More information about CCD is available at: [www.ccdonline.ca](http://www.ccdonline.ca)

ARCH Disability Law Centre is a specialty legal clinic dedicated to defending and advancing the equality rights of persons with disabilities in Ontario, Canada. ARCH is primarily funded by Legal Aid Ontario. For over 35 years, ARCH has provided legal services to help Ontarians with disabilities live with dignity and participate fully in our communities. ARCH provides summary legal advice and referrals to Ontarians with disabilities; represents persons with disabilities and disability organizations in test case litigation; conducts law reform and policy work; provides public legal education to disability communities and continuing legal education to the legal community; and supports community development initiatives. More information about our work is available on our website: [www.archdisabilitylaw.ca](http://www.archdisabilitylaw.ca)

**Canadian Context**

Canada is a federated state: the federal Government of Canada has responsibility for matters such as banking, inter-provincial transportation, telecommunications, federally-regulated employment, federally-regulated services including post and services provided by the Government of Canada, criminal law and policy, certain indigenous issues, and others.[[1]](#footnote-1) Provincial and territorial governments have responsibility for matters such as health care, education, marriage, property and civil rights, provincially-regulated employment, provincial/territorial services, and others. Within their areas of responsibility, the federal and provincial/territorial governments develop public policy and law, administer social security and public benefits, and operate courts, administrative tribunals and other justice systems. This context is important when discussing access to justice for persons with disabilities in Canada. Persons with disabilities` experiences of access to justice differ widely depending on the province or territory where they live and whether their issue is federal, provincial or territorial in nature.

The information and perspectives in this submission are those of ARCH and the CCD. Where possible, we have included information and research conducted by other Canadian organizations. However, we acknowledge that this submission does not include information and perspectives from all jurisdictions in Canada.

**Responses to OHCHR Questions**

**OHCHR Question 1c:** Does your country have laws, policies or guidelines on access to justice, at any level of government, which ensure persons with disabilities, particularly women and children with disabilities have access to effective remedies that are appropriately proportional to the right(s) infringed and which are tailored to their specific situation?

**Response:** In Canada, all provinces and territories have human rights commissions and/ or human rights tribunals/boards of inquiries, which are statutory administrative bodies that monitor and/or enforce the province or territory`s human rights law. There is also a federal human rights commission and tribunal that are responsible for monitoring and enforcement of the federal human right legislation. These commissions and tribunals hear complaints from persons with disabilities who believe that they have been discriminated against because of their disability. Human rights tribunals and boards of inquiry can order a variety of remedies if they find that the relevant human rights law has been violated. These remedies include individual remedies, such as monetary compensation for the discrimination and orders for implementing specific accommodations for the person with a disability, and public interest remedies such as human rights training, the development of human rights policies, or the collection of data on the extent to which persons with disabilities are impacted by a particular rule or practice. The goal of these public interest or future compliance remedies is to prevent the discrimination that has been complained of from happening again in the future.[[2]](#footnote-2)

While human rights commissions and tribunals provide access to remedies for persons with disabilities with respect to equality and non-discrimination, there are many who critique these systems for their lack of accessibility, overly-legalistic procedures, lack of sufficient legal supports, and length of time from making a complaint to getting a remedy.[[3]](#footnote-3)

Canadian courts have ruled that economic, social and cultural rights are generally not justiciable in Canada.[[4]](#footnote-4) Therefore, no effective remedies are available in Canadian civil courts for violations of the right to housing, the right to adequate standard of living, the right to live independently in the community, and other economic, social and cultural rights under the *Convention*.

The provision of funding for disability services and supports falls within provincial and territorial responsibility. Although frameworks vary amongst provinces and territories, generally decisions about applications for funding for disability services and supports cannot be challenged in civil courts or administrative tribunals. In some provinces and territories there is administrative recourse: a person whose application for disability services and supports has been denied can request reconsideration of that decision. Unlike courts or tribunals, administrative recourse generally does not provide an opportunity for the person with a disability to challenge the evidence or criteria upon which the decision is made.

In some provinces and territories, persons with psychosocial disabilities who are subject to forced psychiatric assessment, hospitalization and medication can challenge these decisions at specialized administrative tribunals. For example, in Ontario the Consent and Capacity Board hears applications to review decisions to admit an incapable person to a hospital, psychiatric facility, nursing home or home for the aged, applications to review involuntary commitment to a psychiatric facility, and other matters.[[5]](#footnote-5) Much has been written critiquing this system and suggesting that it fails to provide access to effective remedies for persons who are subject to the psychiatric system.

Several provinces have enacted accessibility legislation, and Canada`s federal government is presently developing accessibility legislation that will apply in the federal sphere. In at least one province, accessibility legislation provides no access to remedies for persons with disabilities if organizations fail to comply with the legislation.[[6]](#footnote-6)

**OHCHR Question 2a:** Do you have examples from your country on how procedural and age-appropriate accommodations are provided and applied, including protocols or other guidelines?

**Response:** Administrative tribunals, including human rights tribunals and other tribunals that make a variety of decisions that affect persons with disabilities, such as social security and social assistance benefits, landlord and tenant disputes, compensation for being a victim of crime, and education for students with disabilities, have a legal obligation under federal, provincial and territorial human rights laws, as service providers, to accommodate the needs of persons with disabilities. In addition, some provinces have accessibility laws, which apply to administrative tribunals and require these tribunals to develop customer service policies about providing accessible services to persons with disabilities, permitting service animals and support persons to accompany the person with a disability, and training staff about how to provide services to persons with disabilities.[[7]](#footnote-7)

In practice, some tribunals have developed policies on the provision of accommodations for persons with disabilities, and have well-developed processes in place to receive accommodation requests and make the necessary arrangements for the provision of accommodation services. As an example, see the attached Social Justice Tribunals of Ontario *Accessibility and Accommodation Policy*.[[8]](#footnote-8) Other tribunals and administrative decision makers do not have accommodation policies in place, or decline to provide accommodations to persons with disabilities. For example, ARCH represented a Deaf person who wanted to make a complaint about the police. He requested that the administrative body charged with police complaints provide an American Sign Language interpreter to enable him to communicate his complaint effectively. The administrative body denied this accommodation. Persons with disabilities who have been found legally incapable of making their own decisions about their property or personal care may also face barriers to participating in legal and quasi-legal proceedings as a result of these findings of incapacity.[[9]](#footnote-9)

Procedural accommodations for persons with disabilities remains an important legal issue that Canadian courts grapple with. An example is the 2012 Supreme Court of Canada decision *R. v. DAI*.[[10]](#footnote-10) The question before the Court in this case was whether persons labelled with intellectual disabilities must demonstrate an understanding of the concept of a “promise to tell the truth” in order to be permitted to testify in court. The case involved a woman labelled with an intellectual disability who claimed that she was repeatedly sexually assaulted by her mother’s ex-partner. The lawyer for the accused sought to exclude her testimony on the basis that she was not mentally capable of promising to tell the truth. The trial judge decided that the woman should not be allowed to testify because she could not answer a series of abstract questions about the concept of truthfulness. The Supreme Court of Canada disagreed and decided that promising to tell the truth is sufficient to allow a person to testify. The case was important for advancing access to justice for persons with disabilities, however it also demonstrates how barriers to access to justice are entrenched within Canadian courts.

**OHCHR Question 2d:** Do you have examples from your country on legal aid programmes, public and/or private, which include the right of access to justice for persons with disabilities in their practices, including the availability of support and liaison services for courts or other judicial or quasi-judicial instances?

**Response:** Canada does not have a national publicly-funded legal aid program. Instead, each province and territory has its own legal aid program. There are stark regional disparities in who can access legal aid, the types of legal issues covered, and the amount and type of legal assistance provided. For example, in some provinces legal clinics assist persons with disabilities to apply for and appeal decisions in relation to social assistance (social security) disability benefits, while in other provinces no such legal assistance is available.[[11]](#footnote-11) Access to legal aid programs is not based on a right to access justice, but rather on a means-tested basis, meaning that a person must earn less than a certain amount of income in order to be eligible to receive legal aid services. In many provinces and territories, a person must be receiving social assistance (social security) benefits in order to qualify for legal aid. In practice, it is persons who live in poverty who qualify for legal aid.[[12]](#footnote-12) Persons with disabilities who are employed are generally not eligible for legal aid, but often are not able to afford private legal services, leaving them without any legal assistance.

The Canadian Bar Association’s 2016 report on access to justice documents a decline in spending on civil legal aid, and the detrimental impacts this has had on marginalized persons, including persons with disabilities.[[13]](#footnote-13) Reduction in legal aid services may have a disproportionately negative impact on persons with disabilities. Studies have found that persons with disabilities are significantly more vulnerable to discrimination and other legal problems, and therefore are significantly more likely to become involved in the civil justice system.[[14]](#footnote-14) In addition, in Canada, persons with disabilities have a higher rate of poverty than persons without disabilities.[[15]](#footnote-15) In short, persons with disabilities are more likely to need legal services, but also more likely to be unable to pay for those services.

Since 2016 the federal Standing Committee on Justice and Human Rights has engaged in a study on access to justice. The Committee is comprised of elected politicians with the power to review and report on the policies, programs, and expenditure plans of Canada`s Department of Justice. The Committee is presently studying legal aid programs, and has received many submissions from stakeholders which may provide relevant information for the OHCHR`s thematic study on access to justice.[[16]](#footnote-16)

1. *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11, ss. 91, 92. [↑](#footnote-ref-1)
2. See, for example, *Human Rights Code*, RSO 1990, c H.19, ss. 45.2, 45.3. [↑](#footnote-ref-2)
3. See, for example, Tess Sheldon & Ivana Petricone, ARCH Disability Law Centre, *Addressing the Capacity of Parties Before Ontario’s Administrative Tribunals: Respecting Autonomy, Protecting Fairness* (1 November 2009)online: <http://www.archdisabilitylaw.ca/addressing-capacity-parties-ontario%E2%80%99s-administrative-tribunals-respecting-autonomy-protecting-fairne> [↑](#footnote-ref-3)
4. *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852 (CanLII), leave to appeal to the Supreme Court of Canada dismissed: 2015 CanLII 36780 (SCC) [↑](#footnote-ref-4)
5. For more information about the Ontario Consent and Capacity Board see: [www.ccboard.on.ca/scripts/english/aboutus/index.asp](http://www.ccboard.on.ca/scripts/english/aboutus/index.asp) [↑](#footnote-ref-5)
6. Ontario`s accessibility law, the *Accessibility for Ontarians with Disabilities Act,2005,* SO 2005, c 11, does not provide any mechanism by which persons with disabilities can complain or seek access to remedies if an organization has failed to comply with the legislation. [↑](#footnote-ref-6)
7. #  *Accessibility Standards for Customer Service*, O Reg 429/07

 [↑](#footnote-ref-7)
8. Social Justice Tribunals of Ontario, *Accessibility and Accommodation Policy* , online: <http://www.sjto.gov.on.ca/documents/sjto/Accessibility%20and%20Accommodation%20Policy.html> [↑](#footnote-ref-8)
9. Tess Sheldon & Ivana Petricone, ARCH Disability Law Centre, *Addressing the Capacity of Parties Before Ontario’s Administrative Tribunals: Respecting Autonomy, Protecting Fairness* (1 November 2009)online: <http://www.archdisabilitylaw.ca/addressing-capacity-parties-ontario%E2%80%99s-administrative-tribunals-respecting-autonomy-protecting-fairne> [↑](#footnote-ref-9)
10. 2012 SCC 5 (CanLII) [↑](#footnote-ref-10)
11. Canadian Bar Association, *Study on Access to the Justice System – Legal Aid,* (December 2016) online: [www.cba.org/CMSPages/GetFile.aspx?guid=8b0c4d64-cb3f-460f-9733-1aaff164ef6a](http://www.cba.org/CMSPages/GetFile.aspx?guid=8b0c4d64-cb3f-460f-9733-1aaff164ef6a) at 7. [↑](#footnote-ref-11)
12. Canadian Bar Association, *Reaching equal justice report: an invitation to envision and act,* (November 2013) online: [www.cba.org/CBAMediaLibrary/cba\_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf](http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf) at 39. [↑](#footnote-ref-12)
13. *Ibid.,* at 40-42. [↑](#footnote-ref-13)
14. Jamie Baxter, Michael Trebilcock, Albert Yoon, “The Ontario Civil Needs Project”, *Middle Income Access to Justice*, (Toronto/Buffalo/London: University of Toronto Press, 2012), eds. Michael Trebilcock, Anthony Duggan, and Lorne Sossin [↑](#footnote-ref-14)
15. Canada Without Poverty, *Basic Statistics on Poverty*, online: [www.cwp-csp.ca/poverty/just-the-facts/](http://www.cwp-csp.ca/poverty/just-the-facts/) [↑](#footnote-ref-15)
16. For more information about the Committee, and to access submissions from stakeholders go to: [www.parl.gc.ca/Committees/en/JUST/StudyActivity?studyActivityId=8806784](http://www.parl.gc.ca/Committees/en/JUST/StudyActivity?studyActivityId=8806784) [↑](#footnote-ref-16)