

## **Need Legal Aid? Get Stuffed!**

**by Stephen Elliott-Buckley - Wednesday, March 05, 2008**

<http://politicsrespun.org/2008/03/need-legal-aid-get-stuffed/>

"Brenner said they were wrong and told them to get stuffed."

- [Ian Mulgrew, Vancouver Sun](#) [see below]

Aside from the perverse standards of journalism at the Vancouver Sun, the above indicates that the BC Court of Appeals is not willing to contribute to a humane notion of legal aid for the resource-deprived embroiled in civil cases.

While legal aid for criminal cases was not the issue, after deep cuts across the country to legal aid for victims in civil cases, the Canadian Bar Association wanted the courts to establish a standard of justice that offends the neoliberal budget cutters that are particularly harsh in BC.

People deserving legal aid include those facing unjust eviction, mothers reeling from deadbeat dads ignoring court-ordered financial support and scores of others find themselves unable to afford effective representation in civil matters.

Of course, the rich do quite well since they can afford counsel to pursue their legal issues. Civil legal aid, however, is becoming far less civil than it deserves to be.

And in one sense, it all comes down to freedom. Political philosophers talk about negative and positive freedoms. Negative freedom refers to a way of defining freedom where individuals are free from "needless" meddling by the state, where we are not regulated and impeded in our pursuit of our liberty. Hyper-capitalists, libertarians and neoliberal governments look for ways to keep society from interfering with our god-given right to go about our business, regardless of how many people or watersheds we abuse.

Positive freedom defines freedom as a way of enabling those who are socially disempowered to have access to opportunity to function as well as those who are socially gifted: often groups like white, upper or middle class, English speaking males. Positive freedom efforts include things like affirmative action, or using tax dollars to fund legal aid for those not wealthy enough to pursue civil legal justice.

Obviously these two conceptions of freedom are mutually exclusive in their pure form. They also form a core conflict in our society: deregulate to the point where we have no society or gather together social and financial resources to empower those who are structurally vulnerable, thereby undermining the power of the economic, social and political elites.

The Court of Appeals has chosen to reject this effort to pursue positive freedom. It is not an isolated incident and it allows a neoliberal regime in our province and country to continue gutting social programs that allow people who aren't white men to have a better shot at success or even meaningful survival.

*Legal aid not a right, court rules*

*B.C. Appeal Court judges quash lawyers' bid to force government to pay civil legal costs of poor people*

*Ian Mulgrew*

*Vancouver Sun*

*Tuesday, March 04, 2008*

*The B.C. Court of Appeal has backed B.C. Supreme Court Chief Justice Don Brenner's decision to kill the Canadian Bar Association's landmark attempt to force governments to provide adequate civil legal aid to poor people.*

*In a majority ruling Monday, the court agreed with the province's senior trial court judge and said he was also quite right to assess costs against the CBA.*

*Susan McGrath, past president of the bar association, said she was saddened because the decision means access to justice will continue being denied to those least able to help themselves.*

*"We're disappointed we continue to confront procedural hurdles trying to bring this case," the Ontario lawyer said in an interview. "We're going to have to study the ruling and consider our options. We had hoped the courts would have been more responsive to this novel approach. We're not giving up the fight."*

*The Appeal Court said the association failed to meet even the minimum threshold for launching such an action -- a reasonable claim.*

*"Although the action is intended to assist low-income members of the public and its spirit is commendable, I do not consider that the altruistic nature of the action should be afforded much weight until at least the [bar association] has established it can meet the minimal test of disclosing a reasonable claim," Justice Mary Saunders wrote.*

*Supported by Justice Peter Lowry, she quoted the Supreme Court of Canada saying there is no fundamental right to access to legal services:*

*"Access to legal services is fundamentally important in any free and democratic society. In some cases, it has been found essential to due process and a fair trial. But a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent's contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law."*

*(Justice Allan Thackray, the third member of the appeal panel, heard arguments in the case but retired in October before the decision and did not participate in the ruling.)*

*In a clear and well-reasoned judgment, Justice Brenner said the bar association was the wrong group to launch such a lawsuit, and the remedy it sought was far too sweeping. (The Appeal Court didn't rule on whether the bar association was the proper body to bring such a lawsuit because it found its arguments*

*had been so unpersuasive that that question didn't need to be answered.)*

*"Instead of considering a specific statute or a specific administrative act or expenditure for constitutional compliance, this case would ultimately require the court to define a constitutionally valid civil legal aid scheme and order its provision by the [federal and provincial governments]," Justice Brenner wrote.*

*For almost two decades, legal aid across Canada has been a growing concern because of government cutbacks.*

*Provinces have curtailed legal aid services, narrowing the types of cases they cover, raising the eligibility criteria, making it harder to qualify.*

*At the same time, the federal government assumes little responsibility, with the primary exception of serious criminal matters.*

*People often have no legal assistance even when critical issues are at stake and no government is accountable.*

*The legal community fears we are creating a system for the rich and stacking the deck against those without resources, yet extensive lobbying has proved useless.*

*In 2002, the bar association launched this lawsuit. It chose B.C. for the unique test case because of the deep, deep cuts to legal services by the Liberal government when it first took office.*

*"Our concern has always been access to justice," McGrath said.*

*The association filed a statement of claim in June 2005, alleging the provision of civil legal aid in B.C. is inadequate and those inadequacies amount to breaches of the Constitution and international human rights conventions.*

*It maintained that coverage was limited, that financial eligibility guidelines excluded many poor people, and that the services provided are too restrictive.*

*As the voice of some 36,000 members of the country's legal profession, the association said it was the most appropriate party to bring such a suit.*

*It maintained it was unreasonable to insist that poor individuals -- denied legal aid in cases where they are unjustly evicted or when they are threatened about the custody of their children -- be required to mount constitutional challenges themselves on a case-by-case basis.*

*The association wanted court-mandated civil legal aid across Canada with judges deciding what was necessary while taxpayers footed the bill.*

*Brenner said they were wrong and told them to get stuffed.*

*He said there are other ways to tackle the problem facing the poor, and like the Supreme Court of*

*Canada, suggested individual litigants could raise their need on a case-by-case basis.*

*The Appeal Court agreed that this lawsuit as put forward by the association was the wrong way to proceed.*

*"We knew there would be setbacks," McGrath said. "But I don't think people without the financial resources and often without the emotional resources should be expected to mount this type of challenge and argue this case before the court. We're not giving up."*

*imulgrew@png.canwest.com*