

# 11<sup>TH</sup> SESSION OF THE OPEN-ENDED WORKING GROUP ON AGEING ACCESS TO JUSTICE

## *Response by Canada*

### **National legal framework**

#### **1. How is the access to justice by older persons guaranteed under the national legal and policy framework? What judicial and non-judicial mechanisms are in place for all older persons to complain and seek redress for denial of their rights?**

Canada recognizes the importance of access to justice for all Canadians, including older persons, to resolve their legal problems. Access to justice is critical to maintaining and strengthening confidence in the justice system and in democracy.

Access to justice is a shared responsibility of the federal and provincial governments. Canada's domestic human rights framework includes legal protections for older persons in Canada's Constitution under the *Canadian Charter of Rights and Freedoms*<sup>1</sup> (Charter), and in the *Canadian Human Rights Act* and similar provincial and territorial anti-discrimination legislation.

The Charter guarantees a broad range of rights and freedoms to all persons, regardless of their age, including various rights relating to the criminal justice process (ss. 9-14). Furthermore, s. 15(1) guarantees the right to equality before and under the law, the right to equal benefit and protection of the law without discrimination on grounds enumerated in s. 15(1) – including age - or those analogous to them. The Charter also protects against discrimination based on an intersection of grounds, such as age and disability or age and sex. The rights in the Charter are subject only to such reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society. The protections in the Charter apply to legislation and actions of the federal government, provincial and territorial governments and municipal governments, and extend to a full range of governmental entities and activities, such as hiring practices and the provision of public services.

Federal, provincial and territorial governments have adopted anti-discrimination legislation prohibiting discrimination on various grounds in regard to employment matters, and the provision of goods, services and facilities customarily available to the public, and require that employers and service providers accommodate these differences up to the point of undue hardship. Age is a prohibited ground of discrimination under the *Canadian Human Rights Act*, which extends protection to older persons who are employed by the federal government or work in the private sector in areas regulated by the federal government such as banks and airlines.

Various modes of redress for human rights violations are available, depending on the nature of the right infringed and the form of remedy sought. The courts have jurisdiction to determine whether there have been violations of the Charter, including civil claims alleging Charter violations. If a challenge based on the Charter is successful, the courts may declare a law of no force and effect or provide an appropriate and just remedy to anyone whose Charter rights have been infringed or denied.

The primary means of enforcing human rights codes and legislation is through the human rights commissions or tribunals established under the legislation. The process for making a complaint under a human rights code varies from jurisdiction to jurisdiction but in general is informal and accessible – a simple form is completed by a complainant who may be assisted by a human rights

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<sup>1</sup> *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c.11.*

commission or tribunal official in initiating the process. Decisions of commissions or tribunals are subject to judicial review by the courts.

There are also many statutes, programs and policies that are intended to implement economic and social rights for all people in Canada, including older persons, such as labour and employment standards legislation, and social security legislation. Programs relevant specifically to older persons include the Canada Pension Plan and the Old Age Security program, which provide income support to millions of older Canadians. Administrative tribunals oversee the administration of these benefit programs and provide recourse and remedies for complaints. The decisions of these tribunals may also be subject to judicial review by the courts.

The common law also contains remedies for violations of some human rights – for example, damages including compensation may be sought for wrongful dismissal from employment.

### **Availability**

#### **2. What steps have been taken to ensure the availability of judicial and non-judicial mechanisms for older persons in urban, rural and remote areas in your country? Are there alternative dispute settlement mechanisms available?**

Non-litigious dispute resolution and restorative justice are rapidly evolving in Canada, involving both lawyers and non-lawyers practicing in a variety of subject areas. Processes such as negotiation, mediation and arbitration may be used either independently of or as complements to litigation. The range of remedies is broad and diversified, including compensation (financial or other), apologies, reinstatement to the workplace, and compliance agreements. The use of these methods varies from one province or territory to another, and also within the federal sphere. There is a growing demand in Canada for these alternative approaches to conflict resolution, and governments increasingly rely upon them for the resolution of disputes.

Online dispute resolution platforms, such as SmallClaimsBC established by the Justice Education Society in the province of British Columbia, provide people in dispute with tools to help them settle online, without going to court. These platforms may be of particular assistance to older persons, including those facing mobility challenges.

### **Accessibility**

#### **3. What steps have been taken to ensure that all justice systems (judicial and non-judicial) are secure, affordable and physically accessible for older persons and adapted to their needs?**

Canada has taken various steps to make justice systems accessible to older persons. Across Canada, Public Legal Education and Information (PLEI) organizations provide people who may face barriers to accessing justice—such as older persons or persons who live with a disability, and people who cannot afford access to a lawyer—with services to better understand their legal rights. PLEI organizations provide law information programs and services in a variety of ways, such as websites, walk-in clinics, toll-free information lines and print and electronic publications. Moreover, PLEI organizations regularly work in partnership with community legal clinics, front-line social and health services, schools, media outlets and legal organizations such as legal aid programs, law societies and the private bar. Canada's 2019 federal budget included increased funding to support the work of PLEI organizations across Canada.

Canada has also taken steps to make the recourse process for programs relevant to older persons more accessible. The Employment Insurance, the Canada Pension Plan and the Old Age Security programs provide important income support to millions of Canadians, including older Canadians, every year. At times, people may disagree with decisions made regarding their claims or benefits. Canada has taken steps and increased funding to make the recourse process for these programs easier to navigate and more responsive to the needs of Canadians, including older Canadians.

In addition, the *Accessible Canada Act (ACA)*, which became law in Canada in July 2019, is intended to address age-related concerns faced by persons with disabilities in Canada's federal sector. The ACA allows for the development of regulations to remove accessibility barriers across the federal sector for persons with disabilities. These regulations could target areas such as employment, the built environment, information and communication technologies, the procurement of goods, services, and facilities, the design and delivery of programs and services, transportations, and other areas designated by regulation. Federally-regulated organizations will be required to create accessibility plans and report on their implementation. Such plans could also address the age-related needs of persons with disabilities.

#### **4. What are the existing provisions to guarantee legal assistance for older persons?**

A strong legal aid system is an important pillar of Canada's justice system. In Canada, provincial and territorial legal aid agencies provide legal aid services for economically disadvantaged persons, including older persons, involved in criminal and civil matters. The Government of Canada provides financial assistance to the provinces for the delivery of criminal legal aid services, and to the territories for criminal and civil aid matters.

The federal government also provides financial support to the six provinces (British Columbia, Alberta, Manitoba, Ontario, Quebec, and Newfoundland and Labrador) that deliver legal aid services to individuals involved in immigration and refugee proceedings.

Canada provides financial support to the provinces and territories for the delivery of social programs through a block funding transfer called the Canada Social Transfer, or CST. Civil legal aid is an eligible expenditure under the CST.

The federal government is also highly invested in a number of civil and family areas relevant to older persons including income supports such as the Canada Pension Plan, Employment Insurance, and Old Age Security, housing, health and health prevention, human rights, and consumer and debt issues.

#### **5. What are the specific challenges encountered by older persons in accessing justice and remedy in your country?**

Disability is more prevalent among seniors than any other age group with a disability rate of 38% for Canadians aged 65 year and older. This can lead to challenges when accessing services such as legal services. As discussed under question 3, steps have been taken to make the justice systems more physically accessible. For example, the Accessible Canada Act (ACA) is intended to address age-related concerns faced by persons with disabilities in Canada's federal sector. In addition, various programs such as the Enabling Accessibility Fund (EAF) support community and work-based projects across Canada that improve accessibility, remove barriers, and enable Canadians with disabilities to participate in and contribute to their community. In particular, the Community Accessibility stream under the EAF supports projects that improve accessibility and safety in communities across Canada where programs or services are offered for people with

disabilities. These projects could increase access for older persons to buildings, common areas and community centres where legal services may be housed.

Seniors' poverty can also exacerbate challenges faced by older persons when accessing services. Canada's public pensions have played a major role in the decline of poverty among seniors over the past few decades. Based on the Low-Income Cut-Off (LICO), the measure used in Canada before the introduction of Canada's Official Poverty Line (Market Basket Measure), the incidence of low income among seniors decreased from 21.4% in 1980 to 4.3% in 2017. This aligns with Canada's Official Poverty Line, the measure used to monitor poverty under the Poverty Reduction Strategy, in which the poverty rate fell from 7.6% in 2006 to 3.9% in 2017.

## **6. What good practices are available in terms of ensuring equal and effective access to justice and remedy for older persons?**

With aging comes potential declines in physical and mental health, which may allow older persons to be targeted for financial exploitation, as well as other forms of abuse. Canada has developed the Federal Victims Strategy (FVS), a horizontal initiative led by the federal Department of Justice (DOJ) with the objective of giving victims a more effective voice in the criminal justice system. The Victims Fund, through the FVS, is available to provincial and territorial governments and non-governmental organizations to support projects that address the needs of victims and survivors of crime in the criminal justice system. The Victims Fund can support projects that meet the needs of senior victims.

In 2016, the DOJ issued a call for proposals under the Victims Fund to non-governmental organizations for projects that help to address gaps in support and services, awareness raising, or research to benefit victims and survivors of crime with disabilities, including older persons with disabilities. Seven projects are currently being funded across Canada.

Additionally, some legal aid plans and other (both publicly and privately-funded) bodies have developed specialized services for economically-disadvantaged older persons. For example, Legal Aid Ontario supports the Advocacy Centre for the Elderly, a community based legal clinic that assists low income senior citizens with a variety of legal issues. Pro Bono Ontario has specialized services, such as a toll-free, province-wide advice line, a Simple Wills Program and Power of Attorney service, and court-based programs to help predatory lending victims.

In British Columbia, the Law Foundation of BC-funded Seniors First BC provides services to people age 55 and over, who are not able to access legal help elsewhere due to low income or other barriers. The clinic can provide legal advice and representation for residential tenancy/housing, debt, pensions and benefits, abuse/neglect, financial exploitation, and other matters.

## **Equality and non-discrimination**

### **7. What are the provisions adopted to ensure effective access to justice for older persons on an equal basis with others, including age-appropriate procedures in all administrative and legal proceedings?**

In addition to the information provided to question 1, specific procedures are available in legal proceedings to help ensure effective access to justice for older persons. For example, Canada's *Criminal Code* allows testimonial aids (screen and remote testimony by CCTV or video-link and support person) to be ordered on a discretionary basis for vulnerable adult victims and witnesses

if the court believes it would facilitate the giving of a full and candid account by the witness or would otherwise be in the interests of the proper administration of justice. The court will consider factors including the witness' age and any mental or physical disability, the nature of the offence, any relationship between the witness and the accused, whether it is needed for the witness's security or to protect them from intimidation or retaliation, society's interest in encouraging the reporting of offences. These testimonial aids are available on a presumptive basis to adult witnesses with a mental or physical disability that may make it difficult for them to testify. The judge must order these testimonial aids unless they believe it would interfere with the proper administration of justice. Testimonial aids will also be ordered for any witness who wishes to present their victim impact statement at a sentencing hearing.

The *Criminal Code* also allows a video recording of victims and other witnesses to be admitted if they may have difficulty communicating their evidence at a criminal proceeding due to a mental or physical disability. The video recording must describe the alleged offence, made within a reasonable time after the alleged offence, and adopted by the witness at the criminal proceedings. For civil law disputes involving smaller monetary claims, online dispute resolution platforms, such as SmallClaimsBC established by the Justice Education Society in the province of British Columbia, may help to ensure effective access to justice for older persons by providing them with tools to help settle disputes online without going to court.<sup>2</sup>

**8. Please specify existing public policies and awareness-raising and capacity building programmes established for all justice system personnel to address the negative impacts of ageism and age discrimination in justice system.**

One example of a capacity building programme in Canada is the national Action Committee on Access to Justice in Civil and Family Matters, which brings together representatives from all levels of government, the judiciary, the legal community, and other justice system stakeholders to foster engagement and a coordinated approach to enhancing access to civil justice in Canada. The Action Committee has developed nine Justice Development Goals to serve as a common framework for access to justice efforts.<sup>3</sup>

### **Accountability**

**9. How do you ensure justice systems function in accordance with the principles of independence and impartiality? Please specify if there is any oversight mechanism in place to address any discrimination against older persons committed by justice system professionals.**

The independence of the judiciary and its separation from the legislative and executive branches of government are a cornerstone of the Canadian judicial system and guarantees that judges act independently of government in interpreting and applying the law. The courts operate independently of the federal and provincial legislative bodies and governments. The *Constitution Act, 1867* adopted the judicial independence features that had been inherited from the United Kingdom. The *Canadian Charter of Rights and Freedoms* has also been interpreted so as to protect judicial independence.

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<sup>2</sup> See <http://www.smallclaimsbc.ca/settlement-options/ODR>

<sup>3</sup> See <http://www.justicedevelopmentgoals.ca/>

Financial security and security of tenure are crucial aspects of judicial independence. Judges' salaries are established by law and are not subject to arbitrary interference by the executive. The adequacy of judicial compensation is reviewed periodically by independent, effective and objective commissions. According to the Constitution, judges of the superior courts have security of tenure during good behaviour until the age of 75 years. Retirement age for provincial and territorial court judges varies across the country. Administrative independence is the third component of judicial independence in Canada. It ensures judicial control over matters that go to the core of the judicial function, such as the assignment of judges and the scheduling of hearings.

Each jurisdiction in Canada has a judicial council which has general responsibility for promoting professional standards and conduct, investigating complaints against judges received from the public, and may recommend that a judge be removed from the bench if necessary. At the federal level, the recommendation is received by the Minister of Justice. The procedure for removing a superior court judge in Canada is on address to the Governor General by the Senate and House of Commons. Provincially and territorially appointed judges can, in most provinces and territories, be removed by the relevant Cabinet or legislature following recommendations made by the provincially- or territorially-created judicial council.

The Canadian Judicial Council's mandate is to promote efficiency, uniformity, and accountability, and to improve the quality of judicial service in superior courts of Canada. As part of its mandate, the Council, reviews complaints or allegations of misconduct against federally-appointed judges. It consists of the chief and associate chief justices of all of the federal courts and provincial/territorial superior courts. The Council has developed a set of Ethical Principles for Judges, designed to assist judges in maintaining their independence, integrity and impartiality.

With respect to oversight mechanisms for justice system personnel, one example is police commissions or similar bodies that have been established in most provincial jurisdictions to review complaints against the police. These bodies increasingly operate independently of the police. For example, the independent Civilian Review and Complaint Commission for the RCMP deals with complaints against the Royal Canadian Mounted Police (Canada's national police force).