

# Legal Aid Test Case Litigation

## BACKGROUND

- In 2002, CBA started to consider litigation as an alternative strategy to supplement lobbying efforts (see separate note on Legal Aid Test Case), presented to Council at the 2002 Mid-Winter Meeting in Moncton. Eight prominent academics contributed legal opinions on arguments to support the existence of a constitutional right to legal aid, particularly in the civil context. A CBA resolution supporting creation of a Coalition with other national groups and a litigation strategy was unanimously endorsed at the 2002 Annual Meeting ([02-05-A](#)).
- A Legal Aid Test Case Advisory committee, established to advise on a litigation strategy, first met in February 2003. The committee's proposal for a test case received widespread CBA support and funding was partially secured through a Law for the Future Fund grant. The grant allowed the CBA to begin research and creating litigation support materials. An [EPIIgram](#) on test case possibilities was published in October 2003.
- The Test Case Advisory committee presented its recommendations to the CBA Board of Directors in June 2004. In August 2004, CBA Council voted unanimously to fund the case, pending Branch ratification of a proportionate sharing formula. All 13 Branches agreed.
- In 2005, CBA filed suit in British Columbia, naming the federal and provincial government, and the legal aid plan, as failing to provide adequate access to justice through legal aid for poor people in that province. The case ran into procedural challenges at first instance, and CBA appealed those issues to the BC Court of Appeal.
- The BC Court of Appeal upheld the lower court's decision on the CBA's Test Case on Legal Aid, and the SCC did not grant leave. In 2009, the CBA Board agreed to continue litigation as one-of its access to justice strategies, using a more conventional approach.

## CURRENT STATUS

- CBA commissioned a comprehensive overview of recent developments and policy directions in legal aid. The CBA released, *Moving Forward on Legal Aid: Research on Needs and Innovative Approaches* in the Spring of 2010. The report contains ten important suggestions as to possible future directions for the CBA's work to improve access to justice.
- The Legal Aid Liaison Committee launched a new Legal Aid Watch, as a national email network to facilitate information sharing and communications among legal aid lawyers, in October 2009. The network is expected to be a useful resource in seeking appropriate cases for ongoing litigation.

- CBA launched its test case in June 2005, filing suit against the Government of BC, the BC Legal Services Society and the federal government for failing to provide access to justice in compliance with sections 7 and 15 of the *Charter*.
- Test case counsel responded to a motion to strike the CBA's pleadings in June 2006. The motion was granted. The judge found that CBA lacked standing to bring the case, and that the challenge would be appropriately launched as an individual case, rather than using a systemic approach.
- Test case counsel appealed the decision to the BC Court of Appeal in October 2007. The Court of Appeal judgment in March 2008 upheld the lower court's decision to strike the CBA's pleadings.
- CBA applied for leave to appeal the BC Court of Appeal decision to the Supreme Court of Canada in May 2008. Leave was denied, with costs, in September 2008.
- The CBA Board of Directors met with counsel in October 2008, to discuss options for continuing litigation as one of the tools CBA will use to improve legal aid. In February 2009, the CBA Board of Directors voted to proceed with litigation with an individual or group of individuals, subject to approval of the Branch in which the case would take place. Further cases will be considered subject to Branch approval and funding considerations.
- A consultant has updated research for use by *pro bono* counsel. A survey was distributed to CBA members involved in legal aid in September 2009 to gather information on which types of cases are most pressing.
- In January 2010, the Test Case Advisory Committee met to consider the best strategies for CBA's renewed litigation efforts and the type of case(s) CBA should seek. Guy Joubert reported on the recommendations to the CBA's Board of Directors in February 2010. Letters were sent to relevant CBA and external groups in May 2010, outlining in general terms the type of cases and *pro bono* counsel the CBA is seeking.
- Three subcommittees were created to develop detailed criteria on the type of cases CBA should seek: Family Law, Poverty Law, and Targeted Scope (Prison, Mental Health and Refugee Law). The Targeted Scope committee created specialized groups for the three areas of law under its mandate. All subcommittees are finalizing criteria for appropriate cases, and have begun to consider jurisdictions for test case litigation to be supported by CBA.

## **NEXT STEPS**

- With recommendations from its subcommittees on specific criteria and a process for assessing possible legal aid test cases, the Advisory Committee will advertise broadly for potential test cases for CBA support. Branch approval to proceed in any jurisdiction is required, and the Committee will seek regional support for test case litigation from lawyers and community organizations.

- The Committee is seeking a family law test case in New Brunswick. The Advisory Committee Chair visited the province in October 2011 to ask for assistance in finding the right case.