



THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

Study on Access to the Justice System – Legal Aid

**CANADIAN BAR ASSOCIATION
ACCESS TO JUSTICE COMMITTEE**

December 2016

PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Access to Justice Committee, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Access to Justice Committee.

TABLE OF CONTENTS

Study on Access to the Justice System – Legal Aid

I.	INTRODUCTION	1
II.	BACKGROUND	2
	A. Why Access to Justice is Crucial to Canada's Democracy	2
	B. The CBA Position on Legal Aid	3
	CBA's Equal Justice Report	3
	Federal Funding of Legal Aid	4
	C. Legal Aid Investments	5
III.	NATIONAL BENCHMARKS FOR PUBLIC LEGAL ASSISTANCE SERVICES	6
IV.	CONCLUSION	11

Study on Access to the Justice System – Legal Aid

I. INTRODUCTION

The Canadian Bar Association's Access to Justice Committee is pleased to contribute to the study of the Standing Committee on Justice and Human Rights on legal aid. We applaud your decision to undertake this important work. The CBA recognizes a pressing need for immediate improvements to legal aid across the country. Canada, by voting in favour of the UN's *2030 Agenda for Sustainable Development*, has agreed to "promote the rule of law at the national and international levels and ensure equal access to justice for all," through Goal 16.3. The federal government has an important role to play in ensuring equal access to justice by supporting and contributing to adequate and well-functioning public legal assistance systems in Canada, in collaboration with other stakeholders.

The CBA is a national association representing 36,000 jurists across Canada. Among the Association's primary objectives are seeking improvement in the law and the administration of justice. The Access to Justice Committee's mandate is to improve and promote access to justice for the poor and middle class in Canada. Over many years, our message has been that publicly funded legal services are required to ensure equal participation in Canadian society. Along with education, health care, and social services, they are a pillar of a just democratic society. We believe that adequately funded public legal assistance systems are the fundamental prerequisite to achieving access to justice, and essential public services.

We use "public legal assistance systems" advisedly, to reflect the current breadth of services by public legal assistance providers and the full spectrum of resources necessary. These systems include what is traditionally thought of as legal aid (focused on procedural justice by providing legal assistance and representation by a lawyer in court), through to services responding to legal needs, health and empowerment more broadly by supporting legal literacy and capabilities and providing legal information, assistance, dispute resolution and representation services, either directly or through referrals to other agencies.

Unfortunately, publicly funded legal services do not receive equal public attention or resources compared to other essential public services. Most recently, together with the Association of

Legal Aid Plans of Canada, the CBA developed proposed national benchmarks for public legal assistance services to provoke a national discussion on the state of these services. We urge the Justice and Human Rights Committee to recommend that the federal government endorse these benchmarks and work in collaboration with the CBA and other access to justice stakeholders to meaningfully contribute to their fulfilment. Below, we expand on our work on these benchmarks and our rationale for their endorsement.

As well, given that current difficulties to Canadians' access to public legal assistance services can be traced from a federal government decision to transfer funds for civil legal aid and other social programs to the provinces under a generalized, "no strings" *Canada Social Transfer* (CST), we renew our calls for a dedicated transfer for civil legal aid.

II. BACKGROUND

A. Why Access to Justice is Crucial to Canada's Democracy

Canada's democracy is based on two basic principles.¹ First, we elect those who govern us. Second, our democratic system is based on the Rule of Law, under which access to justice is a fundamental aspect.² Access to a public system of courts and tribunals to have disputes resolved and to exercise one's rights and freedoms, in accordance with the Rule of Law, is one of the clearest demonstrations of a functioning democracy. Ensuring access to justice is thus in keeping with the best traditions of democratic society.

Canada has long recognized that rights should not be curtailed merely because a person lacks the resources to defend them. Those with the least financial resources often experience the greatest attacks on their rights. If Canadians cannot access the courts because of financial impediments, they will lose faith in our democratic system. The long term consequences will be harmful at all levels of our society. As the Supreme Court has stated:

Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing

¹ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 67-68 (noting also that a "functioning democracy requires a continuous process of discussion").

² *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31 at para 39.

rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.³

As the above quotation implies, access to the courts is but one aspect of access to justice. The crucial element in upholding the Rule of Law is that those involved in a justiciable legal dispute have clear paths to achieving just and timely outcomes, whether that is a court judgment, a tribunal decision, an agreement through a dispute resolution process, or otherwise.

B. The CBA Position on Legal Aid

The CBA's policy foundation on public legal assistance services dates back over 50 years. The CBA's governing Council has identified key issues and problems, and focused our efforts.

Throughout the years, the CBA has urged:

- an increased federal financial commitment to improve both criminal and civil legal aid;
- federal leadership and responsibility for both criminal and civil legal aid, most sensibly housed within Justice Canada;
- a new approach to ensure transparency and accountability in civil legal aid funding;
- minimum national standards for legal aid services;
- coherent thresholds of financial eligibility; and
- effective triage and referral systems to provide the most effective path to justice in individual cases.

CBA's Equal Justice Report

The CBA's 2013 report, *Equal Justice: Balancing the Scales*,⁴ noted the disparate impact of unresolved legal problems and barriers to seeking legal assistance: "Socially excluded groups are more vulnerable and this vulnerability compounds the effects of unresolved legal problems. It also makes it more challenging to navigate the justice system."⁵ Cuts to civil legal aid have resulted in legal protections becoming increasingly limited for low and middle income people, particularly women and children, Indigenous peoples, racialized groups, people with

³ *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at para 1.

⁴ [\(Ottawa: Canadian Bar Association, 2013\) \[Equal Justice\]](#).

⁵ *Ibid* at 36.

disabilities, and refugees.⁶ They impede women’s ability to leave and remain out of abusive relationships.⁷

Federal Funding of Legal Aid

Many problems in accessing legal assistance services over the years can be connected to the 1995 transition away from a funding formula that matched federal dollars to those actually spent by the province,⁸ to a “no strings” funding mechanism, under the CST. Under the CST, there is no dedicated funding for civil legal aid. Instead, provinces have autonomy to dispense the funds received as they see fit. The CBA welcomed the federal government announcement in June 2016 that it will add an additional \$88 million dollars over five years⁹ to “support the provision of criminal legal aid in Canada”¹⁰ through Justice Canada’s Legal Aid Program. However, it is still the case that no federal transfer funding is specifically dedicated to maintaining or improving civil legal aid.

The CBA President raises legal aid problems at meetings with the federal Justice Minister and other federal ministers, as do CBA Branch Presidents with the Attorneys General in their jurisdictions. The consistent federal response is that federal support for delivery of civil legal aid is in the CST, and it is up to the provinces and territories to determine what, if anything, to spend on it. The consistent provincial response is that the federal government gives no money for civil legal aid.

Legal aid providers feel pressure to put the scarce funding they receive to programs recognized as constitutionally guaranteed (criminal and child protection matters).¹¹ Since 1995, the CBA has called for either a “carve out” from the CST specifically for civil legal aid, or separate legislation to safeguard access to justice. In 2000 we urged:

⁶ See, e.g., Dr. Melina Buckley, *Moving Forward on Legal Aid* (Ottawa: CBA, 2010).

⁷ See, e.g., Marina Morrow, Olena Hankivsky, Colleen Varcoe, “Women and Violence: The Effects of Dismantling the Welfare State” (August 2004) 2:3 *Critical Social Policy* 358.

⁸ *Canada Assistance Plan*, or CAP, RSC 1970, c. C-1.

⁹ Government of Canada, Press Release, “Government ensuring access to justice through increased legal aid support,” (June 8, 2016), online: <http://news.gc.ca/web/article-en.do?nid=1081939>

¹⁰ Government of Canada, Budget 2016, “Chapter 5 - An Inclusive and Fair Canada,” online: <http://www.budget.gc.ca/2016/docs/plan/ch5-en.html>.

¹¹ Apart from child protection hearings, courts have not fully adjudicated whether and the extent to which cuts to and inadequate funding of legal aid in family law matters (which disproportionately affect women) and other civil matters touching on fundamental rights are *Charter* violations. The CBA was denied standing to raise these matters in the case of *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92, 290 DLR (4th) 617.

... the enactment of federal legislation to establish access to legal representation as an essential service to be available uniformly across the country, to allocate and protect adequate funding for same, and to separate federal funding for civil legal aid from the Canada Health and Social Transfer (CHST) [*as it was then called*].

In 2003, we called for a separate federal *Access to Justice Transfer* to emphasize that access to justice should be seen as an essential public service and given similar recognition as health care under the *Canada Health Act*.

C. Legal Aid Investments

Legal problems are a fact of life for many Canadians. One study suggests that 48.4% of adult Canadians will experience one or more legal problems they consider to be serious and difficult to resolve within a three-year period.¹² In *Equal Justice: Balancing the Scales*, we state:

[L]egal problems tend to ‘cluster’, multiply, and have an additive effect and this pattern of cascading problems disproportionately impacts people living in marginalized conditions. For every additional problem experienced the probability of experiencing more problems increases.¹³

When an individual lacks the resources or access to legal aid to resolve an initial legal problem, it can lead to escalating social exclusion for that individual, not to mention long term costs to society. The nature of this vulnerability to legal problems means that the required assistance must be preventative, client-focussed, and geared to early resolution.¹⁴ This has implications not only for funding but for the need for national leadership to guide Canada towards a fundamental paradigm shift in legal assistance service delivery.

A 2016 report indicates that the cost to the state for Canadians’ everyday legal problems due to increased use of health care or social programs was \$800 million per year. These were characterized not as one-off costs, because “everyday legal problems are a ‘nearly normal feature of everyday life’” that “occur year after year.”¹⁵ Perhaps unsurprisingly, legal advice

¹² Ab Currie, [Nudging the Paradigm Shift: Everyday Legal Problems in Canada \(Toronto: Canadian Forum on Civil Justice, 2016\)](#) at 3.

¹³ *Equal Justice*, *supra* note 4 at 34. See also the Action Committee on Access to Justice in Civil and Family Matters, [Access To Civil & Family Justice: A Roadmap for Change \(Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013\)](#) at 2-3, and Pascoe Pleasence, Christine Coumarelos, Suzie Forell and Hugh M. McDonald, [Reshaping Legal Assistance Services: Building on the Evidence Base](#) (Sydney: Law and Justice Foundation of New South Wales, 2014) [*Reshaping Legal Assistance Services*].

¹⁴ *Equal Justice*, *supra* note 4 at 60-62 and 70; *Reshaping Legal Assistance Services*, *ibid* at 101 et seq.

¹⁵ Currie, *supra* note 12 at 41.

was found to be the most helpful in resolving legal problems (for between 79% and 83% of respondents), which the report suggests might be related to a lack of legal capabilities in the population.¹⁶

While no Canadian studies exist regarding “return on investment” for dollars spent on legal aid, findings from the UK, the US and Australia suggest that for every \$1 spent on legal aid, the average social return on investment is \$6.¹⁷

This is a significant finding: for every dollar spent on legal aid, about \$6 of public funds are saved elsewhere.

The federal and provincial governments could save substantial amounts in health, social benefits and other areas of social spending, and re-direct those savings into other areas, or use them to reduce deficits.

Nevertheless, spending on the Canadian justice system is about 1% of government budgets and, compared to overall spending, is relatively flat or declining year-to-year.¹⁸ The federal government should take a leadership role to coordinate better funding for legal aid and improve the justice system as a whole, to ensure our democracy remains strong.

III. NATIONAL BENCHMARKS FOR PUBLIC LEGAL ASSISTANCE SERVICES

The CBA's 2013 *Equal Justice* report is a comprehensive, multi-dimensional report offering six main strategies for achieving equal justice in Canada by 2030. It includes 31 longer term targets, each with actions to begin immediately and interim milestones. Several address the need for a renewed approach to public legal assistance services in Canada, with one specifically calling for national benchmarks for legal aid coverage, eligibility and quality of legal services by 2020.

¹⁶ *Ibid* at 23.

¹⁷ *Equal Justice*, *supra* note 4 at 56. A 2015 study commissioned by the Tennessee Bar Association confirms the return on investment in the range suggested by these earlier studies: Kenneth A Smith, Ph.D. and Kelly Thayer, [*Economic Impact of Civil Legal Aid Organizations in Tennessee: Civil Justice for Low Income People Produces Ripple Effects That Benefit Every Segment of the Community*](#) (March 2015).

¹⁸ *Equal Justice*, *supra* note 4 at 50.

Portions of *Equal Justice* concerning legal aid are appended to this submission.¹⁹ Key findings from the report include:

- There are stark regional disparities in who can access legal aid based on financial eligibility, the types of legal matters covered, and the amount and type of legal assistance and representation provided. The following examples illustrate this point:
 - In some provinces, there is no coverage whatsoever for a party leaving a marriage to get access to their share of matrimonial property, leaving one spouse (often the wife) with fewer assets and without matrimonial equity that would assist them to be financially independent.
 - In some provinces, there is no legal assistance to obtain disability or other benefits if they are denied, leaving a disabled person to fend for themselves in obtaining the necessities of life; in other provinces, a legal clinic provides specialized assistance to those with this need.
 - In some provinces, legal assistance is provided on an emergency basis, such as for an initial order on parenting or support, but no assistance is available once the emergency has passed to make long term arrangements for families. This often leaves a caregiver of limited means with no ability to get good legal resolutions for the stability of their family, leaving them in limbo.
- Most assistance and representation is available only on the basis of means testing. Often, an individual or family must be receiving social assistance or earning just above social assistance levels to qualify for legal aid.
- The current inadequacy of civil legal aid is largely attributable to underfunding. Although there has been some increased funding for legal aid, a longer range perspective shows a 20% overall decrease from the pre-1994 per capita spending on civil legal aid.
- Over two decades, the number of approved civil legal aid applications nationally was reduced to a third: in 1992-93, there were almost 18 approved applications for every 1000 Canadian residents; by 2011-2012 this number hovered just over six for every 1000 people.
- One major reason for the decline is spill over from the federal government gradually reducing contributions to criminal legal aid from a high of 50-50 sharing prior to 1995, to about 20-30% of the cost.
- Spending on criminal legal aid, some aspects of which the courts have deemed to be constitutionally required, accounts for an increasing proportion of overall spending.
- Spending on legal aid has not kept pace relative to health care and education.

¹⁹

See also the NAC Report, *supra* note 133 at 3-4, which came to similar findings.

- The reduction in federal spending overall, increased complexity in the law and growing demands for criminal legal aid have placed pressure on legal aid providers to ration services – in ways often inconsistent with the general purpose and public policy values underlying the program.

Since the release of *Equal Justice: Balancing the Scales*, the CBA Committee has worked with several partners to advance the 31 targets. In 2014, a joint working group of the Association of Legal Aid Plans of Canada (ALAP) and the CBA Committee collaborated to propose national benchmarks for public legal assistance services in Canada. The development of benchmarks was widely supported by justice system participants.

After extensive discussion, consultations and research commissioned by the CBA from Dr. Melina Buckley, the working group developed the national benchmarks. They are guiding principles to achieve the shared goal of a national, integrated system of public legal assistance services, focused on improving access to justice and meeting the needs of disadvantaged people across Canada. The federal government's endorsement of the targets could form the basis of a new understanding of and commitment to supporting public legal assistance systems.

We view a federal endorsement of the benchmarks as a necessary step towards improving legal aid access. It would counterbalance the sole focus on reducing expenditure that too often has served as the key driver of legal aid reforms in the past.²⁰ The central feature of the benchmarks is agreement on a definition of essential public legal services, based on a shared understanding of the legal issues or problems that involve fundamental interests.²¹

The National Benchmarks for Public Legal Assistance Services are as follows:

- **A National Public Legal Assistance System** - Canadian public legal assistance systems are sustainably-funded and provide comprehensive, people-centered legal services tailored to local, regional and provincial and territorial circumstances to meet essential legal needs and contribute to the health and well-being of disadvantaged and low-income Canadians.
- **Scope of Services** - Public legal assistance services are provided to individuals, families and communities with essential legal needs who are otherwise unable to afford assistance. Essential legal needs are legal problems or situations that put into jeopardy a person or a person's family's liberty, personal safety and security, health, equality, employment, housing or ability to meet the basic necessities of life.

²⁰ *Equal Justice*, *supra* note 4 at 107.

²¹ *Ibid.*

- **Service Priorities** - Public legal assistance services are provided on a priority basis to individuals, families and communities who are financially disadvantaged or otherwise vulnerable to experiencing unmet essential legal needs.
- **Spectrum of Services** - Public legal assistance service providers use discrete and systemic legal strategies and work in collaboration with non-legal service providers to offer a broad range of services, from outreach to after care, targeted and tailored to people's legal needs, circumstances and capabilities.
- **Quality of Services** - Public legal assistance services in all provinces and territories are fully accessible, timely, high quality, culturally appropriate and cost-effective. Such services will lead to evaluated meaningful participation and fair and equitable outcomes, and contribute to the empowerment and resilience of individuals, families and communities.
- **A Supported, Collaborative, Integrated Service Sector** - Public legal assistance service providers participate in collaborative service planning across this sector and are mandated and supported to innovate and to fulfill their integral role of ensuring access to justice and an effective justice system, working in partnership with all stakeholders.

The national benchmarks capture the predominant evidence-based ideas about public legal assistance services and define pathways for the future.²² They are aspirational but grounded in current international research and best practices, which emphasize a people-centred approach that is “joined up” with other services likely to be needed.²³ They present a transformative vision beyond what currently exists and describe the potential of enhanced public legal assistance. They assist different audiences to understand the important public good involved, that working hand-in-hand with other human services contributes to the social and economic welfare and health of our communities.

The benchmarks:

- establish a common aspirational and measurable goal;
- contribute to informed provision of legal assistance services and policy;
and
- promote shared learning and collaboration.

²² This and the following passages are from Dr. Melina Buckley, [A National Framework for Meeting Legal Needs: Proposed National Benchmarks for Public Legal Assistance Services \(Ottawa: Canadian Bar Association, 2016\)](#) at 8.

²³ *Equal Justice* *supra* note 4 at 62-63; *Reshaping Legal Assistance Services*, *supra* note 13 at Chapter 4, “Joined-up services: mirroring and efficiency”.

The benchmarks are *not* performance indicators. They go far beyond what most Canadian legal assistance providers currently do and far beyond what we can measure. However, each benchmark would have indicators and milestones that could be used to measure progress. For instance, milestones and indicators of progress under the “National Public Legal Assistance System” benchmark would include:

- Development of national public legal assistance data standards to facilitate collection of consistent and comparable data;
- National public legal assistance common data measurement standards;
- A “smart” system that better supports service planning and ongoing “modest but meaningful” monitoring and evaluation, and supports evidence-based policy, decision-making and service delivery;
- Effective triage and navigation support within each province and territory;
- Growing knowledge base and system-wide learning concerning “what works, for whom, under what conditions and at what cost”; and
- Indicators that measure the relationship between legal needs, service provision and outcomes.²⁴

The benchmarks provide a foundation for developing staged measures. They begin with measurements of what legal assistance providers have capacity to measure today and anticipate gradually increased capacity toward national indicators with common data measurement. The benchmarks themselves do not prescribe specific changes in how services are delivered or funded,²⁵ but rather is a point of reference for measuring change and progress. They set the stage for conversations amongst levels of government and justice system stakeholders by providing a common vocabulary and aspirations, as well as establishing of milestones and indicators which ultimately will inform concrete change.

²⁴ See *A National Framework For Meeting Legal Needs: Proposed National Benchmarks for Public Legal Assistance Services* *supra* note 222 at 9-12 for milestones and indicators of progress for all of the benchmarks.

²⁵ In some respects, however, specific changes are strongly implied. For instance, *Equal Justice* points to the clear consensus that legal aid should be available to a wider range of people than at present and recommends the development of a proposal for gradual expansion of eligibility for legal aid (*supra* note 4 at 109-10). We suggest that one indicator on progress for Benchmarks 2 and 3 is that, “Triage or screening for consequences has replaced categories of service and financial eligibility in all jurisdictions” (*ibid* at 10).

IV. CONCLUSION

Canada needs federal leadership in creating a properly funded, national legal assistance systems strategy, with services administered by each province and territory, and minimum national standards and comparable services available throughout Canada. Addressing the complex nature of the legal problems faced by low-income Canadians will require a readjustment of funding and a new, client-centred, and holistic approach. By adopting the National Benchmarks for Public Legal Assistance Services, the federal government would exhibit leadership by taking the first steps towards a common standard and means of evaluation of what public legal assistance services should be provided, to whom, and how.

Better ways of delivering services to more people will be an ongoing challenge, but the foundation for access to justice through support for adequate access to legal assistance services must be an unwavering government commitment to national standards. The CBA's Access to Justice Committee believes that it is time for governments to renew their commitment to bolstering that critical foundation.

RECOMMENDATIONS:

- 1. The CBA recommends that the federal government endorse CBA and ALAP's National Benchmarks for Public Legal Assistance Services; and**
- 2. The CBA recommends that the federal government provide a dedicated transfer (separate from the CST) for funding civil legal aid at levels that will allow for benchmark compliance.**

Indeed, the CBA Access to Justice Committee urges the federal government to assume a leadership role in the justice system that goes beyond legal aid. Its leadership role should encompass access to justice as a whole.²⁶ There are dozens of efforts to improve access to justice across Canada through organizations such as the CBA, the Action Committee on Access to Justice in Civil and Family Matters, provincial ministries, law society committees (such as

²⁶ One model for consideration is the US [White House Legal Aid Interagency Roundtable](#) encouraging 20 federal agencies "to collaborate, share best practices, and consider the impact of legal services on the success of their programs" with a goal of enhancing access to justice. Another is the Council of Australian Governments (COAG), [National Partnership Agreement on Legal Assistance Services \(July 2015\)](#), which incorporates benchmarks, requires collaborative, evidence-based service planning between levels of government and reflects a holistic approach to address both conventional legal needs and everyday legal problems faced by poor people. This model could assist in identifying emerging legal needs based on analysis of the systemic causes of the legal problems of people living on a low income.

Ontario's The Action Group), and law schools. The courts themselves are also working hard to remove barriers to access to justice.

We urge the Department of Justice to join these efforts and take a national leadership role in access to justice, to achieve equal justice for Canadians, and bring Canada's justice system into the 21st century.

reaching equal justice report:
an invitation to envision and act

equaljustice

balancing the scales



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table of contents

AN INVITATION TO ENVISION AND ACT.....	7
INTRODUCTION.....	11
Recognizing the Power of Words.....	12
PART I – WHY CHANGE IS NECESSARY	16
People’s Perceptions and Experiences of the Justice System Today	16
Consultations with People Living in Marginalized Conditions	17
On the Street Perceptions.....	24
What Unrepresented Litigants Tell Us.....	26
What We Know and Don’t Know about Access to Justice	34
Prevalence of Civil Legal Problems and Patterns of Resolution.....	34
Differential Impact of Access Denied.....	36
Private Market Legal Services	38
Public Legal Services	39
Exponential Growth of Pro Bono	42
Unrepresented Litigants.....	44
Courts and the Civil Justice System	46
Internationally – How are we Doing?	48
Complexity in Law and Legal Process	49
Low Relative Spending on the Justice System.....	50
So Much to Learn	51
The Case for Fundamental Change	51
Everyone Experiences Legal Problems	52
Direct Relationship between the Courts and Democracy.....	52
Growth in Poverty and Social Exclusion	52
Poor Public Policy.....	53
Costs of Inaccessible Justice	54
Return on Investment for Legal Aid Spending.....	55
Why Tinkering is Insufficient.....	58
PART II – EQUAL JUSTICE STRATEGIES	60
Envisioning Equal Justice.....	60
Finding the ‘Soul’ of Reform	60
Equal and Inclusive Justice.....	61
Designing a People-Centered Justice System	62
A Participatory Justice System	63
A Standard for Meaningful Access to Justice	63
A Dual Focus on Prevention and Resolution.....	64
One System, Many Paths	64
Learning Institutions, Organizations and Systems.....	65
Building a Bridge to Equal Justice.....	65
Facilitating Everyday Justice.....	66
Law as a Life Skill.....	66
Legal Health Checks.....	69
Effective Triage and Referral to Navigate the Paths to Justice.....	72
Inclusive Technology Solutions.....	76

Transforming Formal Justice	84
Global Trends and Strategies	84
Transcending the SRL Phenomenon.....	85
Court-based Triage and Referral	86
Court Specialization	87
Courts as Learning Organizations	88
Expanding Judicial Functions.....	89
Supporting Court Innovation: Technology and Rules	91
Re-centring Courts	93
Re-inventing the Delivery of Legal Services.....	94
Limited Scope Retainers.....	96
Team Delivery of Legal Services	97
Reorienting The Practice of Law	99
Regenerating Public Legal Services	106
Bridging the Public-Private Divide	115
Law Schools, Legal Education and Law Students	120
PART III – MAKING THE EQUAL JUSTICE VISION REAL.....	126
Access to Justice is a ‘Wicked Problem’	126
Is a ‘Superhero’ Required?.....	127
Building Public Engagement and Participation	128
Changing the Conversation	128
Increasing Public Participation	130
Building a Coherent Civil Justice System: Collaboration and Effective Leadership.....	132
Collaborative Skills, Processes and Structures	134
Lessons from the US Access to Justice Commission Experience.....	134
Access to Justice Commissioners.....	137
Building the Capacity for Justice Innovation	139
Keys to Justice Innovation.....	139
HilL’s Innovating Justice Model	142
Filling the Justice Innovation Gap.....	142
Access to Justice Metrics	144
Strategic Framework for Access to Justice Research.....	147
Reinvigorated National/Federal Government Role.....	149
CBA as an Access to Justice Leader	151
EPILOGUE: Imagining 2030	153
PART IV – THE EQUAL JUSTICE INITIATIVE	164
Project Description, Acknowledgements and Reflections	164
Resources	171
Appendix A	171

Another important trend is that people want more active involvement in the management, strategy and decision making about their legal matters, and more certainty in terms of cost. People seek legal information to enable them to make more informed choices, but often get advice from friends and family, rather than legal professionals.

There is also a movement away from ‘all or nothing’ lawyering, with clients seeking legal advice and assistance for parts of their legal problems rather than following the traditional full representation model. Lawyers are responding through unbundled legal services, alternative billing arrangements, specialized law firms, and in other ways, but significant gaps in private market services remain and contribute to unequal justice. The two current CBA initiatives (Equal Justice and Legal Futures) are considering these means of providing legal services, along with related concepts like preventative lawyering, use of technology in dispute resolution and non-lawyer providers of legal services, as potential innovations for increasing access to justice.

Public Legal Services

Publicly funded legal services are provided by legal aid plans in each province and territory, but plans cannot meet current demands for legal help. There are huge regional disparities in who can access legal aid based on financial eligibility, the types of legal matters covered, and the amount and type of legal assistance and representation provided. One illustration of these disparities is that the national average annual per capita funding for legal aid (both criminal and civil matters) is \$16.21, but it ranges from only \$10.32 in one province to close to \$30 in another.³⁶

In some jurisdictions, there is no legal aid (beyond information) for many civil legal problems that affect areas of vital interest, such as housing. Some legal aid services such as public legal information are generally available to all, but most assistance and representation is available only on the basis of means testing. Often, an individual or family has to

be receiving social assistance or earning just above this threshold to qualify for legal aid. Currently in Alberta, even recipients of Assured Income for the Severally Handicapped are ineligible for legal aid. People working full time for minimum wage qualify for legal aid only in a few provinces. The Barreau du Québec implemented an advocacy campaign to raise eligibility rates so that those earning minimum wage qualify for services, and Québec has recently announced a significant increase in eligibility levels.³⁷

“[I was ineligible] simply because [I am] a hardworking, frugal and responsible citizen.”

B.C. resident

At the Summit, Nye Thomas, Director General, Policy and Strategic Research at Legal Aid Ontario (LAO) noted that LAO offers a broad range of legal aid programs and covers a range of essential legal issues, but has a lower eligibility threshold than all legal aid standards in Canada and the US. In a recent study, LAO analyzed its financial eligibility guidelines against Statistic Canada’s Low income Measure (LIM) – a common measure of poverty in Canada. They found a wide and growing gap between LAO financial eligibility and LIM in Ontario. Today, a single person earning more than \$208 per week would not qualify for legal aid representation in Ontario. The impact of this gap has been significant. Since 1996, all demographic groups have lost ground relative to LIM. Fewer than 7% of all Ontarians are currently eligible for full representation legal aid, even though more than 16% live below the LIM.³⁸ LAO estimates approximately 1 million fewer Ontarians are financially eligible for a legal aid certificate today than in 1996. This means more hardship, less access to justice, more court delays, more court ordered counsel and more unrepresented litigants. Absent corrective action, things will get worse. Other provinces have more generous eligibility guidelines

³⁶ Statistics Canada, Canadian Centre for Justice Statistics, *Legal Aid in Canada: Resource and Caseload Statistics 2011/2012* (Ottawa: Government of Canada, March 2013).

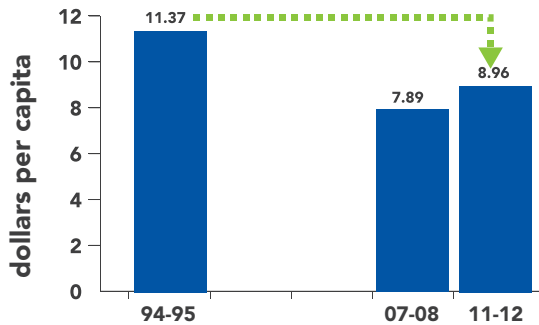
³⁷ See: www.justice.gouv.qc.ca/english/ministere/dossiers/aide/aide-a.htm

³⁸ Nye Thomas, Presentation at CBA Envisioning Equal Justice Summit (Vancouver: April 2013): www.cba.org/CBA/cle/PDF/JUST13_Slides_B1.pdf

but ration legal aid by providing it in a smaller range of legal matters.

The current inadequacy of civil legal aid is largely attributable to underfunding. Although there has been some increased funding for legal aid in the past five years, a longer range perspective shows a 20% overall decrease from the pre-1994 spending on civil legal aid.³⁹ This trend is illustrated in Chart 1: Civil legal aid spending per capita, 1994-2012. In 1994-1995, governments spent \$11.37 on a per capita basis, declining to a low of \$7.89 in 2007-2008 and rebounding slightly in 2011-2012 to \$8.96.

Chart 1: Civil legal aid spending per capita, 1994-2012⁴⁰



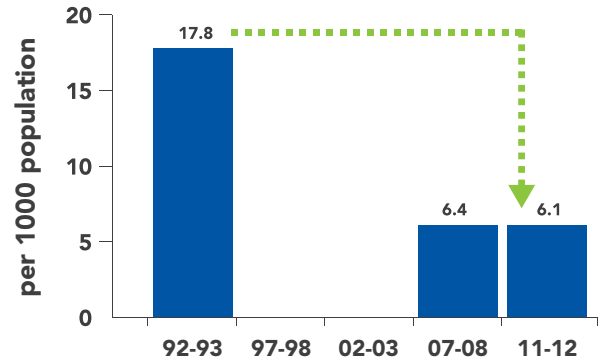
The reduction in legal aid funding and its particular impact on non-criminal matters is illustrated in Chart 2: Approved applications for civil legal aid, 1992-2012. Over two decades, the number of approved civil legal aid applications was reduced to a third: in 1992-1993, there were almost 18 approved applications for every 1000 Canadian residents; by 2011-2011 this number hovered just

³⁹ Ab Currie, "The State of Civil Legal Aid in Canada: By the Numbers in 2011-2012" (Toronto: CFCJ, 2013): www.cfcj-fcjc.org/commentary/the-state-of-civil-legal-aid-in-canada-by-the-numbers-in-2011-2012

⁴⁰ "Current levels of expenditures and services are considerably lower than the historical high levels in the early to mid 1990's. In 1994-1995 direct service expenditures on civil legal aid were \$329,787,000. This was \$11.37 per capita. In 2007-2008 per capita direct service expenditures had declined to \$7.89 per capita (\$259,946,000). Per capita direct service expenditures on civil legal aid increased to \$8.96 in 2011-2012 (\$309,022,000). This represents a 13.6% increase in per capita direct service expenditures over the recent five-year period. However, it reflects a 21.2% decline from the level of per capita direct service expenditure in 1994-1995." *Ibid.*

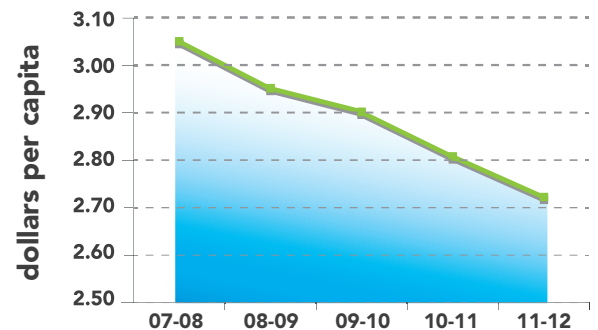
over six for every 1000 people. This represents a 65.7% decline.

Chart 2: Approved applications for civil legal aid, 1992-2012⁴¹



One major change is that the federal government has gradually reduced contributions to criminal legal aid from a high of 50-50 sharing until 1995, to now contributing about 20-30% of the cost. At the same time, the federal government discontinued dedicated funding for civil legal aid in 1995. Direct per capita spending by the federal government on criminal legal aid is illustrated in Chart 3, Federal contributions to legal aid plans.

Chart 3: Federal contribution to legal aid plans (criminal legal aid) (per capita, 2002 constant dollars)⁴²



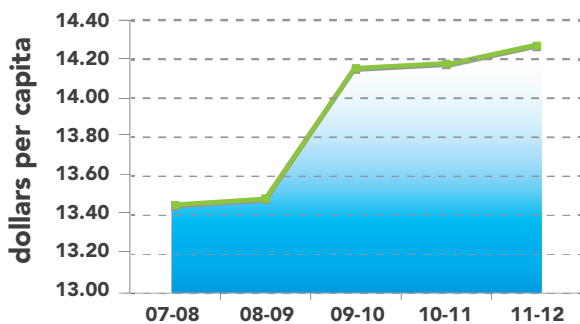
The next chart illustrates rising provincial and territorial spending on legal aid over the same period, for both criminal and civil matters. Any federal contribution to the provinces for civil legal aid is contained in a global transfer (first called the

⁴¹ *Ibid.*

⁴² Statistics Canada, www.statcan.gc.ca/pub/85f0015x/2012000/t003-eng.htm

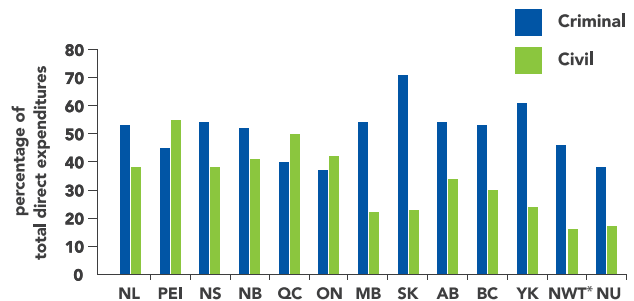
Canada Health and Social Transfer, now the Canada Social Transfer), to allow regions to determine their own priorities. For that reason, it is impossible to say what, if any, federal contribution actually goes to civil legal aid. Provincial and territorial Ministers of Justice have recently challenged the existence of a federal contribution for civil legal aid in the Canada Social Transfer, and called for additional dedicated funding.⁴³

Chart 4: Provincial/territorial contribution to legal aid plans (criminal/civil legal aid) (per capita, 2002 constant dollars)⁴⁴



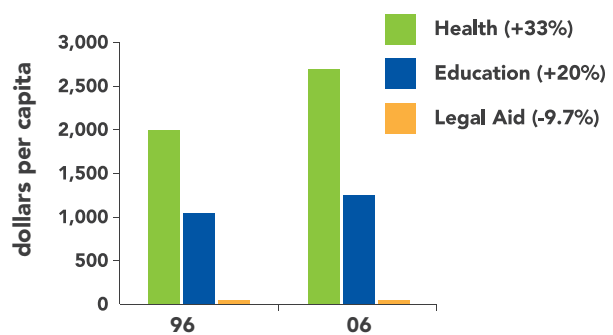
The second important change is that spending on criminal legal aid, some aspects of which have been deemed to be constitutionally required by Canadian courts, accounts for an increasing proportion of overall spending. Of twelve legal aid plans that provided information to StatsCan, nine spent more on criminal matters than on civil matters in 2011/2012. The proportion spent on criminal matters ranged from 52% for New Brunswick to 71% for Saskatchewan.⁴⁵ Of the remaining three jurisdictions, Prince Edward Island and Québec allocated 45 and 40% of direct expenditures to criminal matters, respectively, and Ontario 37%. Chart 5 compares the 2011/12 figures for direct expenditures on criminal legal aid compared to civil legal aid, as a percentage of total plan expenditures.

Chart 5: Regional legal aid spending (criminal/civil)⁴⁶ 2011-2012



Further, spending on legal aid has not kept pace relative to health care and education. In his 2008 study in Ontario, Professor Michael Trebilcock used public accounts data over a decade to demonstrate that while health and education spending had risen 33% and 20% respectively from 1996-2006, legal aid spending over the same period decreased by 9.7%. This trend is illustrated in Chart 6: Ontario Spending on Health, Education and Legal Aid, 1996-2006. There has been some improvement in Ontario's spending on legal aid since 2006, but comparative data is not available for other periods or in other jurisdictions.

Chart 6: Ontario per capita spending on health, education and legal aid 1996-2006⁴⁷



⁴³ See, for example: www.news.gc.ca/web/article-eng.do?mthd=advSrch&nid=182679&ctr.dpt1D=&ctr.tp1D=&ctr.yrndVI=

⁴⁴ Statistics Canada, www.statcan.gc.ca/pub/85f0015x/2011000/t003-eng.htm.

⁴⁵ Statistics Canada, www.statcan.gc.ca/pub/85f0015x/2012000/t006-eng.htm.

⁴⁶ Statistics Canada, www.statcan.gc.ca/pub/85f0015x/2012000/t006-eng.htm. *Note that while these figures are mainly for 2011/12, NWT figures are for 2009/10, the most recent data provided to StatsCan for that region.

⁴⁷ Michael Trebilcock, *Report of the Legal Aid Review, 2008* (report prepared for Ontario Attorney General, Chris Bentley) (Toronto: AG ON, 2008) at 74. www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf [relying on 1996 and 2006 as ON census years].

The reduction in federal spending overall, increased complexity in the substantive law and growing demands for criminal legal aid have placed pressure on legal aid providers to ration services – in a way often inconsistent with the general purpose and public policy values underlying the program.

Currie notes that the “vitality of the legal aid system is of vital importance.”⁴⁸ Because the legal aid system is not as healthy as it once was, “it probably will not play the important, and perhaps key, role it might in the evolution of access to justice in Canada, without resources to repair the erosion” that has occurred since the early 1990s.⁴⁹

Exponential Growth of Pro Bono

The Committee defines pro bono work as free legal services provided to people or organizations who cannot otherwise afford them and that have a direct connection to filling unmet legal needs. The legal profession has always provided services to people with modest means on a charitable basis and indeed our legal aid system grew out of these pro bono roots.

The numbers of people assisted through pro bono efforts has grown exponentially.

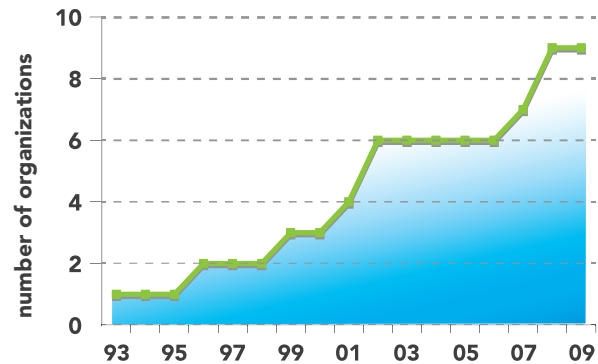
Increasingly institutionalized organizations have developed to act as a broker, taking applications from individuals and small organizations in need of legal assistance and linking them to lawyers willing to volunteer to help.

Pro Bono Students Canada was formed in 1996 and now operates out of 21 law schools across the country. In the last decade, formal pro bono organizations have been established in five provinces, providing an infrastructure and paid staff. (Ontario (Pro Bono Law Ontario); B.C. (Access Pro Bono); Alberta (Pro Bono Law Alberta)); Saskatchewan (Pro Bono Law Saskatchewan) and Québec (Pro Bono Québec)). This growth in pro bono organizations is illustrated in Chart 7.

⁴⁸ Currie, *supra* note 39.

⁴⁹ *Ibid.*

Chart 7: Growth in formal pro bono organizations in Canada 1990-2009



Pro bono organizations play an important role in promoting voluntary services: they develop programs that facilitate lawyer involvement, provide training and match lawyers willing to donate their time to clients with unmet legal needs. Once a client and lawyer are matched, the file might proceed as any other regular paying client file would, or the lawyer or organization might offer assistance with only certain aspects of the file or provide referrals, legal information or self-help materials.

Many pro bono organizations can be more flexible as to who qualifies for help than legal aid programs. The organizations supply administrative support, an intake and screening process to ensure clients meet established financial criteria and need the type of assistance offered by the organization, and a roster of volunteer lawyers to call on as needed, or who regularly attend at a designated location.

As with so many aspects of the access to justice landscape in Canada, there are few firm statistics on the number of lawyers who provide pro bono services, people helped or the value of this contribution. Several law societies collect statistics on pro bono contributions from their members, but reporting that information is optional for lawyers. Anecdotally, most pro bono organizations report that they cannot keep pace with growing demand. Many pro bono organizers describe how quickly their services become oversubscribed, finding it impossible to keep up. The exponential growth in the number of people and matters aided by pro bono lawyers is illustrated in Chart 8, based on information provided by the organizations that have begun to collect comparable data.

Low Relative Spending on the Justice System

Spending on the justice system (excluding policing and corrections but including prosecutions, courts, victim and other justice services, and legal aid) is roughly 1% of government budgets. This 1% includes prosecution, court services and justice services such as legal aid and law reform.

Ratio of spending on health to justice: 40:1

Government spending on justice compared to overall government spending shows a trend: health and education funding is generally stable or gradually increases, while spending on justice is flat or declines from year to year.⁷⁹ This is illustrated in the following charts, showing numbers from three sample provincial budgets (Nova Scotia, Ontario and British Columbia) for justice, education and health over the same period.

⁷⁹ Data taken from the *Annual Budget Estimates* from those sample provinces over the past decade.

Nova Scotia

www.novascotia.ca/finance/site-finance/media/finance/budget2010/EstimatesAndSupDetail2010-11.pdf

www.novascotia.ca/finance/site-finance/media/finance/2007_estimates.pdf

www.novascotia.ca/finance/site-finance/media/finance/2004-2005_Estimates_Book.pdf

Ontario

www.fin.gov.on.ca/en/budget/estimates/2010-11/volume1/

www.fin.gov.on.ca/en/budget/estimates/2007%2D08/volume1/

www.fin.gov.on.ca/en/budget/estimates/2004-05/volume1/index.html

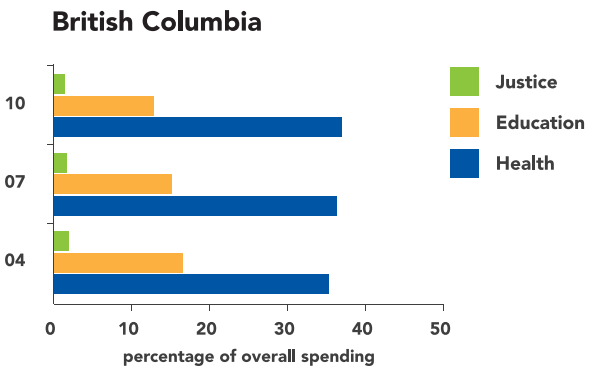
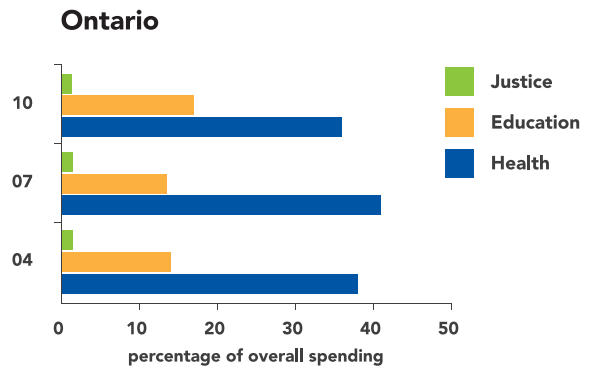
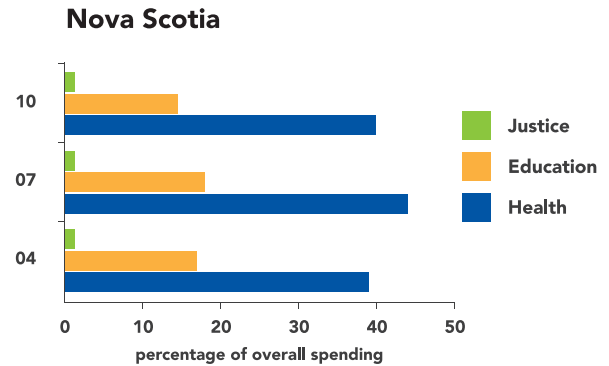
British Columbia

www.bcbudget.gov.bc.ca/2010/estimates/2010_Estimates.pdf

www.bcbudget.gov.bc.ca/2007/pdf/2007_Estimates.pdf

www.bcbudget.gov.bc.ca/2004/est/pdf/default.htm

Chart 10: Comparative government spending in 3 sample regions 2004-2010

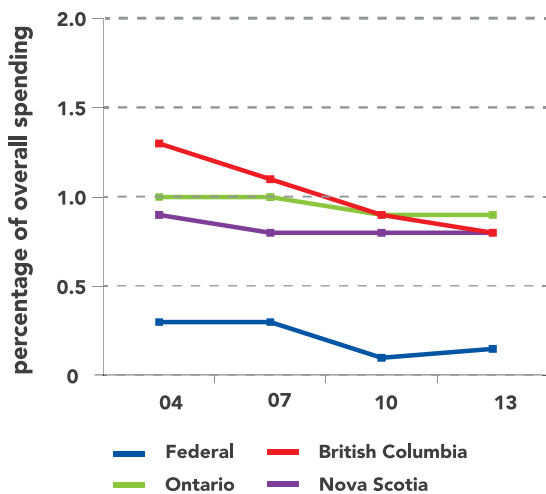


At about the same time, federal government spending on prisons and policing has increased significantly, while Canada's crime rate continued to decline. At the federal level, police services use more than half the justice budget (57.2%), followed by corrections (32.2%), courts (4.5%), prosecutions (3.5%) and legal aid (2.5%).⁸⁰ The next chart sets out the percentage of public spending on justice in the same provinces (Nova Scotia, Ontario, British

⁸⁰ Ting Zhang, *Costs of Crime in Canada, 2008* (Ottawa: Justice Canada, 2008) at 5.

Columbia) as well as the federal government. Again, keep in mind that for every dollar spent on the justice system, our governments spend about \$40 on health.

Chart 11: Justice spending in Canada⁸¹



So Much to Learn

This brief overview of what we know and don't know about access to justice shows there are still many gaps in our knowledge and these gaps impact our capacity for reform.

Over the past two decades the justice system has become more adept at collecting baseline data, but the empirical basis for decision making is still extremely limited compared to what is known about health and education. The justice system has a long way to go in terms of what information is collected, how it is collected and how open it is. Overall we have become better at counting inputs and outputs, although not all of this data is open or transparent and there is no coordination across agencies to collect information in a manner that permits comparison. The Canadian Association of Provincial Court Judges and the Association of Legal Aid Plans are both in the early stages of developing a protocol for standardized data collection. These commitments mark a welcome step in the right direction.

In 1996, the CBA identified the lack of court management information data as an obstacle. This information is essential for planning and evaluating

⁸¹ *Ibid.*

access to justice initiatives and understanding the role of legal and justice services vis-à-vis other support services.⁸² But that is just the tip of the iceberg. We know little about the relative effectiveness and efficiency of various service delivery models, legal information, assistance and representation, or dispute resolution mechanisms across different types of legal matters, and how to match processes and legal services to the nature and intensity of the legal dispute.⁸³ At this time, we do know that we fall far behind the health and education systems in our commitment to and capacity for evidence-based decision making. It contributes to our justice innovation deficit.

This lack of knowledge cannot be an excuse for inaction. Nor can we focus only on what is currently measured or easy to measure and ignore what cannot be measured or what we have chosen not to measure. It is detrimental and wrong-headed to suggest a lack of evidence justifies inaction, where it is obvious that action should be taken. Action is needed on many fronts, including developing and maintaining a stronger knowledge base.

The Case for Fundamental Change

What has gone wrong? The simple answer is that justice has been devalued. We see justice as a luxury that we can no longer afford, not as an integral part of our democracy charged with realizing opportunity and ensuring rights. The justice system has been starved of resources and all but paralyzed by lack of coordinated leadership and a tendency to focus on how justice institutions other than our own are contributing to the problem. As one person put it: "access to justice is even more undervalued in an already undervalued area." Meaningful access to justice is a scarce resource and the mechanisms used to ration this scarce resource are largely hidden. The implications of this rationing are often also invisible.

In this section, the Committee considers arguments in support of a fundamental reexamination of the value we put on our justice system, and ways

⁸² CBA Systems of Civil Justice Task Force, *supra* note 76.

⁸³ The CBA Legal Futures Initiative is canvassing the legal profession, the public, and other stakeholders for their opinions about these concepts.

to create conditions that promote justice system change.

JUSTICE = GROWTH.
JUSTICE IS A VALUE IN ITSELF.
IT IS A VERY GOOD INVESTMENT.

Hague Institute for the Internationalisation of Law (HiIL), Innovating Justice (2013)

Everyone Experiences Legal Problems

We live in a society regulated by law. Everyone's lives are shaped by the law and everyone is likely to experience a legal problem at some point. This is not to say that everyone will engage with the formal justice system: many problems can and should be resolved in more informal ways. Still, we should know for certain that we – and those we care about – will have meaningful access to justice if and when we need it. **Everyone is entitled to justice. This point needs to be a common thread of public discourse and individual understanding.** Needing recourse to the justice system does not suggest a personal failure, any more than a health problem requiring access to the medical system does. It is a simple fact of 21st century life in a developed political economy: law “knits together the fabric of our society”.⁸⁴

Direct Relationship between the Courts and Democracy

The courts are one branch of government (in addition to the executive and the legislature) and an essential component of Canadian democracy. Courts are essential to a society committed to the rule of law, ensuring the peaceful resolution of disputes in a system where no individual or institution is above the law. The rule of law is two-dimensional: it shapes and protects the relationship between the individual and the court and between courts and other branches of government. In this way, access to justice is a democratic imperative. Basing arguments for justice innovation on democratic principles and the rule of law may seem abstract, as the straight line between those

⁸⁴ Eberts, *supra* note 52.

concepts to the services that may help an individual to resolve a legal problem is not immediately obvious. Yet this line is very real.

Can therefore a country be said to be governed by the rule of law if some of its populace is excluded from accessing the law or is faced with significant challenges in doing so, cannot benefit from using the legal process or is disadvantaged in proceedings brought against them by the state?

Dr. Patricia Hughes

Growth in Poverty and Social Exclusion

The reality today is that not everyone has meaningful access to justice regardless of income. When social exclusion becomes more entrenched because a person cannot get the legal help needed to redress a wrong or enforce a right, the justice system aggregates, rather than mitigates, inequality. We know that poverty is deepening across Canada and it is changing the structure of society.⁸⁵

The growth in income disparity and social exclusion is a leading public policy concern and has specific ramifications for justice policy. In a section discussing the lack of access to legal services in Canada, the World Justice Project report notes that these issues “require attention from both policy makers and civil society to ensure that all people are able to benefit from the civil justice system.” A recent US study by the RAND Institute of Civil Justice similarly concluded, “[t]he policy ramifications of diminished legal aid, in terms of what the civil justice system actually accomplishes and whom it serves, present a troubling set of questions for society”.⁸⁶

Providing suitable legal advice and assistance can play a crucial role in helping people move out of some of the worst experiences of social exclusion.

⁸⁵ See: www.cwp-csp.ca/poverty/just-the-facts/.

⁸⁶ Michael Greenberg, Geoffrey McGovern, *An Early Assessment of the Civil Justice System after the Financial Crisis* (Santa Monica, CA: Rand Institute, 2012) at 62.

I just wanted to say when I first started working in community people were poor. We were just poor. Today there are different types of poverty, not just that people are poor. I have young people that I work with. Young couples with children, where 20 years ago they would have been working middle class, and they're not anymore. They're homeless. They make enough money between the two of them to keep their kids fed and to be able to buy clothing for them and send them to school. But they don't have money to pay rent. There's no way that they can pull that kind of money. One of them gets minimum wage and the other one is making a bit more but there's still not enough to cover. So there's a whole new kind of poverty that's becoming even more prevalent in the community.

**Maria Campbell,
Metis Elder, Envisioning Equal
Justice Summit,
April 2013**

Timely intervention in a life crisis triggered by a problem with a legal component, like debt or homelessness, can make all the difference, preventing the situation from becoming more extreme. For these reasons, the UK National Action Plan on Social Inclusion (2003) gave access to justice similar priority to health-care and education, recognizing access to justice as a basic right and a vital element in policies that address social exclusion. Currie's Canadian research highlights the relationship between legal problems and health problems, demonstrating a strong policy rationale for connecting access to justice policy with other public policy concerns. His findings also illustrate the ways that lack of access to justice reinforces social exclusion faced by certain groups in Canada, particularly people with disabilities.

Canadians have a strong commitment to equality, exemplified in domestic and international human rights commitments, and Canadian governments have an important role in offsetting income

inequality. For example, the Canadian Institute for Health Information recently found that public health care alone reduces the income gap by 16%, as wealthier Canadians pay more in taxes than they reap in benefits. As stated by Hughes: "While responding to the needs of members of less advantaged communities matters if there is to be equal access to justice, a failure to achieve 'equal justice' also has implications for other aspects of people's lives and inevitably therefore for society at large."⁸⁷

Poor Public Policy

There are strong practical reasons for ensuring meaningful access to justice. Adequate representation leads to a smoother and more effective functioning of the system. When people receive appropriate assistance in reading and preparing documents and making arguments, it saves public money in the long run and results in better outcomes.

Justice degrades with delay: while the outcome may look the same when a resolution is finally reached or a decision rendered, the justice the person receives is not the same. The parties' position or personal safety may be compromised and the damage may be irreparable. People whose legal issues are not resolved face ongoing difficulties. Problems spread to other areas of their lives, at significant individual and social cost. For example, a mother and children unable to get timely, effective assistance or an expedited court hearing to determine their right to support may eventually get the requested order and judgment, but that won't cure the deprivations or repercussions suffered in the meantime. Further, since we know that people whose legal issues are unresolved face ongoing and escalating problems in different areas of their lives, at significant individual and social cost, society as a whole benefits from providing timely access to justice.

Empirical research shows a false dichotomy between focusing on "efficiency and effectiveness rather than equality and ideals." Equal justice

⁸⁷ Hughes, *supra* note 27 at 5.

makes sense for both “the wallet and the heart.”⁸⁸

Costs of Inaccessible Justice

Studies are now demonstrating how unresolved legal problems and inadequate access to justice can be costly for both the individual and to society at large. For example, Macfarlane’s national SRL study notes some costs of inaccessibility in terms of stress and health effects, loss of income and loss of employment. Children can be secondarily affected if parents are not afforded the fair outcomes that they need. This may be obvious in child support or parenting cases, but is equally true when families with dependent children are at risk because of other unmet legal needs, such as those impacting housing or income issues. The costs and benefits of equal justice are also documented in reports prepared by the Canadian Forum on Civil Justice⁸⁹ and others.⁹⁰ However, we have as yet been unable to quantify the impact of these costs in Canada.

Other jurisdictions are further ahead. For example, one British study calculated that each legal problem reported to cause physical illness ultimately costs Britain’s National Health Service between £113-£528, depending on which service provider was used, or more if multiple providers were involved. Stress-related effects cost between £195-£2224 per patient, again depending of which service provider was used.⁹¹ Similarly, an Australian study found that providing legal aid at the committal stage of a criminal procedure would save the equivalent of three or four district court judges per year.⁹²

The Canadian Forum on Civil Justice is collaborating with a range of individuals and

institutions on a five-year study to define the economic and social costs of justice. The study will develop methods to measure what our civil justice system costs, who it serves, whether it is meeting the needs of its users and the price of failing to do so. The project has two prongs: the costs of providing an accessible system and the costs of not providing an accessible system. The costs of justice system inaccessibility will be measured at four levels:

- individual (health, well-being, power, security, economics, education)
- private sector (business, lawyers, paralegals)
- government (justice system, health care system, other social services (housing, social welfare, policing, for example)), and
- civil society (rule of law, democracy, sustainability).

The results of these research projects are eagerly awaited. They will offer an in-depth understanding of the value of an accessible justice system and a convincing case for institutions and citizens to invest in access to justice.

⁸⁸ Pascoe Pleasence and Richard Moorhead, *Access to Justice after Universalism* (2003) 30:1 *Journal of Law and Society* at 1.

⁸⁹ Mary Stratton and Travis Anderson, *Social, Economic and Health Problems Associated with a Lack of Access to the Courts* (Toronto: CFCJ, 2008).

⁹⁰ Pascoe Pleasence, Nigel J. Balmer, Alexy Buck, Marisol Smith, Ash Patal, “Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems” in Pascoe Pleasence, Alexy Buck, Nigel J. Balmer, eds, *Transforming Lives: Law and Social Process*, (Belfast: 2006) at 61-63 [Papers from the Legal Services Research Centre’s International Research Conference, *Transforming Lives*].

⁹¹ *Ibid* at 83-84.

⁹² Mulherin, *supra* note 73.

Learn More: about the landscape of civil justice problems experienced by Canadians

Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007): www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf

Access to justice and social exclusion:

Pascoe Pleasence, Alexy Buck and Nigel J. Balmer (eds.), *Transforming Lives: Law and Social Process*, note 90.

A. O'Grady, Pascoe Pleasence, Nigel J. Balmer, Alexy Buck and Hazel Genn, "Disability, Social Exclusion and the Consequential Experience of Justiciable Problems" (2004) 19:3 *Disability & Society* 259.

Patricia Hughes, *Inclusivity as a Measure of Access to Justice*, note 27.

Costs of Inaccessible Justice:

Pascoe Pleasence and Richard Moorhead, *Access to Justice after Universalism*, note 88.

Final Report of the Justice Sector Constellation of the Calgary Poverty Reduction Initiative, "Intervening at the Intersection of Poverty and the Justice System" (March 2013): www.enoughforall.ca/wp-content/uploads/2013/03/Justice-Sector-Constellation-Final-Report.pdf

Return on Investment for Legal Aid Spending

In recent years, we have repeatedly heard that legal aid is not sustainable. But legal aid is our most important access to justice program. In addition to being a significant down payment on the promise of equal justice, funding for civil legal aid represents a good social and economic investment.

Synthesizing several studies on the economic benefits of civil legal aid, Dr. Laura Abel notes

that it can actually save public money by reducing domestic violence, helping children leave foster care more quickly, reducing evictions and alleviating homelessness, protecting patient health and helping low-income people participate in federal safety-net programs.⁹³

A growing number of studies are contributing to a business case for adequately funding legal aid by actually quantifying the return on investment for legal aid dollars spent:

- A 2012 Australian study, *Cost Benefit Analysis of Community Legal Centres (CLCs)*, finds that, on average, CLCs have a cost benefit ratio of 1:18. For every dollar spent by government they return a benefit to society that is 18 times the cost. To express this in dollar terms, if the average held constant for CLCs in Australia, the \$47 million spent on the program nationally in 2009/10 would yield around \$846 million of benefit to Australia.⁹⁴
- A PricewaterhouseCoopers study, also in Australia, found that every dollar spent on family law legal aid provided a \$1.60 to \$2.25 benefit to the overall justice system. "Legal aid demonstrably benefits those receiving legal aid support, those people and businesses they have contact with, the community more broadly and the efficiency of the legal system as a whole. Therefore there is a strong economic case for appropriately and adequately funded legal aid services, based on the magnitude of the quantitative and qualitative benefits that this funding can return to individuals, society and the government."⁹⁵
- A 2009 Texas study found that "investment in legal aid services led to economic growth in the community by increasing jobs, reducing work

⁹³ Laura K Abel, *Economic Benefits of Civil Legal Aid* (National Centre for Access to Justice, Cardoza Law School, 4 September 2012) <http://ncforaj.files.wordpress.com/2012/09/final-economic-benefits-of-legal-aid-9-5-2012.pdf>.

⁹⁴ Judith Stubb and Associates, *Economic Cost Benefit Analysis of Community Legal Centres* (Sydney: National Association of Community Legal Centres, 2012) http://www.communitylawaustralia.org.au/wp-content/uploads/2012/08/Cost_Benefit_Analysis_Report.pdf.

⁹⁵ PricewaterhouseCoopers, *Economic Value of Legal Aid: Analysis in relation to Commonwealth Funded Matters with a Focus on Family Law* (National Legal Aid, 2009) at ix-x www.legallaidact.org.au/pdf/economic_value_of_legalaid.pdf

days missed due to legal problems, creating more stable housing, resolving debt issues and stimulating business activity.” In fact, “for every direct dollar expended in the state for indigent civil legal aid services, the overall annual gains to the economy are found to be \$7.42 in total spending, \$3.52 in output (gross product), and \$2.20 in personal income.⁹⁶ Reductions in legal aid spending, therefore, have a negative impact on spending and create an economic burden on the community.”

- A 2011 UK Citizens’ Advice Bureau Report, *Towards a business case for Legal Aid*, found that for every pound of legal aid expenditures on housing advice, debt advice, employment benefits and income benefits advice, the state potentially saves between €2.34 and €8.80.⁹⁷

One British study approached this issue from the opposite perspective: how cuts to legal aid increase costs in other areas of public spending. In a 2011 report for the Law Society of England and Wales, Dr. Graham Cookson of the School of Social Science and Public Policy of King’s College London was asked to consider any “knock on” costs (unintended costs) because of significant cuts to legal aid, and the overall impact of those cuts on government budgets. His advice was that the cuts would involve such significant “knock on” costs that the promise of any cost savings should be reevaluated. He also noted significant areas where additional longer-term costs were likely, but were difficult to precisely evaluate.

Similarly, a British study on the effectiveness of legal aid in the asylum (refugee) context found that restrictions on the quality of legal aid as a cost savings measure resulted in higher costs overall: “poor quality work costs much more in the longer term to the public purse and in human terms to individual asylum seeker applicants.”

These studies from Australia, the UK and the US conclude that the average demonstrated social return on investment is that for every \$1 of legal

⁹⁶ The Perryman Group, *The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential* (Waco: Perryman Group, February 2009) at 3.

⁹⁷ Citizens Advice Bureau, *Towards a Business Case for Legal Aid* (London: International Research Conference, July 2010).

aid spending about \$6 of public funds are saved elsewhere (a range from 1:2 to 1:18.)

**Average Social Return on Investment
from Legal Aid Spending
\$1 = \$6**

US civil legal aid providers increasingly report the economic impact of their programs in concrete terms. Program impacts are quantified in millions of dollars, on an annual basis. The impacts measured include: income benefits and cost savings received by low income families, cost savings to tax payers, economic impact of federal dollars flowing into local economies as an outcome of legal aid cases, increased tax revenue, and systemic changes resulting in savings for state residents. These reports also note additional economic impacts that while difficult to quantify are no less real, including for health care providers, court efficiencies, and for costs and losses to the state from homelessness and domestic violence.⁹⁸

Unfortunately no Canadian studies to date have quantified the economic impact of legal aid in this way. Several legal aid plans have reported in general terms the ways legal aid can save public funds.⁹⁹ In 2012, the Law Foundation of British Columbia commissioned Yvon Dandurand and Michael Maschek to conduct a feasibility study on the economic impact of legal aid. They identified a number of promising areas for future research, proposing four studies on the impact of legal aid.¹⁰⁰

⁹⁸ See sources in “Learn More”, *infra* at 55.

⁹⁹ For example, see Legal Aid Ontario, Business Plan, 2006-07: www.legalaid.on.ca/en/publications/PDF/Public_Business_Plan_April_2006.pdf; for other Canadian discussions of the cost benefit of funding legal aid, see Doust, *supra* note 11; Sharon Matthews, *Making the Case for the Economic Value of Legal Aid* (Vancouver: CBA-BC, 2012); Kamloops Chamber of Commerce: www.kamloopschamber.ca/files/documents/Go%20Long%20on%20Legal%20Aid%20Funding%20FINAL.pdf; Alberta Government, *New Ways for Families: Social Return on Investment Case study: Medicine Hat Family Services* www.newways4families.com/images/pdfs/Medicine%20Hat%20Family%20Services_Executive%20Summary.pdf

¹⁰⁰ Yvon Dandurand and Michael Maschek, *Assessing the Economic Impact of Legal Aid - Promising Areas for Future Research* (Vancouver: Law Foundation of British Columbia, 2012).

- Enhance paralegal services (so far Ontario, British Columbia and Alberta have taken steps to do so)
- Permit alternative business structures ABS (described more below)
- Become brokers of legal services (there is a pilot project in Manitoba where law society matches clients with family law lawyers, and lawyers accept a reduced fee. However, the law society guarantees payment.)
- Make pro bono mandatory
- Make ethical infrastructures mandatory
- Promote financial transparency through the publication of lawyer remuneration.

Devlin also noted that countries like the UK and Australia have liberalized their legal services regulation, and asked the question: What price have they paid?

Professor David Wiseman of the University of Ottawa Faculty of Law provided an overview of the issues in the move to permit alternative business structures (ABS). ABS are businesses that provide legal services not owned or managed under the control or direction of lawyers. The main advantages of ABS are that they supply more capital and business expertise (organizational management, product development, branding, market research etc.) compared to current law firm structures. ABS may assist in addressing unmet legal needs by investing time and resources to reach out to more people who lack legal services. ABS may also increase access through marketing to clients that need services and may be more user friendly, accessible and inviting.

Hesitancy over ABS arises from a concern that allowing corporate legal practice will create ethical dilemmas and conflicts. Wiseman called this concern “overblown” given the existing tension lawyers face now, between their duty to the court and the client, and their need to also make a living. Regulators can address these issues directly. For example, in Australia, the profession outlined a hierarchy of obligations for ABS – court, client, and then owners. A serious concern is the potential to exploit vulnerable persons through marketing.

From the Committee’s perspective the central question is whether ABS will increase meaningful access to justice by those currently underserved by lawyers in private practice. Who will benefit from ABS? What ‘pain’ is addressed through this development? Wiseman stated that the supposed gains in equal justice are speculative at this point. There is an active and growing debate on ABS in Canada, and it is now under consideration by several law societies and the CBA Legal Futures Initiative, which acknowledges in its early research that ABS may migrate to Canada as markets become more closely connected. The initiative is examining ABSs from the perspective of increased access to legal services. Last year, ABA rejected a resolution permitting ABS in the US. More research and evaluation is needed on the access gains by ABS before it can be considered a priority for reaching equal justice.

Regenerating Public Legal Services

Public-funded legal services, generally referred to as legal aid programs, are an indispensable component of a fair, efficient, healthy and equal justice system. At present, Canada’s legal aid system is inadequate and underfunded, and there are vast disparities between provinces and territories on who is eligible for legal aid, what types of matters are covered and the extent of the legal services provided. Legal aid alone will not cure all barriers to access and it is important not to conflate legal aid with access. At the same time, our justice system cannot operate fairly and efficiently without a healthy legal aid system.

I found, first of all, that there is a huge consensus that the current system isn’t working, that the disparities and gaps in legal aid are truly deeply troubling, challenging to our core shared values, democracy, our shared citizenship, our understanding of justice and fairness. There’s a huge consensus that what we have isn’t good, that the disparities are unsupportable.

Alex Himelfarb

At the Summit, Karen Hudson, Executive Director of Nova Scotia Legal Aid, proposed the REACH framework for regenerating legal aid: Research, Eligibility, Advocacy, Coverage and Holistic services. These vital elements are woven into the discussion in this section.

Three main components are needed to regenerate legal aid:

- national legal aid benchmarks with a commitment to their progressive implementation, monitored through an open, transparent process;
- reasonable eligibility policies that give priority to people of low and modest means but provide graduated access to all residents of Canada who are unable to retain private counsel (including through contributory schemes); and
- effective legal service delivery approaches and mechanisms designed to meet community needs and the meaningful access to justice standard.

National Benchmarks

At its inception over 40 years ago, the federal government envisioned “the establishment of a coast-to-coast federally funded legal aid system that would cover both civil and criminal cases”, modeled on the Canadian medicare system. This vision was never met¹⁶⁹ and Canada is further away from this goal in 2013 than when the program was created. National benchmarks for legal aid are completely non-existent and there is an unacceptable disparity in service provision between jurisdictions.

The Committee proposes the development of national benchmarks as the basis for a principled framework for this key social program, to counterbalance the sole focus on reducing

expenditure as the key driver of legal aid reforms. National benchmarks should be focused and concrete, but leave scope for local priority setting and innovation. Benchmarks should be aspirational rather than setting a minimum threshold and include targets for progressive implementation.

National benchmarks should be established on the basis of evidence about legal needs and legal assistance required to ensure meaningful access to justice. This is a rapidly growing body of knowledge that provides a platform for developing generic and more refined standards. Where evidence is lacking, steps must be taken to fill the knowledge gaps.

The central feature of national benchmarks would be agreement on a definition of essential public legal services, based on a shared understanding of the legal issues or problems that involve fundamental interests. Responses to the Committee’s discussion paper on National Legal Aid Standards suggest that it would not be difficult to achieve a broad consensus. Essential public legal services include situations where basic human needs are at stake. These include: criminal law; child protection; family law; domestic violence; landlord tenant matters where an individual faces eviction; employment law where an individual is not represented by a union; refugee and immigration; and social benefit cases. Within this overall category of essential public legal services, cross-cutting issues would have to be addressed by national benchmarks, including the complexity and consequences of the issues; priority characteristics of individuals; the type of legal assistance from the continuum of available services required by the various factors at play; and assistance in addressing non-legal factors with a significant impact on the legal matter.

Several US initiatives have been established to empirically demonstrate where a right to publicly funded counsel is in fact essential. The Boston Bar Association’s Civil Gideon Project and the California legislature’s Access to Justice Statute, known as the Shriver Pilot¹⁷⁰, are models that could be considered as we work together to frame national legal aid benchmarks in Canada.

¹⁶⁹ National Health and Welfare did indeed propose a combined criminal and civil program at that time, but the Department of Justice opposed it and the criminal cost sharing program emerged. Health and Welfare developed civil legal aid funding under the Canada Assistance Plan as a default. See Dieter Hoehne, *Legal Aid in Canada* (Lewiston, NY: Edwin Mellen Press, 1989); Ab Currie, “Down the Wrong Road” (2006) 13:1 *International Journal of the Legal Profession* 99.

¹⁷⁰ See: www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf; www.courts.ca.gov/documents/20110429itemp-revt.pdf

In addition to defining legal aid coverage based on essential public legal services, national benchmarks should also address eligibility and quality of legal aid services by employing services according to the continuum of legal services described above, in a manner consistent with the meaningful access to justice standard.¹⁷¹ Eligibility and delivery of legal services are discussed in the next two sections.

Rather than a minimum threshold, national benchmarks should be aspirational and include targets for progressive implementation. Benchmarks will supply a principled basis for legal aid funding decisions, be focused and concrete, while still leaving scope for local priority setting and innovation.

Target: By 2020, national benchmarks for legal aid coverage, eligibility and quality of legal services are in place with a commitment and plan for their progressive realization across Canada.

Milestones:

- *Federal, provincial and territorial governments establish a national working group with representation from all stakeholders including recipients of legal aid, to develop national benchmarks*

Actions:

- *The CBA works with all interested justice sector, service providers and community-based organizations to increase public awareness about the importance of legal aid and the costly personal and social consequences of inadequate legal aid*
- *The CBA works with all interested justice sector, service providers and community-based organizations to develop a broad alliance of individuals and groups to support and champion the regeneration of legal aid and the development of national benchmarks*
- *The CBA and the Association of Legal Aid Plans, in consultation with other justice*

¹⁷¹ The continuum is discussed *infra* at 93 and the standard *infra* at 61.

system stakeholders, prepare draft national benchmarks as a means of engaging stakeholders and fostering dialogue and action

- *The Association of Legal Aid Plans consults with the Federal-Provincial-Territorial Permanent Working Group on Legal Aid on an action plan to initiate work on national legal aid benchmarks*
- *The CBA and the Association of Legal Aid Plans, in consultation with other justice system stakeholders, carry out research to develop and refine the empirical basis for understanding 'essential legal needs' and 'meaningful and effective access to justice'*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Eligibility

The process described above for developing national legal aid benchmarks should also consider eligibility for publicly funded legal services. At present, some legal aid services such as public legal information are available to all, but most forms of legal assistance and representation from legal aid are available on the basis of a means test. Generally, an individual or family must receive social assistance or earn just above this threshold to qualify for legal aid. In many regions, people working full time for minimum wage do not qualify. In Alberta, even recipients of Assured Income for the Severely Handicapped are ineligible. The Barreau du Québec has implemented an advocacy campaign to raise eligibility to include those earning minimum wage. Québec has very recently announced a significant change to its eligibility standards so that more people will qualify for help¹⁷².

¹⁷² www.justice.gouv.qc.ca/english/ministere/dossiers/aide/aide-a.htm.

At the Summit, Nye Thomas from Legal Aid Ontario (LAO) noted that LAO offers a range of legal aid programs and covers a range of essential legal issues, but has a lower eligibility threshold than all legal aid standards in Canada and the US. In a recent study, LAO analyzed its financial eligibility guidelines against Statistic Canada’s Low income Measure (LIM) – a commonly used measure of poverty. The LIM is an income threshold below which a family is likely to spend a larger share of household income on the necessities of food, shelter and clothing than the average family.

As discussed in Part 1, LAO has itself noted a growing gap between its financial eligibility criteria and the LIM in Ontario. Since 1996, all demographic groups have lost ground. Without corrective action, things will get worse, meaning more hardship, less access to justice, more court delays, more court ordered counsel, and more unrepresented litigants.

Thomas emphasized that expanding financial eligibility does not have a linear or automatic correlation to legal aid costs: “There are a lot of ways to improve accessibility which doesn’t mean you need to double costs. The money discussion is more nuanced than it is often portrayed.”¹⁷³ This highlights the critical relationship between coverage, eligibility and the type and extent of legal services provided by legal aid, and the strategic policy choices required to ensure meaningful access to justice.

There is a clear consensus that legal aid should be available to a wider range of people than at present. The stumbling block is not that this is a bad idea, but that it is impractical and unaffordable. A more difficult question is, if eligibility should be extended, how far should it go: To everyone living below the LIM? To those earning a minimum wage? To people of modest means? To all Canadians?

At the Summit, the Committee invited Alex Himelfarb, former Clerk of the Privy Council, and Sharon Matthews, a lawyer at Camp Fiorante Matthews Mogergerman in Vancouver, to debate the question: should there be a national justice care program in Canada? This was an opportunity to explore whether legal aid should be a universal

or targeted social program, a question raised frequently during the Summit.

Both speakers based their positions on an understanding that a national justice care system, similar to the universal healthcare system, is a noble idea and reflects good public policy. Himelfarb argued in favour of adopting a vision of a national justice care system and building it in increments. Research has demonstrated that “if you target your social program to those in need, sooner or later that program gets starved”¹⁷⁴, because the political commitment wavers when many people aren’t benefiting from it. People need to see what their tax dollars are buying for them. The current dismal state of legal aid targeted only at the neediest of the needy reinforces his position. The more people have a stake in the quality of the system, the better it will be. Targeted social programs also tend to be ineffective in that they can unjustifiably exclude

In short, the legal aid system, despite the important normative rationales that underpin it, is not a system in which most middle class citizens of Ontario feel they have a material stake. As a percentage of the population, fewer and fewer citizens qualify for legal aid, and many working poor and lower middle-income citizens of Ontario confront a system which they cannot access and which they are expected to support through their tax dollars even though they themselves face major financial problems in accessing the justice system (as witnessed most dramatically in the family law area, but also in various areas of civil litigation).

This leads me to suggest that both LAO and the Government of Ontario, through the Ministry of the Attorney General, need to accord a high priority to rendering the legal aid system more salient to middle-class citizens of Ontario (where, after all, most of the taxable capacity of the province resides).

Trebilcock 2008 (note 47)

¹⁷³ Thomas, panel presentation at Summit, *supra* note 38.

¹⁷⁴ Alex Himelfarb, former Clerk of the Privy Council, Presentation at CBA *Envisioning Equal Justice* Summit (Vancouver: April 2013).

people who require services. Professor Michael Trebilcock of the University of Toronto Faculty of Law has made this same argument.¹⁷⁵

For purposes of this debate, Matthews, a long time advocate for legal aid, argued that while a national justice care system should be the ultimate goal, Canadians are not ready for it. The CBA-BC Branch, as part of its legal aid advocacy campaign, highlighted how little most people know about legal aid and so, do not really understand its importance. Given the low public traction of legal aid, Matthews argued that it is better to focus limited resources on improving legal aid for those most in need, rather than providing justice care for people who can afford to pay. In her words, “without a foundation of public support we can’t make real changes and we don’t have the foundation of popular support.” She suggested that it is best to meet the needs of the most vulnerable and build from that base in an incremental and affordable way.

Following the ‘ambitious but possible’ theme used to set its targets, the Committee proposes that eligibility for legal aid be increased gradually over time, so that by 2020 all Canadians living at and below poverty level are eligible for full legal aid coverage for essential legal services and by 2025 those services are available to low-income Canadians, defined as those with incomes less than two times poverty levels.

The Committee also proposes that we fully canvass, develop and encourage an informed public dialogue about options for a national justice care system.

Funding options include client contribution schemes (based on ability to pay) and public insurance schemes (whether mandatory or opt-out). Eligibility can be approached flexibly: it does not have to be uniform for different types of services.

Professors Sujit Choudry and Michael Trebilcock and James Wilson have developed a proposal for a non-profit legal expense insurance scheme for Ontario that would operate through the province’s legal aid plan. The proposal would address shortfalls in

¹⁷⁵ Trebilcock, *supra* note 47.

access to justice, while remaining grounded in the public interest, in contrast to for-profit private market legal expense insurance plans discussed in an earlier section. Under their proposal, everyone would be assumed to subscribe to the insurance scheme, with allowance for people to opt out.¹⁷⁶

Another option is offered by popular reforms enacted in Finland in 2002, which raised the proportion of households eligible for assistance with their legal costs to 75%, with cost sharing on a sliding scale. (The figure is below 30% in most English-speaking common-law countries.)¹⁷⁷ Coverage encompasses criminal and civil matters, ranging from simple estate inventories to complex litigation. The main criteria are the seriousness of the matter and how well the applicant can handle it alone, rather than the area of law.

Targets:

By 2030, options for a viable national justice care system have been fully developed and considered.

By 2025, all Canadians whose income is two times or less than the poverty line (Statistics Canada’s Low Income Measure) are eligible for full coverage of essential public legal services.

By 2020, all Canadians living at and below the poverty line (Statistics Canada’s Low Income Measure) are eligible for full coverage of essential public legal services.

Milestones:

- *The working group on national benchmarks (see Milestone for ‘Regenerating Publicly funded Legal Services’) develops a proposal for a gradual expansion of eligibility for legal aid*
- *A vigorous public policy dialogue about the value and feasibility of a national justice care system is underway*

¹⁷⁶ S Choudry, M Trebilcock and J Wilson, “Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance” in *Middle Income Access to Justice*, *supra* note 32.

¹⁷⁷ www.lawyersweekly.ca/index.php?section=article&articleid=787.

- *Federal, provincial and territorial governments commit to continue increasing funding for legal aid to ensure progressive implementation of the national benchmarks (see Targets under 'Reinvigorated Federal Government Role')*

Actions:

- *The CBA works with the Association of Legal Aid Plans and other interested stakeholders to prepare draft national benchmarks on eligibility as a means of engaging stakeholders and fostering dialogue and action*
- *The CBA works with interested public policy institutes and think tanks to develop an options paper for a national justice care system building on existing research and considering universal legal aid models in Canada and abroad*

What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
(write to: equaljustice@cba.org)

Legal Aid Services Delivery

Today legal aid plans offer an array of legal services that vary widely from jurisdiction to jurisdiction. In some places, services include the full continuum from legal information to representation, while in others legal aid provides a narrower range of services, such as duty counsel and representation. In addition to direct service, the continuum of services can include strategic advocacy and test case litigation on issues affecting low income people, so that problems can be addressed on a systemic basis instead of dealing repeatedly with individual cases. Strategic advocacy contributes to efficiency in courts and tribunals and the proper functioning of our legal system. Services are provided by a mix of employees, often operating through legal centres or clinics and by lawyers in private practice working for rates generally far below market rates.

Legal aid plans in Canada have spent many years making do with less, and have become adept at

doing so. Although many provincial and territorial governments have increased legal aid funding in the past 5 to 10 years, demand continues to far exceed the capacity of most legal aid plans. This approach is unsustainable. Changes to legal aid services should be driven by the legal needs of the communities served, not by a drive to decrease expenditures in every way possible.

There is a gap between the information available to legal aid providers and the perspectives of the broader community as to how well current services address the public's legal needs. While legal aid program evaluations including client satisfaction components are generally strong, the Committee's community consultations and other recent public forums have provided less positive feedback. Complaints are heard about the inadequacy of and lack in flexibility in legal aid, but also the quality of service offered (for example, delays in getting service, service providers not caring, not doing thorough work, not fighting hard enough for clients, or not listening to or respecting clients). Many felt the underlying cause of these problems is that legal aid lawyers are overworked and underpaid. Related to this observation, many of those consulted believed that people with low incomes are given second-class service relative to private legal services.

"Unless you have lots of money, you cannot access justice." **Single mother, Moncton**

"Once you finally get there and you get an order, there is nobody there to enforce it. This is what I needed. Now that I have an Order, it's not being respected and there is no one to do anything." **Single mother, Moncton**

"To me, legal rights are an unfulfilled promise." **Person with Disability, Toronto.**

"If you don't know what your rights are, how can you have them protected?" **Single mother, Kentville**

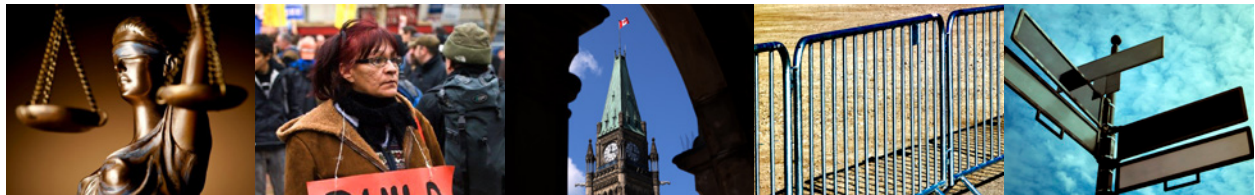
"Their (legal aid lawyers) case load is so big that they cannot go through every detail of the case. It's hard when you are trying to prove your innocence and they are not willing to fight for you." **Aboriginal person, Saskatoon**



THE CANADIAN
BAR ASSOCIATION

A NATIONAL FRAMEWORK FOR MEETING LEGAL NEEDS: PROPOSED NATIONAL BENCHMARKS FOR PUBLIC LEGAL ASSISTANCE SERVICES

Report of Canadian Bar Association Access to
Justice Committee



Prepared by Dr. Melina Buckley (Consultant)*

August 2016

*The Committee acknowledges, with thanks, the generous support received for this project from the Canadian Bar Association, and the BC Legal Services Society and the Law Foundation of BC Access to Justice Research Fund.

Table of Contents

Proposed National Benchmarks for Public Legal Assistance Services	1
A. Developing National Benchmarks.....	2
B. Next Steps	2
C. Digging Deeper	3
Project Overview	3
Meeting the Legal Needs of People in Canada.....	4
Toward a Responsive National Public Legal Assistance System	6
One Strategy: National Benchmarks.....	8
D. Proposed National Benchmarks with Milestones and Indicators.....	9

Proposed National Benchmarks for Public Legal Assistance Services¹

1. A National Public Legal Assistance System

Canadian public legal assistance systems are sustainably-funded and provide comprehensive, people-centered legal services tailored to local, regional and provincial and territorial circumstances to meet essential legal needs and contribute to the health and well-being of disadvantaged and low-income Canadians.

2. Scope of Services

Public legal assistance services are provided to individuals, families and communities with essential legal needs who are otherwise unable to afford assistance. Essential legal needs are legal problems or situations that put into jeopardy a person or a person's family's liberty, personal safety and security, health, equality, employment, housing or ability to meet the basic necessities of life.

3. Service Priorities

Public legal assistance services are provided on a priority basis to individuals, families and communities who are financially disadvantaged or otherwise vulnerable to experiencing unmet essential legal needs.

4. Spectrum of Services

Public legal assistance service providers use discrete and systemic legal strategies and work in collaboration with non-legal service providers to offer a broad range of services, from outreach to after care, targeted and tailored to people's legal needs, circumstances and capabilities.

5. Quality of Services

Public legal assistance services in all provinces and territories are fully accessible, timely, high quality, culturally appropriate and cost-effective. Such services will lead to evaluated meaningful participation and fair and equitable outcomes, and contribute to the empowerment and resilience of individuals, families and communities.

6. A Supported, Collaborative, Integrated Service Sector

Public legal assistance service providers participate in collaborative service planning across this sector and are mandated and supported to innovate and to fulfill their integral role of ensuring access to justice and an effective justice system, working in partnership with all stakeholders.

¹ These six national benchmarks were prepared by a joint working group of the CBA Access to Justice Committee and the Association of Legal Aid Plans of Canada.

A. Developing National Benchmarks

National benchmarks are the next step to closing the access gap in public legal assistance services. They can help to build common aspirational and measurable goals, better inform public legal assistance provision and policy, and promote shared learning and collaboration.

The Canadian Bar Association Access to Justice Committee (CBA Committee) retained Dr. Melina Buckley as consultant on the project. In early consultations, people were asked about what they expect and need from the public legal assistance services system in Canada. There was a remarkable consensus among the broad and diverse group who commented, and the benchmarks developed bring together that input.

B. Next Steps

The proposed national benchmarks continue a conversation about public legal assistance that began with the Canadian Bar Association's 2013 *Reaching Equal Justice* report. The next steps in this ongoing conversation leading to concrete change are:

- 1) Promoting public discussion about the benchmarks.** More people need to be included in the conversation about the proposed benchmarks. Over time, the benchmarks can contribute to a shared public understanding of the importance of legal assistance when people have pressing legal problems and ensure a consistent, sector-wide approach to meeting the legal needs of disadvantaged people.
- 2) Developing indicators for the benchmarks and measuring progress.** At the Expert Roundtable held in Toronto in 2015, leading authority Dr. Ab Currie likened the idea of national benchmarks to the top of a funnel, with development of more and more refined indicators and measurements over time. Part of the process of implementing the benchmarks will be to develop modest but meaningful measurements.

Not every aspect can be concretely measured but even unmeasurable goals and actions may be valuable. Process and dialogue can be as important, sometimes more, to innovation and improved service as measurement tools.

- 3) Breathing life into the benchmarks.** The proposed benchmarks offer a common measure of success while also allowing for tailoring to local needs. This process of breathing life into Canada's benchmarks can begin today. All public legal assistance service providers can take steps within current resources and capacity toward advancing one or more of the benchmarks and share their experiences with other providers. Similarly, funders and policymakers can promote the benchmarks by facilitating concrete steps toward their realization.

Question:

What do we want Canada's legal aid system to look like in 2020?

Answer:

We want a national public legal assistance system that fully meets the legal needs of people living in Canada, prioritizing individuals and communities experiencing disadvantage and adapting to local realities.

C. Digging Deeper

Project overview

In 2013, the Canadian Bar Association released *Reaching Equal Justice*, a comprehensive multi-dimensional report offering six main strategies for achieving equal justice in Canada by 2030. It includes 31 longer term targets, each with actions to begin immediately and interim milestones. Several address the need for a renewed approach to public legal assistance services in Canada, with one specifically calling for national benchmarks for legal aid coverage, eligibility and quality of legal services by 2020.

Since the release of *Reaching Equal Justice*, the CBA Committee has worked with several partners to advance the 31 targets. In 2014, a joint Working Group of the Association of Legal Aid Plans of Canada (ALAP) and the CBA Committee agreed to collaborate to propose national benchmarks for public legal assistance services in Canada. This work advances both organizations' commitment to achieving a robust legal aid system in Canada, and key aspects of the CBA report.

After extensive discussion, consultations and research commissioned by the CBA from Dr. Buckley,² the Working Group developed the national benchmarks that began this report. They are intended to constitute guiding principles to achieve the shared goal of a national, integrated system of public legal assistance services, focused on improving access to justice and meeting the needs of disadvantaged people across Canada.

With this strong foundation, both organizations will now use the benchmarks to support their respective efforts to improve Canada's public legal assistance system.

The CBA Committee acknowledges, with thanks, the Working Group members:

Dr. Melina Buckley (Co-Chair)
Karen Hudson, Q.C. (Co-Chair)
Mark Benton, Q.C.
Teena Hartman
Trish Hebert, Q.C.
David McKillop
Ed Montigny
Nick Summers
Gaylene Schellenberg (CBA Staff Lawyer)

² Based on that research and preliminary consultation, the Working Group produced a *Backgrounder, Discussion Paper* and a *Consultation Kit* in 2015. Feedback was received through a web survey, written submissions, public consultation sessions in several locations, a workshop at the *Innovating Access to Justice Conference* in Montreal, October 2015, and the Working Group's *Expert Roundtable* in Toronto in November 2015. The *Expert Roundtable* was generously funded by the BC Legal Services Society and the Law Foundation of BC *Access to Justice Research Fund*.

Meeting the legal needs of people in Canada

Most people in Canada experience legal problems at some point in their lives. Indeed, many experience multiple legal problems simultaneously and these problems often have both legal and non-legal dimensions.

People who experience economic, social or other disadvantage have more legal problems.³ They experience higher rates of legal need and have more contact with the justice system than others. Often those most susceptible to legal problems are less equipped to deal effectively with those problems. Indigenous people face particular disadvantage, along with significantly higher rates of incarceration.

People's legal needs are not well understood by the public or by governments. Generally, legal needs are not recognized to near the same extent as other aspects of Canada's social safety net. Yet, access to law and the need for help to resolve legal problems are simple facts of life in the 21st century. Laws shape and regulate most aspects of daily living and the relationships between individuals, businesses and governments.

In Canada, there is an enormous gap between people's legal needs and the public legal assistance available to address those needs and assist people when they most need help. The prevalence of legal problems and significant levels of unmet legal need cannot be addressed with existing public funding for legal aid and other legal assistance services. The results can be devastating.

Unresolved legal problems escalate, cause undue personal hardship and trigger non-legal problems like health and social welfare issues. They inhibit people's ability to participate effectively in society.⁴ A recent Organization for Economic and Cultural Development (OECD) initiative recognized that effective public legal assistance makes a strong social and economic contribution to individuals, families and small and medium enterprises, both at the community and at the societal level.⁵ Conversely, there is increasing acknowledgement in many circles that inadequate legal aid is costly.⁶

3 CBA *Reaching Equal Justice* (Ottawa: CBA, 2013) at 32, 33.

4 For further discussion and examples, see CBA *Reaching Equal Justice*, *ibid*.

5 OECD, Equal Access to Justice, 2nd Expert Roundtable Background Notes (Paris, December 2015). See also, Trevor C. W. Farrow, Ab Currie, Nicole Aylwin, Les Jacobs, David Northrup and Lisa Moore, [Everyday Legal Problems and the Cost of Justice in Canada: Overview Report](#) (Toronto: Canadian Forum on Civil Justice, 2016).

6 Melina Buckley, *Moving Forward on Legal Aid* (Ottawa: CBA, 2010) at 52; *Reaching Equal Justice*, *supra* note 3 at 53.

Towards understanding the impact of public legal assistance

- Legal aid can assist individuals and families to resolve legal and social needs, obtain access to opportunities and become full participants in the community and economy.
- Legal aid can contribute to reducing inequality by breaking down the cycle of dependency and increasing resilience by assisting individuals to address recurring patterns of problems in their lives and by interrupting the process of escalating problems, in such a diverse range of issues as health, housing, employment, violence, education and family.
- At the community level, the aggregate impact of legal aid can contribute to social cohesion and the social fabric of communities by promoting social mobility, reducing criminality and increasing business and economic opportunities.
- Investment in legal aid services can lead to economic growth in the community by increasing jobs, reducing work days missed due to legal problems, creating more stable housing, resolving debt issues and stimulating business activity.
- At the societal level, civil legal aid has been found to lead to a series of social benefits, which in turn benefits governments and societies economically through reduced cost on social interventions that would otherwise be needed to address those specific challenges.
- There is increasing evidence that benefits of civil legal aid may range from a reduction in domestic violence, less time spent by children in foster care, reduction in the need for safety-net programs, reduction in evictions, greater protection of patients' health and greater participation in public assistance programs. Aggregate health benefits have also been demonstrated.
- Conversely lack of access is associated with negative impacts at the individual, community and societal levels. Unequal access to justice is expensive. Evidence is mounting that unresolved legal problems are costly both to the individuals directly affected and to society as a whole.
- Studies have repeatedly shown that there is strong return on investment from public spending on legal aid.
- Unresolved legal problems and the requirement to navigate justice systems without appropriate assistance result in individuals bearing additional stress with an attendant impact on emotional and physical health, lost days of work and in some cases unemployment, and negatively impacts parenting and other family relationships.
- At a societal level these costs include lower economic productivity and knock-on costs to public spending in other areas (e.g. employment insurance, social assistance, health). Recent Canadian research estimates these knock-on costs are approximately 2.35 times greater than the annual direct service expenditures on legal aid.
- Studies have also shown that inadequate legal aid results in additional costs to other justice services, through for example longer and less efficient hearings.⁷

⁷ Additional references omitted. Excerpted and adapted from OECD, Equal Access to Justice, 2nd Expert Roundtable Background Notes, *supra* note 5.

Toward a responsive national public legal assistance system

Canada has no national public legal assistance system. Services are primarily provided by legal aid plans (plans) in each province and territory,⁸ in conjunction with organizations like public legal education providers and community-based advocacy groups. Many of these groups also receive some public funding. Plans generally help the most disadvantaged people get the legal support they need to engage effectively with the justice system but there are significant variations across Canada, much more than for other public services.

Legal aid has often been synonymous with legal assistance and representation by a lawyer. Today, most plans provide a continuum of legal information, assistance, dispute resolution and representation services, either directly or through referrals to other agencies. A range of services can better respond to the range of people's legal needs, but it can also reflect the reality of severe budgetary constraints for most public legal assistance providers, as demand continually outstrips capacity. We use the more inclusive term, "public legal assistance services" to reflect these developments and the full spectrum of resources necessary, without diminishing the importance of actual representation in meeting the legal needs of people in Canada.

Public legal assistance schemes have evolved significantly over the past sixty years, both in service delivery and policy foundation. Originally based on advancing procedural justice and maintaining the rule of law by ensuring the law applies equally to all people, they also protected fundamental rights like the presumption of innocence and the right to a fair trial. These original priorities were court-centered and to some extent reflected the needs of the justice system and the legal profession.

In the 1960s, public legal assistance grew in importance as a tool to promote human rights and social justice. Over time, governments increasingly recognized the connection between legal health and social and economic wellness, leading to further expansion and recognition in the 1970s. However, in the 1990s, a general trend toward reducing public services and the social safety net and instead promoting individual responsibility meant cutbacks to public legal assistance in many jurisdictions, including many Canadian provinces and territories.

Today, the rationale for robust public legal assistance is shifting with a growing appreciation of the sound empirical foundation of current legal needs research, which has shown both the personal impact and spiraling costs of unmet legal need, and a growing understanding of the social return on investment when public funds are spent on legal assistance. This broader perspective is consistent with general concepts of access to justice, including achieving just outcomes and promoting legal health, legal empowerment and social inclusion.

These mega trends in the provision of public legal assistance are illustrated in the following chart.

⁸ Many legal aid plans provide some specialty clinics/programs, although the availability and focus of those offices are not consistent across the country.

Evolution of Public Legal Assistance in Canada

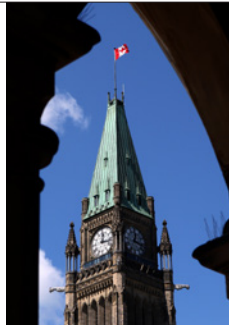


PROCEDURAL JUSTICE

- Growing recognition of need for legal counsel to ensure fair trials
- Provided on an ad hoc basis, often pro bono
- Court centered
- Law Societies, lawyers and judges lead

SOCIAL JUSTICE/CIVIL SOCIETY

- **1960s** – greater emphasis on human rights and empowerment
- Community-based clinics begin to provide legal aid
- Political but non-partisan
- Non-lawyers lead, lawyers and legal bodies also active

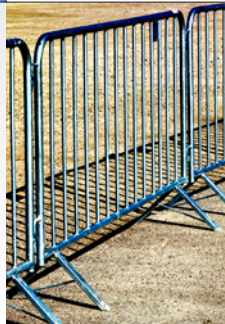


POLITICS AND SOCIAL WELFARE

- **1970s** – greater emphasis on public/governmental responsibility for legal aid
- Federal funding for legal aid is formalized
- Links between health and unmet legal need are recognized by Health Canada
- Government leads

RETRENCHMENT OF THE PUBLIC SAFETY NET

- **1990s** – emphasis on reducing spending and individual responsibility
- Shift in federal transfer payments and budget cuts to most provincial/territorial legal aid plans
- Non-criminal legal aid is dramatically scaled back in many provinces/territories
- Marked increases in unrepresented litigants and unmet legal need



LEGAL NEEDS, LEGAL HEALTH, LEGAL EMPOWERMENT

- **Today** – greater emphasis on empirical findings on costs of unmet legal need (individual and societal)
- Focus on understanding and building legal capability
- Recognition that a range of services and providers are needed to meet range of needs
- Collaborative leadership

One strategy: national benchmarks

Benchmarks are one effective strategy to achieve today's focus on a people-centered, responsive national public legal assistance system. Our consultations showed near unanimous support for national benchmarks, even though justice system participants and culture have historically resisted performance management and measurement. The main barriers to building this responsive national public legal assistance system are little public and political awareness of, and support for public legal assistance, especially compared to other human services such as health, education and social assistance. Benchmarks can contribute to a new conversation about meeting the legal needs of people in Canada and the concerted action required to move forward.

Most basically, a benchmark is a point of reference for measuring change and progress.⁹ It can be defined as a minimum requirement, a target, or by reference to a principle or norm (e.g. human rights), a goal, past performance or a comparison with another system or organization. Most benchmarks are a mixture of different reference points. All provide clear targets. Micro benchmarks target the behavior of individual service providers while macro benchmarks target aggregate behavior or systemic operations.

Benchmarks can:

- create an opportunity for developing and sharing a common vocabulary on progress and measurement among various stakeholders, including the public;
- provide a lens for interpreting variations in performance indicators and other metrics;
- offer an external validation of performance, rather than relying on those working in the system to determine what is to be considered “good enough”.

On the other hand, implementing benchmarks requires careful monitoring to avoid perverse or unintended consequences. Australian benchmarks that encouraged early intervention resulted in shifting resources to written materials, although those interventions are not necessarily uniformly effective. Benchmarking is an iterative process and benchmarks need to be frequently updated to adjust for their impact on performance.

The national benchmarks at the beginning of this report capture the predominant evidence-based ideas about public legal assistance services and define pathways for the future. They are aspirational but grounded in current international research and best practices. They present a transformative vision beyond what currently exists and describe the potential of enhanced public legal assistance. They assist different audiences to understand the important public good involved, that working hand-in-hand with other human services contributes to the social and economic welfare and health of our communities. The proposed benchmarks:

- establish a common aspirational and measurable goal
- contribute to informed provision of legal assistance services and policy, and
- promote shared learning and collaboration.

⁹ These points were made by Yvon Dandurand, international expert on justice system indicators, at the November 2015 *Expert Roundtable*, *supra* note 2.

The benchmarks are *not* performance indicators. They go far beyond what most Canadian legal assistance providers currently do and far beyond what we can measure. However, for each benchmark, examples are provided below of indicators and milestones that could be used to measure progress.

The benchmarks provide a foundation for developing staged measures. They begin with measurements of what legal assistance providers have capacity to measure today and anticipate gradually increased capacity toward national indicators with common data measurement.

D. Proposed national benchmarks with milestones and indicators

The benchmarks constitute guiding principles to achieve the shared goal of a national, integrated system of public legal assistance focused on improving access to justice and fully meeting the needs of disadvantaged people across Canada. They are bold and focus on the longer term, rather than simply on what is immediately achievable. These benchmarks incorporate bellwether behavior, that is, leading best practices and evidence-based trends.

Benchmark 1 – A National Public Legal Assistance System

Canadian public legal assistance systems are sustainably-funded and provide comprehensive, people-centered legal services tailored to local, regional and provincial and territorial circumstances to meet essential legal needs and contribute to the health and well-being of disadvantaged and low-income Canadians.

Indicative milestones and indicators of progress for achieving Benchmark 1 include:

- Development of national public legal assistance data standards to facilitate collection of consistent and comparable data¹⁰
- National public legal assistance common data measurement standards
- A “smart” system that better supports service planning and ongoing “modest but meaningful” monitoring and evaluation, and supports evidence-based policy, decision-making and service delivery¹¹
- Effective triage and navigation support within each province and territory
- Growing knowledge base and system-wide learning concerning “what works, for whom, under what conditions and at what cost”¹²
- Indicators that measure the relationship between legal needs, service provision and outcomes.

10 See for example, Australian Government, *National Legal Assistance Data Standards Manual* (Sydney: Attorney General, 2015).

11 Presentation by Dr. Hugh MacDonald at the *Expert Roundtable*, *supra* note 2. See also Pascoe Pleasence et al, *Reshaping Legal Assistance Services: Building on the Evidence Base* (Sydney South: Law and Justice Foundation of New South Wales, 2014).

12 *Ibid.*

Benchmark 2 – Scope of Services

Public legal assistance services are provided to individuals, families and communities with essential legal needs who are otherwise unable to afford assistance. Essential legal needs are legal problems or situations that put into jeopardy a person or a person’s family’s liberty, personal safety and security, health, equality, employment, housing or ability to meet the basic necessities of life.

Benchmark 3 – Service Priorities

Public legal assistance services are provided on a priority basis to individuals, families and communities who are financially disadvantaged or otherwise vulnerable to experiencing unmet essential legal needs.

Priority clients and communities will vary across and within Canadian jurisdictions. In general these are likely to include:

- Indigenous Canadians, people experiencing or at risk of domestic violence, youth, the elderly, recent immigrants, people experiencing language or literacy barriers, people with disabilities, including mental illness, prisoners, people living in remote and rural areas, and those otherwise at risk of social exclusion.
- People who live at or below 150% of the Low Income Measure¹³ are considered to be financially disadvantaged.

Indicative milestones and progress indicators for achieving Benchmarks 2 and 3 include:

- Triage or screening for consequences has replaced categories of service and financial eligibility in all jurisdictions
- The most intensive services (representation services) are directed to financially disadvantaged people and targeted to other priority client groups (may differ in each jurisdiction)
- Public legal assistance is provided based on comprehensive needs assessments in each community/ jurisdiction
- Public legal assistance services include a broad range of strategic legal advocacy services to correct systemic problems affecting low-income people in each province and territory

Benchmark 4 – Spectrum of Services

Public legal assistance service providers use discrete and systemic legal strategies and work in collaboration with non-legal service providers to offer a broad range of services, from outreach to after care, targeted and tailored to people’s legal needs, circumstances and capabilities.

Benchmark 5 – Quality of Services

Public legal assistance services in all provinces and territories are fully accessible, timely, high quality, culturally appropriate and cost-effective. Such services will lead to evaluated meaningful participation and fair and equitable outcomes, and contribute to the empowerment and resilience of individuals, families and communities.

¹³ <http://www.statcan.gc.ca/eng/help/bb/info/low>

Indicative milestones and progress indicators for achieving Benchmarks 4 and 5 include:

- All public legal assistance service providers have a strong diagnostic capacity to match services to client needs, circumstances and capabilities
- More effective referrals and a measurable increase in effective use of interagency cooperation and collaboration
- Public legal assistance service providers provide “joined up” or coordinated services with other service providers to address both legal and non-legal aspects of a client’s problem or situation
- Public legal assistance service providers develop strong capacities for outreach relevant to targeted local communities
- Public legal assistance service providers develop strong capacity for follow up and after care to ensure effective client outcomes, contribute to resilience and provide systemic feedback on what does and doesn’t work
- A strong client voice in evaluations
- Reductions in “new” emerging legal issues and return clients for the same or similar issues

See also the *Australian National Framework for Public Legal Assistance*,¹⁴ which offers outcomes that are relevant for Canada:

- Legal assistance services are high quality, relevant, delivered respectfully and focused upon improving people’s outcomes
- Culturally appropriate legal assistance services are accessible and available to Indigenous Australians and people from culturally and linguistically diverse communities
- Service models deliver the right mix of legal assistance services to meet people’s legal needs and capabilities where practicable
- Innovative service models are used to improve legal assistance services and better address legal need
- Legal assistance service costs are proportionate to the complexity and significance of the legal matter and people’s capability
- Legal assistance services offer a range of timely intervention services and use the most appropriate service type to address and resolve people’s legal problems
- Matters are resolved quickly and cost effectively, including through the use of alternative dispute resolution where appropriate
- People have access to information about their legal rights, responsibilities and the options they have for action
- Community legal education is tailored appropriately for different groups, coordinated across the jurisdiction, aligned with shared priorities and not duplicated unnecessarily
- People are equipped with increased skills and knowledge to help resolve future problems

¹⁴ <https://www.ag.gov.au/LegalSystem/Legalaidprogrammes>

Benchmark 6 – Supported, Collaborative, Integrated Service Sector

Public legal assistance service providers participate in collaborative service planning across this sector and are mandated and supported to innovate and to fulfill their integral role of ensuring access to justice and an effective justice system, working in partnership with all stakeholders.

Milestones and progress indicators for achieving Benchmark 6 include:

- Canadian justice system is characterized by clear and effective referral pathways and easy navigation
- Public legal assistance providers are recognized as a key component of the wider justice system with an important role in informing justice system reform, substantive and procedural law reform and broader issues such as reducing poverty and improving the situation of people with mental illnesses
- Meaningful cooperation between all participants in the justice system to achieve more timely resolution
- All public legal assistance service providers participate in collaborative service planning on a quarterly basis
- Public legal assistance indicators and measurements are aligned with those of other relevant organizations (i.e. criminal legal aid and prosecution services)
- The relationship between governments, legal aid authorities and service providers are effective partnerships.