



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

Response to Public Commission on Legal Aid

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PREFACE

The Canadian Bar Association is a national association representing 37,000 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 National Legal Aid Liaison Committee of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

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Response to Public Commission on Legal Aid

I. INTRODUCTION

The Canadian Bar Association (the CBA) is pleased to contribute to the British Columbia Public Commission on Legal Aid. We applaud this important initiative. The CBA recognizes a pressing need for immediate improvements to legal aid in British Columbia, but also across the country. This submission focuses on the national situation regarding legal aid. We have opted to leave those questions specific to the needs of British Columbians to organizations within the province.

The CBA's mission includes seeking improvements in the law and the administration of justice. The CBA is also dedicated to promoting and improving access to justice and equality for all people. Over many years, our message has been that legal aid is required to ensure equal participation in Canadian society. Along with education, health care, and social services, it is a pillar of a just democratic society. We believe that a publicly, adequately funded legal aid system is the fundamental prerequisite to achieving access to justice, and an essential public service. The CBA is among the many justice system participants currently examining how we can do more to assist with the serious shortfalls in services covered by legal aid plans. However, this willingness to contribute must not distract attention from the main issue and the main responsibility – governments must ensure that people have real access to justice by providing adequate funds for legal aid.

Unfortunately, legal aid does not receive equal public attention or resources compared to other essential public services. Over several decades, the CBA has tackled this problem from a variety of fronts, which we describe in this submission. While not specific to British Columbia, we trust that our experience and observations will be helpful to the Public Commission on Legal Aid.

II. BACKGROUND

The CBA's policy foundation on legal aid dates back over 50 years. Through resolutions to our National Council, we have identified key issues and problems, and focused our efforts.

Some general themes to our legal aid resolutions include the CBA urging:

- 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; and
- coherent thresholds of financial eligibility.

At the foundation of our current legal aid policies are two resolutions from the early 1990s. In 1992, the CBA adopted a *Legal Aid Action Plan* whose central theme reflects that an effective and fair legal aid system is a question of equality. It includes a statement that:

The objective of an effective and fair legal aid system is to provide and encourage equal access for all Canadians to the full range of essential legal services, of a consistently high quality through a plan adequately funded by federal and provincial governments and assured of independence in promoting the legal welfare of those individuals who are unable to afford legal counsel. (Resolution 92-09-A)

In 1993, the CBA adopted a *Charter of Public Legal Services* addressing the link between access to justice and legal representation. In it, the CBA urges all levels of government to fulfill their responsibilities to ensure that legal representation is available to individuals with legal problems that put in jeopardy their or their families' liberty, livelihood, health, safety, sustenance or shelter.

In addition, the CBA has noted the disparate impact of shortfalls in legal aid, particularly on already vulnerable populations. Recent research¹ establishes that the impact of having unresolved legal problems on people's lives tends to snowball. 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.

¹ See, for example, Dr. Melina Buckley, *Moving Forward on Legal Aid* (Ottawa: CBA, 2010) at 40.

Resolutions from the CBA's 1993 *Touchstones Report on Gender Equality* pointed out that inadequate legal aid coverage for family law matters amounted to discrimination against women. Out of the CBA's *Racial Equality in the Legal Profession* report in 2000 also came a call for action to improve legal aid funding, acknowledging the disproportionate impact under-funding has on clients from racialized communities.

We echoed these thoughts in 2004, with a resolution calling on the federal government to designate one minister responsible for access to justice on civil legal aid matters and to offer new funds to the provinces and territories for civil legal aid services. We noted that legal protections are increasingly limited for low and middle income people, particularly women and children, aboriginals, minorities, people with disabilities, and refugees and that there is a crisis in access to justice for disadvantaged Canadians with respect to civil law matters like custody and support, housing, income, refugee situations and deportation.²

Many of the problems we have highlighted over the years come as a result of a 1995 transition away from a funding formula that matched federal dollars to those actually spent by the province,³ to a "no strings" funding mechanism, under what is now called the *Canada Social Transfer*. Originally touted as offering provinces autonomy in making appropriate regional decisions as to how to spend federal funds, provincial justice ministers now say there is nothing left in the CST for civil legal aid, calling for a separate designated transfer.⁴ 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. Our 2000 resolution said:

Be it resolved that the CBA urge 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).

² The disparate impact of cuts to civil legal aid is well documented. See, for eg. Buckley, *ibid*.

³ *The Canada Assistance Plan*, or CAP, RSC 1970, c.C-1.

⁴ This point has been made in various contexts, but perhaps most important, at annual meetings of Federal/Provincial/Territorial Ministers of Justice. Provincial/Territorial Ministers have pressed for designated funds for civil legal aid separate from any notionally contained in the CST. See, for example, http://www.justice.gc.ca/eng/news-nouv/nr-cp/2008/doc_32302.html

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*.

The CBA has also shown the legal profession's commitment to help in dealing with the access to justice crisis in Canada. At the same time though, we have continually stressed the many ways that the legal profession is already "giving back" and doing *pro bono* work far beyond that expected from other professionals. The CBA has emphasized that this spirit of volunteerism and social responsibility is NOT the required systemic solution to the access to justice problem. While lawyers are willing to help to address the shortfalls in the system, the CBA has continually stressed that the main onus is on governments to address the need for universal access to justice by providing legal aid.

These resolutions and the many others passed by the CBA over the years speak to our membership's concern with legal aid and an on-going interest in ensuring that Canada protects access to justice for all Canadians through properly funded legal aid plans, for both criminal and civil matters.

III. EXPERIENCE WITH LEGAL AID

The CBA's extensive policy on legal aid has been translated into action in many ways. The Legal aid Liaison Committee was established by the CBA in 1985, with the mandate to inform CBA leaders about legal aid problems and developments across the country. Some of the Committee's activities have been to create the Legal Aid Advocacy Resource Kit, monitor the progress of our legal aid litigation, identify ways to support legal aid lawyers and work in coalitions with others organizations.

Communications Tools

The CBA's Legal Aid Advocacy Resource Kit provides tools to facilitate communication by bar leaders speaking publicly on legal aid. Background materials are information and research based. Other parts of the Kit are more practical – speaking notes, sample letters to the editor or to a justice minister, and typical questions and answers to be expected during an interview. The goal is to encourage an effective and consistent message when CBA leaders speak about legal aid in different situations, in different parts of the country.

Building Political Will

The CBA National President consistently raises legal aid problems at meetings with the federal Justice Minister and other federal ministers. CBA Branch Presidents meet regularly with the Attorneys General in their jurisdiction on the issue. During recent election campaigns, the CBA has featured access to justice as a campaign issue.

Justice Canada acknowledges responsibility for criminal legal aid, though its proportionate contribution has steadily declined over the years. On the other hand, it says 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. No federal minister is officially (or unofficially) responsible for civil legal aid.

A recurring obstacle to CBA's advocacy efforts has simply been this lack of political will, paired with little public support for legal aid. We created a *Legal Aid Watch*, hoping to generate political pressure and public sympathy by publicizing stories about the people who need legal aid and the circumstances that require people to seek legal representation, and by correcting misperceptions about legal aid lawyers. By featuring stories of people falling through the cracks in the legal and social systems, the plan was to highlight the human consequences of inadequate legal aid. The *Watch* network was revitalized in 2009 as an information sharing vehicle where legal aid lawyers can say how the CBA can better support their daily work.

Working with Others

We often collaborate with other organizations, particularly those representing legal aid clients. Collaboration assists in addressing the misperception that lawyers are not committed to improving access to justice, but take on legal aid cases only for the money. Given the low pay that legal aid lawyers receive, this is not a logical position, but it is one we often confront. Working with client organizations also keeps us in touch with problems and provides examples of what happens when access to justice is denied.

CBA joined a national group called the Poverty Law Advocacy Network of Canada (PLANC) in 2006. CBA assisted the group in organizing a national meeting, and in developing a tool kit for poverty law advocacy, which was completed in 2008.

CBA Litigation

The CBA has intervened, usually before the Supreme Court of Canada, in cases where an access to justice issue is at stake. *J(G) v. New Brunswick* is one example, involving the right to publicly funded legal representation in a child apprehension case. A mother sought legal aid when the New Brunswick Minister of Health and Community Services applied for the temporary custody of her children, but a certificate could only be issued for permanent guardianship applications. In 1998, the Supreme Court confirmed that section 7 of the *Charter* gives all parents the right to a fair hearing when the state seeks custody of their children, and that access to counsel through legal aid can be a key element of that right. Also, it held that the province's policy of fiscal restraint was not saved by section 1 of the *Charter*. However, the Court's carefully worded decision was limited to this particular type of case, considering the complexity of the issues at stake and the parents' ability to represent themselves.

In April 2006, CBA intervened in *Little Sisters v. CRA*, focusing on the issue of advance costs in the broad context of access to justice. Advance costs would allow non profit or small for profit organizations to advance their legal claims against government. The Supreme Court of Canada dismissed the appeal as not meeting the very high threshold required for an order of advance costs, saying this case lacked the necessary compelling public interest.

In November 2006, CBA intervened in *Attorney General of British Columbia v. Christie*, to support the argument that a tax on legal services is unconstitutional in that it impedes access to justice. The Supreme Court of Canada held that the tax was not unconstitutional and that the British Columbia Court of Appeal erred in finding a "general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations" under the Rule of Law. While "specific and varied" circumstances may support a constitutional imperative requiring counsel to be appointed, the Rule of Law could not support a generalized obligation.

The CBA began considering its own litigation because long and concerted efforts advocating for adequate legal aid proved unfruitful. After careful research by a committee of experts, the CBA filed a statement of claim in June 2005 against the federal government, the British Columbia government, and the province's legal aid plan for failing to provide adequate access to justice for poor people in British Columbia. The decision to begin litigation in British Columbia was made for several reasons, in particular the recent drastic cuts to legal aid in that province.

The CBA's claim was based on the *Charter of Rights*, unwritten constitutional principles and the Rule of Law, with the CBA acting in the public interest. We took a broad approach as the most direct route to constitutional recognition of a right to counsel for critical civil law matters, and to avoid pitfalls when dealing with individual litigants, or a result limited to the narrow facts of a particular case.

Unfortunately, both the British Columbia Supreme Court and Court of Appeal were unreceptive to the CBA's approach, though the appellate court suggested a different result might be possible if the CBA pursued a similar claim with named plaintiffs. The Supreme Court of Canada denied leave to appeal in 2008.

In 2009, CBA's Board of Directors agreed that litigation should continue to be part of the CBA's strategy to improve access to justice. We are currently developing a second phase of our litigation strategy, and will support *pro bono* lawyers pursuing "right to counsel" cases in different areas of law and in different parts of Canada.

IV. RESPONSE TO LEGAL AID QUESTIONS PARTICULAR TO BRITISH COLUMBIA

As previously noted, this submission will not address issues specific to British Columbia, but will comment briefly on the underlying issues raised in this section.

A. In what circumstances should legal aid be provided; For what legal issues should legal aid be provided

The 1993 *Charter of Public Legal Services* addresses this question. In it, the CBA urged all levels of government to fulfill their responsibilities to ensure that legal representation is available to individuals with legal problems putting in jeopardy their or their families' liberty, livelihood, health, safety, sustenance or shelter.

B. How should legal aid be funded

The CBA has consistently called for federal leadership in creating a properly funded, national legal aid strategy, with services administered by legal aid plans in each province and territory, with minimum national standards and comparable services available throughout Canada. In terms of the federal financial contribution to legal aid, we have encouraged either a "carve out" from the CST for civil legal aid, or a separate federal Access to Justice transfer, with a corresponding provincial or territorial contribution.

C. What should the priorities of the legal aid system be

Again, the *Charter of Public Legal Services* above outlines general parameters for when the CBA believes legal aid services should be provided, and to whom.

V. IDEAS FOR THE FUTURE

A. Innovative solutions to challenges facing legal aid

The CBA recently commissioned a comprehensive report on current research on legal needs and innovative approaches to legal aid delivery, *Moving Forward on Legal Aid*, by one of Canada's foremost experts on the subject, Dr. Melina Buckley. Dr. Buckley summarized her findings in three main recommendations:

1. acknowledge that the main cause of declining legal aid is the federal government's retreat from being a partner in providing legal aid, both in terms of funds and in terms of leadership
2. accept that legal aid renewal will require enhanced public awareness and support, to generate the necessary political pressure
3. continue to modernize and be innovative in delivering legal aid services

Rather than innovative delivery options and doing more with less as an *alternative* to a renewed commitment to adequate funding for legal aid by governments, Dr. Buckley suggests that this two pronged approach must go hand in hand. Better ways of delivering services to more people will be an ongoing challenge, but the foundation for access to justice through support for adequate legal aid must be an unwavering government commitment.

Dr. Buckley concludes with ten avenues for future efforts on legal aid.

B. Thoughts on the future of legal aid

To talk about a right of access to justice without legal aid is like talking about a right to universal health care without medicare. The CBA believes, first and foremost, that governments have an obligation to sustain an adequately funded public legal aid system providing comparable services throughout the country. That primary obligation on the federal, provincial and territorial governments must not be overlooked.

Yet, these days, discussions seem focused more on ways that non-governmental organizations, including the legal profession, should take responsibility for providing access to justice. With

increased complexity in the legal system, increased costs of providing legal services, decreased services offered to fewer people by legal aid plans, not to mention economic pressures across the board, not only the poor are shut out. The “working poor” and middle class Canadians increasingly cannot afford legal representation, even when serious pressing legal issues are at stake. The CBA, legal aid plans, academics, law societies, charitable and not for profit organizations and governments are all looking for new possibilities.

Ideas under consideration include improved public legal information to facilitate self-representation, lawyers doing more *pro bono* work or acting on only part of a file at a reduced fee (limited scope representation), simplified court procedures (again, to facilitate self-representation), or increased use of non-lawyers to provide legal advice and representation.

The CBA, like other organizations committed to access to justice, is part of these efforts and discussions, and is committed to finding new and better ways of providing access to justice at a reasonable cost. But, the willingness of CBA and other stakeholders in the justice system to find better and creative ways of ensuring that legal services are more broadly available cannot be confused as relieving governments of their primary obligation to fund legal aid as an essential public service. That public service must be seen for what it is: the foundation of how Canada provides access to justice to its people. The contributions of other justice system participants are an appropriate, necessary and important supplement. But the CBA believes that it is time for governments to renew their commitment to bolstering that critical foundation.