



**SUBMISSIONS OF THE CANADIAN BAR ASSOCIATION  
(BRITISH COLUMBIA BRANCH)**

TO

**JAMIE MACLAREN, QC**

REGARDING THE

**EXTERNAL REVIEW  
OF  
LEGAL AID SERVICE DELIVERY  
IN  
BRITISH COLUMBIA**

Issued By:

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British Columbia Branch  
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## PREFACE

Formed in 1896, the purpose of the Canadian Bar Association (British Columbia Branch) (the “CBABC”) is to:

- Enhance the professional and commercial interests of our members;
- Provide personal and professional development and support for our members;
- Protect the independence of the judiciary and the Bar;
- Promote access to justice;
- Promote fair justice systems and practical and effective law reform; and
- Promote equality in the legal profession and eliminate discrimination.

The CBA nationally represents approximately 35,000 members and the British Columbia Branch itself has over 7,000 members. Our members include lawyers, law students, judges, academics and others involved in the legal profession. Our lawyer members practice law in many different areas. Among our members are a number who accept legal aid referrals. Many others practice in the courts and see regularly those who struggle to represent themselves. The CBABC has been strongly advocating for improvements to legal aid for decades.

The CBABC has established 76 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education, research and law reform. The CBABC has also established standing committees and special committees from time to time.

This submission was prepared by the CBABC Access to Justice Committee (the “Committee”). The Committee works to improve and promote access to justice for the poor and middle classes in BC. The Committee stresses government responsibility for a sufficiently publicly funded legal aid system as an essential foundation, promotes pro bono services in the legal profession, and supports innovative legal system reform and delivery options for greater access to legal services.

The Committee’s submissions reflect the views of the members of the CBABC Access to Justice Committee only and do not necessarily reflect the views of the CBABC as a whole.

## SUBMISSIONS

The Committee welcomes this opportunity to provide submissions to the current review of legal aid service delivery models, which follows many other studies of the legal aid system, most notably by the Public Commission on Legal Aid, led by Leonard Doust, QC. The Commission's final report, even more relevant today than when it was released in 2011, is available here: [Foundation for Change](#).

There are three key issues in our legal aid system - all of which are tied to funding decisions made over the years including, but not limited to, those taken in the course of major reductions in legal aid spending in 2002. These are:

1. Lack of coverage for family law and poverty law matters – At present, legal aid coverage for those who qualify is guaranteed only in very few family matters and no poverty law matters. Both the scope and duration of coverage create significant hurdles for people facing life-altering legal issues, and disproportionately affects women and children.
2. Insufficient legal aid tariff – tariff rates have increased only once since 1991, and have been frozen for 12 years. They are significantly lower than other provinces, leading to a decrease in lawyers able to afford to take legal aid files and replace retiring members who have taken them for years as a public service.

3. Inadequate eligibility criteria – the criteria for eligibility exclude many low income-earners who, while not living in the most dire circumstances of poverty, cannot realistically obtain the services of a lawyer and may be significantly impacted as a result of their interaction with the legal system.

It is very unfortunate that the scope of this review has been limited to the issue of delivery models and so exclude these critical issues – which are necessarily at the heart of any realistic effort to improve the legal aid system.

### **Any Model Should be Assessed Against the Legal Aid Benchmarks**

It is important to keep in mind in assessing models that the key goal of any model has to be the provision of services to those British Columbians who require it. In considering how best to achieve this goal, the CBABC commends the Legal Aid Benchmarks proposed by the CBA in its August 2016 report [A National Framework for Meeting Legal Needs: Proposed National Benchmarks for Public Legal Assistance Services](#):

1. Sustainably funded, comprehensive, people-centred legal services tailored to meet essential legal needs and contribute to the health and well-being of disadvantaged and low-income Canadians.

2. 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. 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. 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 peoples' legal needs circumstances and capabilities.
5. 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. Public legal assistance service providers participate in collaborative service planning across this sector and are mandated and supported to innovate and to fulfil their integral role of ensuring access to justice and an effective justice system, working in partnership with all stakeholders.<sup>1</sup>

Any model proposed for British Columbia should be assessed against these benchmarks.

### **Government Costs of Legal Problems**

The struggles of those dealing with legal problems – whether in the family, criminal, or poverty law areas – give rise to significant costs for individuals, institutions and government departments beyond Justice – including Health, MFD and Social Development.<sup>2</sup> In the 2014 briefing note, to the BC government on the [Economic Value of Legal Aid](#), prepared by then-President Sharon Matthews, now Madam Justice Matthews of the Supreme Court of BC, there are excellent examples of research that shows that investments in legal aid have significant return to government services otherwise required as a result of an unresolved or poorly resolved legal problem:

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<sup>1</sup> Available at: [https://www.cba.org/CBAMediaLibrary/cba\\_na/PDFs/LLR/A-National-Framework-for-Meeting-Legal-Needs\\_Proposed-National-Benchmarks.pdf](https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/LLR/A-National-Framework-for-Meeting-Legal-Needs_Proposed-National-Benchmarks.pdf)

<sup>2</sup> See cost of justice reports from the [Action Committee on Access to Justice in Civil and Family Matters](#)

- For every \$1 spent on family legal aid in Australia, there is a return of \$1.60 to \$2.25 to the government;
- For every \$1 spend on legal aid in Louisiana, there is a return to the government of Louisiana of \$2.40;
- For every \$1 spent on legal aid in Nebraska, the government saves \$3.97;
- For every \$1 spent on legal aid in Florida, the government saves \$4.78;
- For every \$1 spent on civil legal aid in New York State, there is a return to the government of New York of \$5;
- For every \$1 spent on legal aid in Texas, the annual gains to the economy are \$7.42 in total spending, \$3.56 in output (gross product), and \$2.20 in personal income;
- For every \$1 spent on housing, debt, benefit and employment legal aid in the United Kingdom, the government saves between \$2.33 to \$8.79;
- For every \$1 spent on disability legal aid in the Commonwealth of Massachusetts, results in a return to the state government of \$15 to \$30.

According to the published data noted above, every \$1 invested in legal aid more than pays for itself.



## **The Current BC System**

At present, most legal aid-funded legal representation is provided by lawyers in private practice. This encompasses both lawyers accepting legal aid matter referrals and duty counsel, as well as lawyers who take contracts to attend remote circuit court locations. This service is available only to those individuals who have sufficiently low incomes to meet the eligibility criteria.

In addition to these services, the Legal Services Society provides:

1. Legal information services, which are available to all British Columbians through online resources and paper publications.
2. Family Duty Counsel in some locations.
3. Parents Legal Centres (PLC) to assist those dealing with child protection issues – currently in Vancouver and Surrey, and in the course of expansion to five other locations.
4. Family LawLINE – providing legal advice by telephone to low income individuals.
5. An expanded duty counsel pilot project in Port Coquitlam.

### **What BC Has Had in the Past**

The basic legal representation services described in the first paragraph of the previous section have been provided for many years in British Columbia. In addition, prior to 2002:

- There was an expanded scope of legal representation services provided, particularly in the areas of family law and poverty law;
- Legal aid services were provided both by private lawyers and by staff at clinics serving clients in the criminal law, family law and poverty law areas.

### **What Has Worked**

Legal representation (including duty counsel) provided by lawyers in private practice has been an effective model – at least to the extent that it is adequately funded. The model itself works well, and is cheaper than a staff model, although chronic under-funding has limited its benefits.

Specific benefits of a private bar model include:

- a. **Choice of Counsel.** This right to choose increases the autonomy of clients, places responsibilities on both the client (to select a lawyer) and the lawyer (to justify that confidence), and thereby invests both in the representation.
- b. **Independent.** The private bar model is independent from outside influence.
- c. **Reduces the Appearance of Conflicts.** The private bar model reduces the number of situations where a lawyer cannot act due to a conflict or an

appearance of a conflict (staff models are bound by conflict rules applicable to all law firms and those rules have become more onerous in recent years).

As noted above, BC has also in the past used a staff model which operated in addition to the private bar model. Staff model costs are generally higher, as staff lawyers must be paid a reasonable salary and clinics give rise to substantial overhead costs. Specific benefits of a staff model include:

- a. Provides a stable income and work environment for those who are ready to commit their legal careers to serving legal aid clients.
- b. De-centralized clinics (clinics in smaller communities) allow for easier access to lawyers where private Bar lawyers are not available.
- c. Can provide a focus for the delivery of training and resources to clinic staff.
- d. May allow for greater legal representation for files which would not ordinarily be covered under the tariff. (Files, which for economic reasons the private bar cannot take).
- e. Can provide a broader array of legal services and related services, (if properly resourced), including information services with a community presence.

### **What Did Not Work**

It is impossible to accurately identify what has not worked due to the many years of chronic under-funding of Legal Aid. The long-standing underfunding has limited the effectiveness of both models. For example:

- a. There is a significant gap between those who qualify for legal aid and those who can afford a lawyer, regardless of the model.
- b. Limited eligibility and coverage areas have increased the number of self-represented persons within the judicial system, regardless of the model.
- c. The lack of legal representation available to large portions of the population disproportionately impacts indigenous peoples and women and children, regardless of the model.
- d. Lack of legal representation for first time offenders can result in consequences (a criminal record) which far outweighs the cost of providing legal representation, regardless of the model.

Other specific issues that have arisen include:

1. Legal Aid intake – the documentation required to apply for legal aid, creates an unworkable barrier to people with obstacles such as mental health, cognitive, addiction and housing issues.
2. On-line and written materials for self-represented persons. The adversarial system is such that even with the assistance of law students it is unrealistic to assume that individuals can adequately represent themselves without the assistance of lawyers. Many files are too complex for law students, even under supervision.

3. Limited number of legal aid lawyers in rural areas, resulting in the costs of flying-in counsel.
4. Child-welfare - over-representation of Indigenous children in care.
5. Over-representation of Indigenous people in the criminal justice system.
6. People with barriers such as addiction, poverty, mental health, language are not adequately served at any stage of the process.

### **A Mixed Model Will Offer the Best Range of Services**

It is important not to abandon a model (private bar model) which works well when funded adequately and sustainably. The staff model (although more expensive) could be used to enhance and fill in the gaps in the private bar model. However, it is not realistic to move all services to a staff model. In any event, no model is going to work if it is under-resourced.

### **Other Jurisdictions – Ontario – What Is Working And What Is Not**

Ontario has moved to a mixed model for legal aid service delivery. Features of the Ontario model include:

1. Legal representation is provided by lawyers in private practice at a much higher tariff rate than in BC (\$109-\$150 vs \$84-\$92).

2. Legal Clinics focus on four practice areas which do not displace the private bar model, rather the clinics supplement the primary model of tariff legal aid.

The four areas of practice of the Ontario clinics are:

1. Social assistance, violence and health - the violence refers to assisting victims of crime with representation and compensation.
2. Immigration and Refugee - all aspects of immigration, including family sponsorships.
3. Workers' rights.
4. Housing rights.

### **Issues To Consider In Any Future System Of Legal Aid Service Delivery**

As noted above, the issue that is most critical to improving our legal aid system is not the model of legal aid provision. Rather, it is the amount of money the government spends on legal aid funding. If legal aid is not properly funded, the model through which it is delivered does not matter.

For any service model, the lack of adequate and sustainable funding limits the retention of experienced counsel which is necessary to ensure junior counsel are mentored and increases the likelihood of efficient and optimal results.

Increases to legal aid funding are also necessary to reflect the increasing time required to address more complex clients and legal issues. Addiction and mental health factors continue to contribute to increasingly complex legal and client issues.

Increases to legal aid funding are also necessary to reflect the fact that changes in the law have added new requirements that impact time and scope (for example, Gladue requirements in criminal matters and Family Case Conferences in family matters).

The Committee puts forward the following ideas for thought and discussion:

1. Restructure legal aid funding to allow for a graduated scale of financial eligibility. This would provide coverage to those who are somewhere between extreme poverty and able to afford a lawyer.
2. Consider expanding special purpose courts (including Indigenous courts, unified family courts, mental health courts, intimate partner violence courts), which are often staffed by in-house lawyers.
3. Access to justice can only be achieved through the provision of a continuum of services and by developing a more holistic approach, which would include a family law model that is less adversarial.
4. Improve access to community mental health services to divert and prevent criminalization of individuals dealing with mental health challenges.

5. Consider building on the CBABC REAL (Rural Education and Access to Lawyers) initiative to encourage second year law students to consider rural/small community locations and practice areas (criminal and family) that are most needed in future legal aid lawyers. These placements could occur with either private bar or clinics, or both in a mixed model.

**Recommendation: Mixed Model of Legal Aid**

It is the recommendation of the Access to Justice Committee that a mixed model of legal aid services delivery be adequately and securely funded for family, criminal, mental health, poverty, prisoner and refugee legal aid, as is the case in Ontario, including tariff services, legal aid clinics, and funding for in-house counsel located in front line service delivery organizations.

Key benefits of a mixed model along these lines would include:

1. Choice – clients will be able to choose the type of service delivery that best serves their needs:
  - a. Tariff Services Model (also known as judicare model)<sup>3</sup> allows clients to select a lawyer of their choice; ensures that the lawyer’s principal loyalty is to his or her client, whose interests they would defend or advance just as would a privately paid lawyer; and, “ensures maximum

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<sup>3</sup> In the judicare model, legal services are provided by lawyers in private practice, who are paid by the legal aid plan contract, or tariff basis.



independence from state interference or influence, particularly in cases where the state was directly implicated as a party (e.g., criminal prosecutions, child protection cases, immigration cases, and state benefit or entitlement claims)”<sup>4</sup>;

b. Government Clinic Model (lawyers and support staff are hired directly by the legal aid administration) and Community Legal Clinic (staff are hired by each clinic and are accountable to a community-elected board responsible for the clinic's governance) benefits include:

- i. Specialization (for example criminal law or family law);
- ii. Ability to process high volumes of cases;
- iii. Increased accessibility for clients through location of staff offices in client communities;<sup>5</sup> and
- iv. Additionally, community based clinics could promote and advance law reform initiatives on behalf of the populations they serve to address challenges faced by these populations. This is a significant benefit that would likely not be gained through the *judicare* model.

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<sup>4</sup> “Introduction” in the Report of the Ontario Legal Aid Review: A Blueprint For Publicly Funded Legal Services, Chapter 7: The Choice Of Delivery Models For Legal Aid:  
<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch7.php>

<sup>5</sup> *Ibid.*

2. Innovation – variety in service delivery models allows for increased innovation in the manner legal services are delivered generally (not just in the context of legal aid).

## CONCLUSION

On behalf of the Access to Justice Committee of the CBABC, we thank you for this opportunity to provide input to your deliberations about the future delivery of legal aid services in British Columbia. We are pleased to discuss our submissions further in order to provide any clarification or additional information that may be of assistance.

All of which is respectfully submitted,



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