



LEGAL AID
NOVA SCOTIA

Senate Submission from Karen Hudson QC, Executive Director, Nova Scotia Legal Aid Commission - February 2016

Submission to Senate Standing Committee on Legal and Constitutional Affairs:
Study on Delays in Criminal Proceedings.

Why Should you Care about Legal Aid?

An anemic legal aid system contributes to delays and denial of justice. Erosion of federal investment in legal aid is a denial of justice for low income and historically vulnerable Canadians. Erosion of federal investment in legal aid is a lost opportunity for creating a more responsive and efficient criminal justice system.

Federal dollars have remained the same since 2003. Factoring in inflation on top of this means that this erosion is undermining the stability of the criminal justice system.

I offer 10 points for your consideration:

- August 2010 the Federal Minister of Justice noted to the CBA that "all players" in the justice system share responsibility for making the justice system more efficient and effective.
- October 2010 FPT Ministers Statement on Criminal Legal Aid endorsed criminal legal aid as one of the pillars that supports Canadians' faith in a fair and accessible justice system.
- Legal Aid ensures that help is available at a critical point. It is the type of help that can take an individual or family out of crisis, map a better way forward and put within grasp the means of transformation.
- Legal Aid ensures that all have access to our justice system. It promotes a society where everybody counts and everybody gets a chance.
- CBA 2013 Report "[Reaching Equal Justice: An Invitation to Envision and Act,](#)" "Inaccessible justice costs us all, but visits its harshest consequences on the poorest people in our communities".
- "Providing legal aid to low-income Canadians is an essential public service. We need to think of it in the same way we think of health care or education. The well-being of our justice system—and the public's confidence in it—depends on it". Chief Justice Beverley McLachlin.
- "The incarceration rate for Aboriginal adults in Canada is estimated to be 10 times higher than the incarceration rate of non-Aboriginal adults": Office of the Correctional Investigator.
- Too low financial eligibility for legal aid means "more hardship, less access to justice, more court delays, more court-ordered counsel and more unrepresented litigants". CBA 2013 Report.
- Funding Legal Aid is an investment. The costs of not funding Legal Aid are too high.
- Federal investment in Legal Aid has withered.

Legal Aid: A Shared FPT Responsibility

- More than 4 decades of FPT Criminal Legal Aid Agreements.
- Shared Constitutional Responsibility: *Constitution Act 1867*.
- *Canadian Charter of Rights and Freedoms*, including right to a fair trial.
- International Obligations: *International Covenant on Civil and Political Rights*, addresses the right to publically-funded counsel for accused.
- FPT Ministers agree, 2010, that it is a shared responsibility.
- All levels of government have an interest in public confidence in the criminal justice system; 2008 Ipsos-Reid Survey "Public Support for Legal Aid": 94% of Canadians surveyed believe legal aid programs are important in maintaining the fairness of the Canadian criminal justice system.
- FPT Business Cases for renewed federal investment in Criminal Legal Aid were made in 2008 and 2011. Both failed.
- The Federal Government spending on criminal legal aid as a proportion of total government spending is only 15% (2013/14 Canadian Centre Justice Statistics).
- PT ministers have repeatedly called for a return to 50/50 cost sharing.

Pressures on Criminal Legal Aid: Increased Demand and Cost: What has changed since 2003 (the last time federal investment increased)

- ↑ in Direct service expenditures on criminal legal aid: 2003/04 = \$514M; 2013/14 = \$662M. 29% increase. National.
- ↑ in Full-Service Approved Applications 2003/04 = 245K; 2013/14 = 268K. 9.4% increase. National.
- ↓ in services offered as a result of budget realities. Criminal Duty Counsel 2006/07 (first yr reported) = 1.1M; 2013/14 = 1M. 6% decrease. Duty Counsel was rolled back as result of budget pressures. Federal Evaluation of Legal Aid Program, 2011, noted that the evaluation evidence presented a picture of legal aid system facing serious pressures.
- ↓ in services offered as a result of budget realities: approved criminal legal aid applications for full service (a lawyer for the case) from 1990s to 2014/15 is significant. However, provinces have increased contributions to Legal Aid Plans as they acknowledge the value for money provided and so slight increase from 2003/04 to 2014/15: 1992/93=440K cases approved; 2003/04=245K cases approved; 2013/14 268K cases approved.
- ↑ in Cost per case 2003/04 to 2014/15: consider the Nova Scotia example: Homicide, staff cost/case, increased more than 200% to \$27K/case. Sexual Assaults increased by 79% to \$4K/case. Breaches increased by 27% to \$500/case.
- ↑ in Disbursements costs (e.g. transcripts, experts, medical reports, travel) increased in Nova Scotia: excluding high-cost homicide cases, disbursement cost/case increased 87%.
- ↑ in salaries, private bar tariffs, rent, paper, all increased. The CPI increase from 2003/04 to 2014/15 = 23%.

Pressures on Criminal Legal Aid: Increased Complexity: What has changed since 2003 (the last time federal investment increased)

- ↑ Seriousness of cases: changes to the Conditional Sentencing Provisions. On November 20th, 2012 the amended s. 742.1 came into force, and significantly restricted the availability of CSO's.
- ↑ Seriousness of cases: more mandatory minimum offences: Please consider this from my colleague Roger Burrill, senior criminal lawyer: "Mandatory minimum jail sentences provide little room for front-end resolution of a case. No matter the circumstances of the offence, or the unique circumstances of the offender, jail is the only option upon conviction. Crowns have little room to maneuver. Judges have no discretion but to impose jail. This can unnecessarily prolong proceedings and result in pointless, nothing-to-lose, trials. Not to mention sentences that may be just plain disproportionate. Judges need to be trusted to do the right thing keeping in mind their expertise in applying the principles of sentencing. They do it every day."
- ↑ Complexity: more high-cost cases. More cases that cost over \$20K each, that involve more disclosure, more forensic evidence, more multiple co-Accused. There is a danger of underrepresentation by Legal Aid Plans: in 2013/14 Legal Aid Plans approved over 316K full-service cases and spent \$349M. This is only \$1100/case and this includes all cases, high complexity and/or high stakes cases.
- ↑ Expectations on Legal Aid Plans to be part of the solution for chronic offenders, accused with mental health and addictions problems, and overrepresented vulnerable communities. Legal Aid Plans care about people and our justice system. We are key to implementation of problem-solving court approaches and to ensuring Aboriginal responsiveness. In Nova Scotia: we provide dedicated lawyers to the full-time Mental Health Court, and to the Domestic Violence Court; other Staff Lawyers provide services to addiction and mental health approaches in other Provincial Courts. These are time intensive, yet outcomes are promising (e.g. the MHC 2015 external evaluation). We are asked to provide services in 8 Mi'kmaq communities. We struggle to be culturally responsive. We struggle to ensure that *Gladue* and *Ipeelee* (SCC cases) are applied. We struggle to provide the level of time and depth of understanding needed to be part of the solution and not part of the problem. Not because we don't care; but because of fiscal realities.
- ↑ Tough on crime focus has meant an unbalanced criminal justice system and increased demands upon legal aid. Legal Aid Plans were asked to respond to more breach charges resulting from more police being hired. Legal Aid was asked to respond to more accused being remanded for bail hearing. Demands on Duty Counsel have increased yet Plans have not been able to respond to the increased need. Duty counsel services nationally have decreased as noted above. There are more people serving time on remand in correctional institutions than serving custodial sentences. Over the last decade more money has been invested in building federal penal institutions, hiring 'more boots on the streets' (2010 saw the highest proportion of police officers per population since 1981) and investing in more prosecution (7 of 8 jurisdictions studied reported greater investment in prosecution than Legal Aid) and more accused remanded.

How Nova Scotia is Responding to Delay Issues

- Nova Scotia has had the second highest case processing times compared to other provinces.
- Nova Scotia has few resources available to invest in new approaches. Low GDP and aging population.
- Yet, Nova Scotia is making change happen. The Department of Justice and the Judiciary have called upon other stakeholders such as Legal Aid, Public Prosecutions, Police, Corrections to increase effectiveness and efficiencies.
- Some examples:
 - Applying Differential Response. This means that not all cases should be handled the same way:
 - Some should be off-ramped to community restorative justice and out of the court system.
 - Those that proceed within the court system should be triaged: vulnerable witness cases, quick cases, lengthy and/or complex cases should be treated differently.
 - More case management to combat litigation drift.
 - Using Technology: increased use of Video Conferencing and E-Disclosure.
 - More information for more Nova Scotians about how to navigate the Criminal Justice System whether one is a self-represented accused, a witness, a complainant.
 - Investment in wellness approaches: mental health, addictions, domestic violence, sentencing circles. Yet these are serving only few Nova Scotians who struggle with these realities and so the issue of chronic reoffenders, and a safer and more productive society overall is insufficiently addressed.
 - Police who use frontend HUB approaches to provide preventative, collaborative help to at risk youth.
- Work is being done, but much more needs to be done. Chronic reoffending rooted in poverty, mental health and addiction requires the public to value a responsive criminal justice system. We all need to do a better job in engaging the general public in dialogue about our criminal justice system.

Solutions: What can the Federal Government Do?

- See Legal Aid as an investment.
- Legal Aid is a key partner in addressing chronic reoffending. Legal Aid Plans will be key in addressing overrepresentation of Aboriginal peoples in our criminal justice system. Chronic reoffenders and overrepresentation of historically vulnerable peoples add to delays. Differential response, video conferencing, wellness approaches that address root causes of intersection with the criminal justice system, cultural responsiveness all require a sustainable legal aid program.
- Task the FPT PWG (Permanent Working Group on Legal Aid) to focus on increased federal investment to support increased financial eligibility.
- Increased federal investment could support Legal Aid Plans to increase responsiveness to mental health and addictions.
- Federal investment could value technology application and infrastructure.

- Federal investment could support updating national data reporting. This would support better accountability and transparency. Legal Aid reporting has remained the same for the last 6 years I have been CEO and it is an exercise in trying to compare apples to oranges. Evidence-based criteria.
- Collaboration and integration:
 - Invite Legal Aid Plans to federal tables: Why are we not at The Coordinating Committee of Senior Officials? This would allow future policy priorities to consider what the impact would be upon Legal Aid Plans and those who struggle most with accessing justice (our clients).
 - We should also move forward on integrated justice system metrics.
 - Legal Aid Plans should be encouraged to support a multi-disciplinary approach (think nurse practitioners), including an approach that also provides help with everyday legal issues. NS Legal Aid provides a small measure of help on income and housing stability issues: e.g. CPP Disability issues, Residential Tenancy advice and help. See www.nslegalaid.ca publications, Annual Report on "Social Justice".
- Federal legal aid investment could address burgeoning remand problems through support of Enhanced Duty Counsel Programs; support for Legal Aid and Crowns and judges and police to focus on moving forward with realistic release conditions, through applying increased understanding of the issues faced by those who live in poverty each day. People in poverty live in a 'constant simmer of chaos' (Dr. Ab Currie) and have compromised abilities to comply. Yet we continue to place unrealistic release conditions which, in turn, means more charges, more delay. Unrealistic release conditions means more system-generated criminal records: This means more difficulty in securing employment, securing insurance, securing rental accommodations (in short, more economic instability and social exclusion), and increased recidivism. More chronic reoffending. Means more delay.

Respectfully submitted,

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