Access to Justice in Canada:

Canadian Bar Association Strategies to Make It Happen

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Since 1985, the Canadian Bar Association has vigorously lobbied for increased access to justice through better legal aid. Inadequate funding for criminal legal aid is a concern, but the problem is even more acute for civil law matters, such as those involving family law, refugee law, income support or tenants' rights. While our primary focus is always on access to justice, we also stress that legal aid lawyers must be fairly compensated. After substantial advocacy efforts failed to yield satisfactory results, the Canadian Bar Association recently decided to litigate, although our lobbying efforts continue.

Canada provides legal aid services in different ways. Some provinces and territories provide almost all services through staff-run offices. Others use a judicare model, where an individual applies to the legal aid plan, and if the plan approves the application, the individual receives a legal aid certificate. The individual then takes the certificate to a member of the private bar who accepts legal aid certificates, and that lawyer bills the legal aid plan according to any rules and restrictions. Some regions use a combination of these two models, and a few provinces have clinics that provide particular services, such as poverty law services dealing with workers' compensation or tenancy problems.[1] There are several pro bono programs across the country and many public legal information centers.

In this article I give some background about Canada's legal aid services and an overview of and rationale for the Canadian Bar Association's advocacy efforts to improve those services. I also outline the development of the Canadian Bar Association's constitutional challenge to clarify government responsibility to provide civil legal aid services when fundamental interests are at stake.

I. Canadian Bar Association History of Legal Aid Advocacy

Established in 1985, the Canadian Bar Association's Legal Aid Liaison Committee produced two significant national reports during the first three years of its existence.[2] In 1992, responding to what the legal community already saw as a crisis in access to justice, the Canadian Bar Association's governing body, our National Council, endorsed a legal aid Action Plan. The following year, the National Council passed a Charter of Public Legal Services.[3]

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[1] In most parts of the country, however, such services are unavailable.

[2] Canadian Bar Association, The Provision of Legal Aid Services in Canada (1985); *id.*, Legal Aid Delivery Models: A Discussion Paper (1987).

[3] Canadian Bar Association National Council, Resolutions 92-09-A and 93-11-A, respectively.

Between 1994 and 1996, the Canadian Bar Association unsuccessfully lobbied against a proposed shift in responsibility in the federal funding mechanism for civil legal aid from the federal government to the provinces and territories, with minimal accountability or transparency.[4] Soon after, as expected, the situation deteriorated, and in 1998 concerned lawyers asked the incoming association's President to put improving legal aid atop his priorities. Since then, improving legal aid has been a priority for the association.

II. Our Challenges

Our primary challenge has been to gain recognition that access to justice is as fundamental a need as access to health care or education. We have tried to press governments, and particularly the federal government, to guarantee that basic legal services will be available to everyone where critical interests are at stake. To create political pressure, we have also tried to raise public awareness of what access to publicly funded legal services can mean in people's lives.

The different funding mechanism for criminal and civil law services is indicative of the lower status of civil legal aid in Canada. The federal Justice Department funds criminal legal aid through cost-sharing agreements with each province and territory since Canada's Charter of Rights and Freedoms guarantees procedural rights and a fair trial. The transfer mechanism works because the amount transferred is clear: it must be spent on legal aid and a provincial or territorial contribution is part of the calculation.

The mechanism for federal funding of civil legal aid is different. Before 1995, the Canada Assistance Plan matched federal funds to what a province or territory actually spent; the federal transfer was linked to a contribution at the provincial or territorial government level. As with criminal legal aid, the amount spent was readily ascertainable, and the federal contribution had to be spent on legal aid. The Canada Health and Social Transfer replaced the Canada Assistance Plan with a global, "no strings attached" transfer for several health and social programs, including civil legal aid, to give provinces and territories greater autonomy and flexibility. The Canadian Bar Association vigorously opposed this change. We feared that it could permit the option of no coverage at all for civil legal aid, and certainly politicians would rather direct funds to education or health—services that attract greater public support.

No level of government in Canada seems responsible for providing adequate civil legal aid services. Provincial and territorial leaders point to the federal government and say that, given shrinking federal transfers, they cannot do better. The amount of the federal transfer notionally intended for civil legal aid services and the amount actually used for those services once the transfer is merged in a province or territory's general revenues are difficult to ascertain. The federal Justice Department may acknowledge our concerns but argues that its involvement ends with the global transfer. Making matters even worse, no federal department is even clearly responsible for civil legal aid.[5]

In 2002 British Columbia, one of Canada's largest provinces and one where legal aid had been fairly well funded, pushed the issue by eliminating most civil legal aid services in a dramatic cut over three years. The federal government did not intervene.

A real lack of national information about legal aid in Canada also makes it difficult

[4]Statutes of Canada. The change from federal funding for civil legal aid from the Canada Assistance Plan, repealed, 1995, c.17, s.32, to the Canada Health and Social Transfer is described more thoroughly below. Since 2004, the federal contribution for health has been placed in a separate designated transfer (Canada Health Transfer), and the global transfer renamed the Canada Social Transfer.

[5]The Justice Department has advised the Canadian Bar Association to obtain the interest and cooperation of four federal departments: Finance, Citizenship and Immigration, Justice, and Human Resources and Development Canada to discuss civil legal aid. Ironically, our attempts to initiate discussions usually result in the other ministers directing us back to the Justice Department.

to compare services, share information, or join efforts for improvements. Provinces and territories each deliver legal aid services through a separate plan and various delivery models. The thirteen plans meet annually, in different locations, but no unifying body sets national standards. Some plans determine eligibility by looking at household income, while others use individual income, some consider gross figures and others net, and some will factor in assets or require repayment or a contribution while others will not. For civil matters other than family law, such as landlord and tenant matters or denials of pension benefits, only Ontario offers any comprehensive coverage through a system of community legal clinics.

III. Our Strategies

Our strategies are lobbying, policy development, and litigation.

A. Lobbying

Legal aid is on the agenda at each meeting between the federal justice minister and Canadian Bar Association national president, although the minister generally begins by repeating that civil legal aid is not within the Justice Department's portfolio. Canadian Bar Association branch presidents also meet regularly with their respective provincial or territorial justice ministers, and association staff members are in regular contact with government officials.

In fall 2005 the Canadian Bar Association heard rumors that then Prime Minister Paul Martin had asked the previous justice minister to add responsibility for civil legal aid to his responsibilities for criminal legal aid. We were unable to confirm, before the call for elections, that this was true and, if so, whether this addition would be permanent. Earlier in 2005, then Justice Minister Irwin Cotler had initiated discussions with his provincial or territorial counterparts about a new civil legal aid fund, presumably involving added transparency and accountability. There is no indication to date that the new Conservative government will consider legal aid a priority.

During recent election campaigns, the Canadian Bar Association featured access to justice as a major campaign issue. We used our website to suggest questions for members in challenging electoral candidates. We sent to political party leaders letters asking for their views and posted their responses on our website.

B. Advocacy Tools

The Canadian Bar Association publishes a Legal Aid Advocacy Resource Kit to assist our members in speaking about legal aid more effectively and with a more consistent message. It contains background information and various tools, such as notes for a speech, a sample letter to the editor, or questions and answers to anticipate in an interview on legal aid. The kits have been well used and are regularly updated.

In 2002–2003, as the Canadian Bar Association started to consider litigation as a viable alternative to lobbying, we prepared materials for lawyers considering their own legal aid test case. A number of arguments and resources to facilitate this kind of litigation were added to the Legal Aid Advocacy Resource Kit.

C. Policy Development

Once adopted by our National Council, Canadian Bar Association resolutions become official Canadian Bar Association policy and are policy "building blocks" for further statements and initiatives on related subjects. Resolutions have covered many aspects of the legal aid problem, and, since 1985, the Canadian Bar Association has passed thirteen resolutions on legal aid and access to justice.

D. Legal Interventions

In 1998 the Canadian Bar Association intervened at the Supreme Court of Canada in *J(G) v. New Brunswick* involving the right to publicly funded legal representation in a child apprehension case.[6] A mother sought legal aid when

[6] *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46. Supreme Court of Canada judgments can be found at www.scc-csc.gc.ca/judgments/index_e.asp.

the New Brunswick minister of health and community services applied for the temporary custody of her three children, but the mother's request was denied because a certificate could only be issued for permanent guardianship applications. Section 7 of the Charter, the Supreme Court of Canada confirmed in 1999, gives parents the right to a fair hearing when the state seeks custody of their children and access to counsel through legal aid can be a key element of that right. The Supreme Court held that Section 1 of the Charter did not save the province's policy of fiscal restraint.[7] 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 ability of the parent to represent herself.

The Canadian Bar Association recently again intervened in *Little Sisters Book and Art Emporium v. Commissioner of Customs and Revenue Canada*.[8] We addressed the question of awarding advance costs to ensure that not-for-profit and small for-profit organizations can pursue their constitutional rights and protections when they claim a violation against a better-funded entity, such as a government agency.

E. Creating Political Pressure

A recurring obstacle to our efforts is the absence of political will to address deficiencies in legal aid. To create pressure on politicians by better informing the public about the people who need legal aid and the circumstances that can require people to seek legal representation, and to correct misperceptions about legal aid lawyers, we started a project called Legal Aid Watch in 1999. By featuring particular instances of people falling through the cracks in our legal and social systems, we highlighted the human consequences of inadequate legal aid and denied access to justice. Legal aid attorneys volunteered to participate in a national e-mail conversation to communicate problems in their areas and report egregious stories that the Canadian Bar Association might potentially publicize. Those stories went to all federal members of Parliament, as well as their counterparts in the provinces or territories where the stories took place, and to national and local media.

This project was more difficult to sustain than we anticipated. That the lawyer volunteers were already overcommitted perhaps made our requests for ongoing communication unrealistic. Also, the complexities of the lives of people living in poverty were obviously often not amenable to becoming the kind of stories that the media were keen to publicize. Still, we are contemplating ways to revitalize the Legal Aid Watch.

F. Considering Litigation

By 2001 the Canadian Bar Association was increasingly frustrated with the results of our extensive efforts to improve legal aid. Only where courts had ordered governments to provide legal aid services as constitutionally required were those services consistently available. The Supreme Court of Canada recognizes an obligation to provide legal aid in a few other types of cases than criminal ones, for example, in certain child protection matters or upon arrest and detention, and legal aid plans now cover those services.[9] We began to consider that meaningful progress might require Canadian courts to find that certain civil services must be available to comply with constitutional guarantees. That Canada's Charter has been generally interpreted as applying only to cases involving state action against an individual would present another hurdle, for example, when a parent requires legal aid in a family law matter.[10]

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[7] Section 7 guarantees life, liberty, and security of the person. Once a Charter right is found to be violated, Section 1 can serve to "save" the offending state action if a balancing test demonstrates that the public interests at stake justify the violation.

[8] *Little Sisters Book and Art Emporium v. Commissioner of Customs and Revenue Canada,* S.C.C. File No. 30894, was heard on April 19, 2006. The same lawyers who are handling our constitutional test case represented the Canadian Bar Association.

[9] See *supra* note 6; see also *R. v. Brydges*, [1990] 1 S.C.R. 190.

[10] *RWDSU Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. (See *supra* note 6 for link.)

We asked eight prominent constitutional scholars or litigators to consider the scope for expanding constitutional recognition of a right to civil legal aid. A report, called *Making the Case: the Right to Publicly Funded Legal Services in Canada*, synthesized those legal opinions.[11] In 2002 our National Council adopted that report and endorsed a litigation strategy.[12] At that point the Canadian Bar Association began seriously considering litigation as potentially our only recourse.

While the resolution was to "pursue a litigation strategy," we were under significant pressure in the following months to announce quickly the details of a constitutional challenge. We were sensitive to that pressure and how it might appear if we delayed, but we were most concerned with our responsibility to approach constitutional litigation cautiously.

Two academics, two constitutional litigators, a past President of the Canadian Bar Association and experienced family law lawyer, and a community and race relations advocate formed a committee. Complex issues required consideration before we could make a final decision about litigating. Some of the initial questions that the committee wrestled with were the kind of case to launch, the legal arguments to make, what kind of litigant or litigants would be best, how to find a litigant able to stay with the case possibly through to the Supreme Court, what part of the country and what court to file in, and, of course, how to fund litigation sure to last for several years, given that Canadian Bar Association member dollars were already committed for the ongoing operation of the association.

The committee gradually resolved these questions. With grant funding, we commissioned legal memos on Charter arguments to support state responsibility for legal aid under Section 7 (right to life, liberty, and security of the person) and Section 15 (the right to equality), constitutional arguments on fundamental constitutional principles, including provisions beyond the Charter such as the rule of law and judicial independence, arguments for the federal government's particular responsibility for legal aid, arguments around Canada's international legal obligations and relevant concepts from international human rights jurisprudence, strategies for developing an evidentiary foundation, and a review of possible cases for interventions. The committee presented a concise strategy for the case to the Canadian Bar Association board of directors in 2004. Following that, another grant allowed for a significant amount of detailed research in preparation for litigation.[13]

G. Canadian Bar Association Test Case

The Canadian Bar Association ultimately decided to launch a comprehensive constitutional challenge to the systemic problems with legal aid in Canada. The association will pursue the test case in its own right as a public interest party since we believe that no individual, or even a group of individual plaintiffs, can commit to enduring a lengthy test case. We know that cases can be settled with individual litigants just prior to trial, and prior to any precedent being established. We also know that an incremental approach in expanding the current jurisprudence around Section 7 would not address the existing limitations of the case law, especially for civil legal aid. Also, we want broad recognition that civil legal interests can be fundamental to life, liberty, and security of the person, not for just one area of law or type of case. We know that courts might recognize the fundamental problems, and the importance of the interests at stake, but then limit their finding to the fact situation before them. Certainly courts have dealt with individual claims, but there has never been a systemic challenge to a legal aid program.

[11] Vicky Schmolka, Canadian Bar Association, Making the Case: the Right to Publicly Funded Legal Services in Canada (2002).

[12] Canadian Bar Association National Council, Resolution 02-05-A, Legal Aid Strategy (2002).

[13] One of the members of the committee, Dr. Melina Buckley, acted as our principal researcher throughout the development of our test case and is now part of our litigation team.

The Canadian Bar Association argues that the federal government, the British Columbia government, and the British Columbia Legal Services Society have failed to provide what various domestic legal and constitutional guarantees require and what international covenants that Canada signed require. The association will bring the claim on behalf of "people living on low incomes, and who lack sufficient means to obtain proper advice and to obtain redress, including legal representation if necessary, in matters where their fundamental interests are threatened."[14] We argue that vulnerabilities due to the frequent, systemic, and multidimensional nature of the legal needs of poor people, and the additional layers of regulation imposed on poor people compared to those that do not live in poverty, exacerbate the need for publicly funded legal representation. The approach shifts from the current limited recognition of legal representation as sometimes required for a fair hearing to broader arguments for equal access to justice.

The Canadian Bar Association statement of claim argues that the federal Crown and the provincial government are obligated to provide legal aid in civil matters for many reasons found within Canada's Constitution Act of 1867, found under the Charter, and derived from Canada's obligations under international human rights law. Legal representation must be available when necessary to protect fundamental interests and to accord with the rule of law, substantive equality, and the independence of the judiciary. The association argues that British Columbia's civil legal aid is inadequate in that it excludes fundamental interests from coverage, in its financial restrictions that exclude many people living in poverty, and in the too-restrictive services that it covers. The areas of law not adequately covered, such as family, prison, poverty and refugee law, involve complex and sophisticated substantive law and procedural rules, and litigants cannot meaningfully access them without a lawyer's assistance. We are seeking a declaration that the defendants are in breach of several legal and constitutional obligations, and we are seeking an order of *mandamus* directing them to establish and maintain a legal aid system that meets their obligations to the people of British Columbia.

While we could have brought the case in any Canadian jurisdiction, we chose the province of British Columbia for several reasons. In 2002 that province went from a fairly well-funded legal aid system to one where little to no actual representation for civil legal aid is available. Cuts of 40 percent in the province's legal aid spending fell mainly on civil law services. The system retained legal representation where constitutionally required, but the system replaced most legal representation for civil matters with various public legal education services to facilitate self-representation.

We filed our statement of claim in June 2005.[15] The chief justice of the British Columbia Supreme Court is acting as case management judge, and preparation for discovery of documents is now in progress. As expected, the Canadian Bar Association will soon face a motion to dismiss our statement of claim since defendants argue, among other points, that the association has no direct or genuine interest in this matter.

IV. Conclusion

The Canadian Bar Association has tried many different approaches for communicating what our members see on a daily basis; too many people cannot exercise their legal rights or rely on their legal protections because they lack meaningful access to justice. While this work has not achieved the desired improvements, we continue to press governments to make legal aid a priority, to facilitate the efforts of concerned lawyers, and to share national information and strategies.

[14]Press Release, Canadian Bar Association, CBA Launches Test Case to Challenge Constitutional Right to Civil Legal Aid (June 20, 2005), www.cba.org/CBA/Advocacy/legalAid (Statement of Claim cl. 8).

[15]The documents related to our litigation can also be found on the Canadian Bar Association's website,www.cba.org.

At the same time, we have concluded that litigation will be required to get results, and we have determined that only a broad and perhaps ambitious test case will bring to light the systemic impact of inadequate legal aid. Discriminatory patterns and the need for overarching remedies will never become clear by considering one case in one region at one point in time.

The Canadian Bar Association is well aware that our advocacy for legal aid is often dismissed as being self-interested rather than regarded as genuine concern for access to justice. We recognize that courts generally defer to governments on decisions about allocating resources and determining social policy. Proving that Canada has a positive legal obligation to expand those cases in which it must provide funding for legal representation will not be easy. We are aware of the risks of litigation, such as a damaging precedent, negative political consequences, or an adverse costs award.

Remarkably every tough decision about this project, for funding and otherwise, has received virtually unanimous endorsement from Canadian Bar Association members. Lawyers actually practicing the types of law where legal aid is at stake, and those whose practices are removed from the issue, have been overwhelmingly supportive of the association's efforts for access to justice. At the Canadian Bar Association 2004 annual meeting, our National Council agreed to use association-deferred revenues for the litigation, with each of our thirteen branches contributing proportionately. We were able to retain counsel in February 2005 and were fortunate enough to find a very experienced team of counsel prepared to make a significant pro bono contribution.[16]

We realize that we are relying on novel legal arguments, but we think that our legal aid test case is based on sound analysis and strategy and is ultimately winnable. As Canada's national association for the legal profession, we believe we are the appropriate organization and perhaps even the only organization that can realistically pursue the fundamental interests at stake through this challenge. The launch of our case has had a remarkably coalescing impact within our membership, and it has been a very exciting event for the Canadian Bar Association. Our case presents a unique opportunity to demonstrate the strength of the association's commitment to improving justice, fairness, and equality, and we hope, through equal access to justice, to make a significant difference in improving the lives of many people living in poverty.

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[16]The Canadian Bar Association's litigation team: J.J. Camp, Q.C. (and past Canadian Bar Association president), Sharon Matthews, Dr. Gwen Brodsky, and Dr. Melina Buckley. See their biographies on www.cba.org.