

Restoring Funding for Legal Aid

Proposal to the Attorney General



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1. Executive Summary

Canadian democracy is governed by the rule of law. A fundamental principle of this rule is that every person within Canada is to be afforded the same protections of the law and justice. As stated by our former Chief Justice Beverly McLachlin: “There is no justice without access to justice.”

The most disadvantaged and vulnerable members of society: for example, those who live in poverty, with a mental illness, or are from marginalized communities, depend upon legal aid to access justice.

In his 2011 Report of the Public Commission on Legal Aid in British Columbia, Leonard Doust QC described legal aid as “a public service that is as essential as education, healthcare and social assistance... Indeed, the significance of the legal aid system is that it picks up where our other social systems fail, and timely legal aid can often significantly reduce the strain on healthcare and social assistance.”

It is therefore not surprising that British Columbians strongly support government funding of legal aid. A significant majority agree that government must give legal aid the same priority as health care, education, welfare and child protection.

Despite the fact that legal aid ensures our most vulnerable and impoverished citizens can have access to justice, and the significant public support for legal aid, for more than twenty years, successive governments have starved the legal aid system of the financial resources it needs to fulfill its essential role in our society.

As a result of cuts and consistent underfunding, legal aid is now in crisis. Starting in 2002 the budget of the Legal Services Society (LSS) was cut by 40 per cent over three years. The independent board of LSS told the government that it could no longer meet its legally required services. The Attorney General, Geoff Plant, responded by firing the board and changing the legislation so that the LSS and the government no longer have an arm's length relationship.

These cuts and consistent underfunding for many years have had a disastrous effect on the legal aid system. Eight five per cent of the legal aid offices around the province were closed and 75 per cent of employees lost their jobs. Legal aid for family law is now only available if there is a threat of violence or if the government is trying to have a child removed from their family permanently. Poverty law legal services no longer exist.

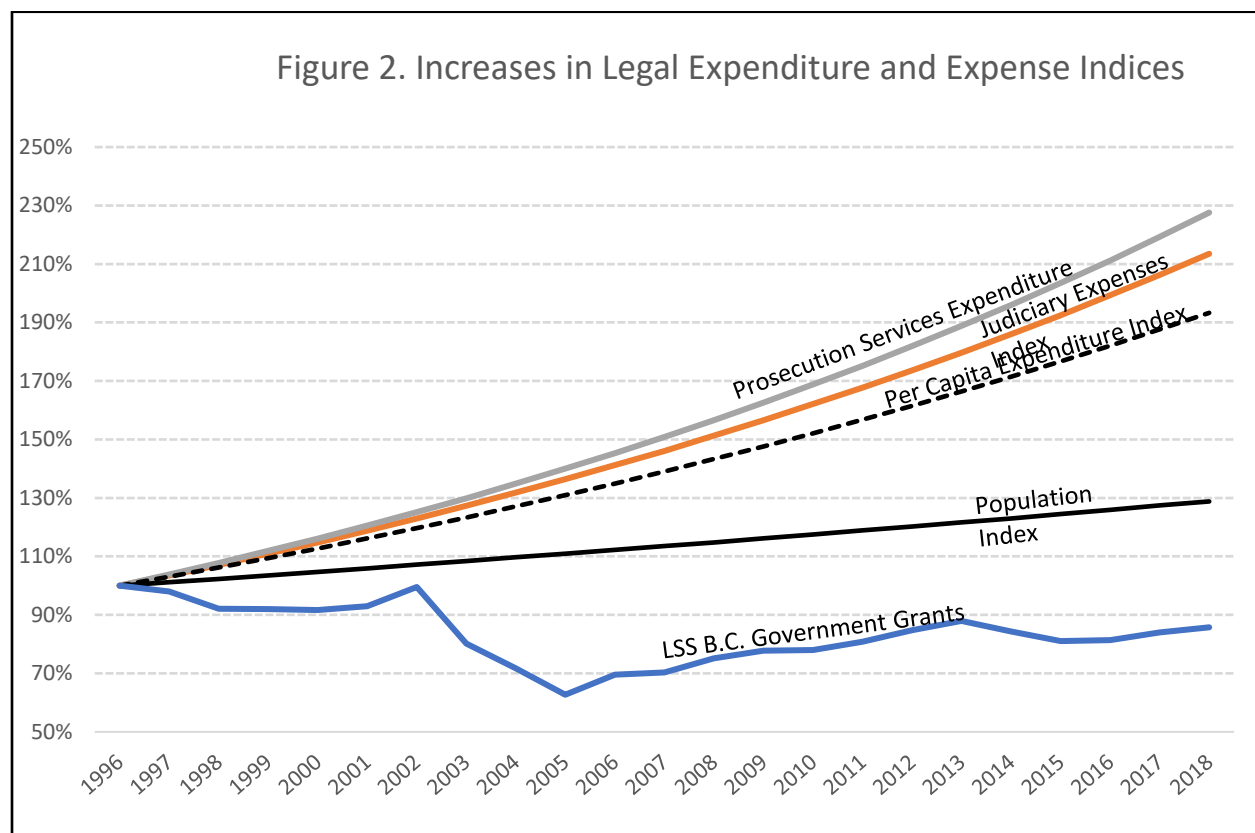
People with family law problems, the mentally ill and the drug addicted who are charged with a criminal offence, or a young mother whose child has been apprehended by the Ministry of Children and Family Development, all of whom are either not getting the assistance of a lawyer or are receiving the help of a lawyer who is being grossly underpaid or not paid at all for this essential work.

LSS has only been able to offer one raise in the tariff since 1991 with the result that the average hourly rate is now \$88. This represents about 27-30 per cent of the private law hourly rate, well below the 75 per cent recommended by Ted Hughes in his 1984 B.C. Task Force on Public Legal Services.

The legal aid tariff rate, which are the fees paid to legal aid counsel, has increased only once since 1991, an increase of 10% in 2006. That 2006 increase resulted in the rate changing from its 1991 level of \$80/hr. to an average rate of \$88. /hr. In comparison, Crown Counsel wages have increased 111.3% since 1994. The average weekly wages of British Columbians have increased 62.3% since 1994. The consumer price index increased 55.7% from 1994-2018. (see paragraph above where the comparables do not relate to wages)

By every objective measure the legal aid tariff is fundamentally grossly inadequate. To have simply kept up with inflation the \$80 rate in 1991 should now \$128.73. Private lawyers who do government work for the Ministry of Children and Family Development are paid \$135 an hour. ICBC pays private law counsel at rates well above the legal aid tariff, and those rates are reportedly increasing substantially in 2019.

The simple reason that the rates of pay of legal aid lawyers have fallen so far behind is that the legal aid budget, as a whole, is grossly inadequate. In 1992/1993, per capita spending on legal aid was \$25.22. To keep up with inflation, per capita annual spending should now be around \$40. Instead, per capita spending had sunk to approximately \$15.00 by 2017/2018. In real terms factoring in inflation this represents a 60 per cent decrease in per capita spending from the 1992/1993 levels. As a result, despite the obvious wealth of this province, British Columbia ranks 10th out of the 12 provinces and territories in per capita legal aid funding.



This massive reduction in legal aid funding means that only a very small number of people in B.C. can ever qualify for legal aid and, even then, only for criminal cases, a very small number of family cases, refugee claims, and child protection cases. For example, a one-person household income after deductions over \$1,580 a month would be ineligible for a legal aid lawyer in a criminal or family law matter.

It is not at all surprising that in 2011 Mr. Doust QC observed: “The level of coverage for every type of legal problem is inadequate. We have fallen from being a leader in legal aid provision to seriously lagging behind other jurisdictions on the legal aid front. We can no longer avoid the fact that we are failing the most disadvantaged members of our community.”

The solution to these obvious problems is simple: Government must restore the funding of legal aid to its 1992 levels, based on per capita levels at the time increased to account for inflation. Annual funding for LSS needs to be \$200,000,000 which equates to approximately \$40 for every BC resident.

Individuals and businesses who pay for legal services in British Columbia pay a seven per cent tax on those services. When this tax on legal fees was introduced in March 1992, its goal was to fund legal aid. The more than \$200 million raised by this tax is enough to fund a legal aid system all of us in British Columbia would be proud of.

In other words, the legal profession in BC generates more than sufficient revenue directly from the tax on legal fees to fund a legal aid system that can adequately and fairly fill the needs of our more marginalized residents. Only then can any government in British Columbia justly say that they are providing access to justice, a core value of the rule of law.

All lawyers in BC swear an oath to uphold the rule of law. All lawyers are ministers of justice, required by legal ethics to serve the cause of justice. In addition, our code of professional conduct obliges us to try and improve the administration of justice.

The Association of Legal Aid Lawyers (A.L.L.) was incorporated in 2018 with the specific goal of advocating for improved funding for legal aid and thereby improving access to justice.

Our more than 475 members represent a substantial majority of those lawyers who accept criminal legal aid referrals, as well as a substantial number of lawyers who do family duty counsel and child protection work. A.L.L. is supported by many important legal organizations, including the C.B.A and Trial Lawyers Association.

The crisis of legal aid funding and its impacts on access to justice require immediate action by government. Failing this, members of A.L.L. will begin job action that highlights the importance of the work legal aid lawyers do providing access to justice to our communities' disadvantaged and impoverished.

The legal aid lawyers who form a substantial majority of the membership of A.L.L. perceive that their work is not valued or respected by government, and indeed that it is actively *disrespected*.

No other conclusion is possible when their rate of pay has only seen a single 10 per cent increase in 28 years, a time period in which the inflation rate has been 60 per cent. No other conclusion is possible when government provides in 2018 a modest increase to LSS' budget but specifically directed those monies not be applied in whole or in part to the tariff. No other conclusion is possible when the cuts ostensibly motivated by fiscal austerity are not reversed in times of fiscal surplus. No other conclusion is possible when our legal colleagues in the Crown Counsel offices and civil lawyers employed by government have in the same time period enjoyed many pay raises while the legal aid tariff rates have remained frozen.

A.L.L. is hopeful that through negotiation with government, adequate funding for legal aid will move beyond being a subject for discussion and become a reality. However, our directors have recommended to our 475 members, in the event provincial funding is not immediately significantly enhanced, we should commence withdrawal of our legal services on April 1, 2019.

2. Legal Aid is an Essential Public Service

A fundamental aspect of the Rule of Law is that every person is afforded the same protection of justice. Former Chief Justice Beverly McLachlin has noted that “there is no justice without access to justice.”¹

The adequate provision of legal aid is an essential mechanism by which disadvantaged and vulnerable people are made aware of their legal rights and obligations and provided with a fair opportunity to participate in the adjudication of their legal problem. Without this assistance, those in our society who cannot afford legal representation are denied an even footing in an adversarial process that demands its participants put forward their best case as the means to determine truth.

In his 2011 *Report of the Public Commission on Legal Aid in British Columbia* Leonard Doust QC described legal aid as “a public service that is as essential as education, healthcare and social assistance... Indeed, the significance of the legal aid system is that it picks up where our other social systems fail, and timely legal aid can often significantly reduce the strain on healthcare and social assistance.”²

In serious criminal matters, where an accused’s liberty is at stake, the adequate provision of legal aid operates to reduce the financial expense of an already over-burdened court system. Although more than 80% of criminal trials in B.C. are resolved before trial, early resolution becomes challenging where the accused is unrepresented.³ On the other hand, where legal aid lawyers are overburdened and underfunded, the decision to ‘plead out’ may become the only way to effectively manage the criminal law process, resulting in injustice.

¹ *Making Justice Work*, *supra*, 10.

² Doust, *supra*, 8.

³ *Ibid*.

Likewise, adequate provision of legal aid is essential in family matters again leads to social and economic benefits. Additional healthcare costs, additional burden on the social welfare system, and additional burden on the court system can be avoided by the provision of legal aid to lower income people facing family law issues. Children are often the focus of family law disputes, and obviously benefit if their parents are not floundering without representation through legal proceedings.⁴

Some civil law contexts engage similar policy considerations as does criminal law insofar as the potential outcomes are of an analogous importance to the loss of liberty in the criminal law realm. A parent losing custody of their child, an individual involuntarily committed to a health facility, a refugee seeking asylum - inadequate access to justice in these circumstances is unfair to the unrepresented individual and has repercussions for the social systems that will engage as a result.

Critically, this need for legal aid is often imperceptible to the average Canadian. Unlike healthcare or education, where every person will require and interact with the system at some point in their lives, legal aid is intended to support those who cannot otherwise afford to fairly participate in the legal system. Most Canadians will never become aware of a deficiency in the provision of legal aid as they will never need to rely on these services. However, this does not mean that the public would not endorse this aspect of our social safety net were its consequences more visible. The social welfare system affords basic essentials to those who cannot afford them: food, clothing, shelter. The assertion of our basic legal rights is a fundamental part of that equation and is best satisfied by the adequate provision of legal aid.⁵

With inadequate legal aid, Canadians who are poverty-stricken and marginalized and cannot navigate the law, or speak for themselves within it, must live without its protection. Then-Attorney General of the United States, Robert F. Kennedy, stated in 1964 that “The poor man looks upon the law as an enemy, not as a friend. For him the law is always

⁴ Ibid.

⁵ Doust, *supra*, 13-14.

taking something away.”⁶ Without legal aid, impoverished Canadians do not participate in the law, they are subjected to it.

The particular need of low-income Canadians is augmented by the nature of our justice system itself. Low-income accused in criminal matters are more likely to be held in prison while their wealthier counterparts are released on bail until trial. In civil law too, low-income people are disadvantaged and are more likely to need legal assistance as consumers (as often targets of consumer fraud), in housing (sanitation and safety in urban areas, landlord-tenant disputes), and employment (unemployment insurance, disability benefits).⁷

While the accessibility of legal information ‘self-help tools’ (such as online through the LSS) may provide some limited assistance to people who cannot afford a lawyer, it is a grossly insufficient substitute for actual legal representation and advice. 40% of British Columbians have literacy impediments. Moreover, English is a second language to many B.C. residents. Even for those of high comprehension and fluent in English, these resources cannot teach someone to effectively represent themselves in court.⁸

Finally, a key aspect of the adequate provision of legal aid is timeliness. Early intervention in a legal problem can not only reap individual benefits (minimization of stress and mistaken actions in the legal process), but also systemic ones. Expeditionousness in seeking appropriate measures can resolve legal issues more quickly and thus reduce costs in the legal aid budget and the court processes. Where legal aid is delayed, issues become significantly more complicated.⁹

A critical aspect of the delivery of adequate legal aid is its full recognition as an essential public service, as has been recognized for healthcare, education, and social assistance.

⁶ *Legal Aid and the Poor*, *supra*, 3.

⁷ *Ibid*, 7-8.

⁸ Doust, *supra*, 23.

⁹ *Ibid*, 23-24.

Legal aid is an absolute necessity in the administration of justice, especially in an increasingly complex legal landscape:

Today, there is a much higher degree of administrative and criminal regulation of our lives. Our statutes and regulations have doubled or tripled in number and length. Procedural complexity has increased significantly. For a while, the legal aid system grew in tandem with these developments but at present it is hopelessly out of step. The nature and volume of required legal aid continues to increase in the face of reduced social investment in this essential service.¹⁰

3. History of LSS Funding

In the report of the 1984 B.C. Task Force on Public Legal Services, Commissioner Ted Hughes recommended that the legal aid tariff be raised to match 75 percent of the fees an average lawyer would charge a private client of modest means.¹¹ That report was ignored. In the years that followed the report legal aid rates remained very low.

In 1991 a service withdrawal by legal aid lawyers resulted in the hourly tariff being raised to \$80.¹²

The provincial government instituted a 7% PST on legal fees in March 1992, with the advertised goal of this new tax being to fund legal aid: however, each successive government has reneged on this promise and instead put the money into general revenue. The funds raised by the tax would be more than sufficient to cover the costs of legal aid.¹³

¹⁰ Doust, *supra*, 44.

¹¹ As noted below, LSS' average tariff hourly rate of \$88 represents on average 27-30% of average surveyed 2018 billing rates of lawyers who practice in the areas of law covered by legal aid.

¹² *Adequate Tariffs to Meet Client Needs*, *supra*, 1.

¹³ Beveridge, *supra*, 3.

In 1992 the government-commissioned Review of Legal Aid Services in British Columbia ("*Agg Report*") concluded that there should be a reasonable, permanent relationship between the legal aid tariff and comparables such as Crown Counsel wage scales, legal services staff lawyer scales, and contract counsel rates.

Funding for the Legal Services Society, and the hourly tariff, stagnated, however, in the 1990s. While provincial contribution to LSS was \$96,988,622 in 1994, it had declined to \$81,810,541 by 2000, notwithstanding inflationary effects and population increases in the interim.

In the years between 1994 and April 2005, due to budgetary constraints various "holdbacks" ranging from 10% to 15% were applied to the LSS tariff fees.

After a number of years of declining or stagnant funding, beginning in 2002 the Province instituted severe cuts to the budget of the Legal Services Society. Over three years provincial funding was cut by 40%. After the funding cuts were announced, the LSS Board advised that it could not meet its statutory requirements to fund services within the budget set by the Attorney General. The Attorney General fired the Board. The government of the time amended the *Legal Services Society Act* to restructure the Board and remove the arm's-length relationship between LSS and government, through the office of the Attorney General, is a party to most proceedings covered by legal aid (i.e. criminal and child protection cases.)

Henceforth government could dictate through *Memoranda of Understanding*, which are entered into between LSS and government every three years, funding priorities and the services to be funded, a matter that had previously been within the mandate of the Board.

The result of the 2002-2004 funding cuts was that 85 per cent of legal aid offices around the Province closed, and 75 per cent of employees lost their jobs. Prior to the cuts, legal aid funded representation for a variety of family law problems, but as a result of the cuts family law representation became only available in cases involving child apprehension or the threat of violence. Poverty law services including those related to housing and income

security were eliminated. Due to the higher cost of staff lawyers, LSS' mixed private bar lawyer and staff lawyer model was replaced with one involving almost exclusively private bar referrals.

The legal aid cuts were so controversial that in 2002 the members of BC Law Society voted to censure the then Attorney General, Geoff Plant. Len Doust QC noted in his seminal 2011 report on legal aid that no other province or territory in Canada made such drastic reductions to its legal aid budget while coping with the same fiscal factors that led British Columbia to take these steps: in fact, Ontario managed to increase its contribution to legal aid during those same lean economic years.¹⁴

In April 2005, LSS reduced the holdback on lawyer fees from 10% to 5%, making the effective tariff hourly rate \$76. In June 2005 the holdback was removed, and lawyer fees became payable without holdback deductions for the first time in many years.

In 2006 the only tariff rate increase since 1991 was made, an average increase to the hourly rate of approximately 10%, resulting in an average hourly rate of \$88.¹⁵

Subsequently, between 2009 and 2011, LSS faced additional significant budget pressures and again made extensive reductions to its operations and infrastructure.¹⁶ LSS' budgets have seen little growth since then.

As a result of its limited funding, the Legal Services Society has increased tariff rates only once since the increase to \$80/hr. in the early 1990s – the modest increase in 2006 to an average hourly tariff of approximately \$88.

¹⁴ *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia*, p. 56

¹⁵ As will be explained below, for criminal cases, in addition to the usual hourly range of \$83.90-\$92.29, in some large cases senior counsel with requisite experience are paid \$125/hr., and may be permitted junior counsel to assist them at \$62-\$69/hr. In a rare number of very complex cases highly experienced counsel may be paid an "exceptional responsibility" premium of an additional 15%.

¹⁶ *Making Justice Work*, p. 19

4. Overview of Current LSS Tariff Services

The Legal Services Society provides three broad categories of core services: legal information and education, legal advice, and representation by a lawyer.

Information and education are largely provided via reports and other publications made available online. Legal advice is provided through telephone services and duty counsel. Eligible clients receive representation assistance through referrals to members of the private bar.

LSS provides legal services in the areas of immigration, child protection, criminal, and family law cases involving the threat of violence. Many of the legal services LSS provides are constitutionally mandated.¹⁷ In criminal law, the right of impecunious persons to state-funded counsel was confirmed by the Supreme Court of Canada in *R. v. Rowbotham* [1988] 41 C.C.C. (3d) 1 (S.C.C.) In child protection matters, the constitutional right of persons unable to afford counsel to state-funded counsel was recognized in *New Brunswick (Minister of Health and Community Services) v. G. (J.)* [1999] 3 S.C.R. 46 There is also arguably a constitutional right to state-funded counsel in refugee matters, although the Courts have not to date adjudicated that issue.¹⁸

Financial eligibility rules are such that only a small percentage of low-income British Columbians qualify for legal aid. In order to be financially eligible, the present maximum monthly income level (net of tax, CPP, EI and a handful of other deductions) for a one-person household is \$1580. A higher level of \$2580 applies to child protection cases. For a two-person household the maximum allowable income to qualify for legal aid is \$2210 (\$3210 for child protection cases).¹⁹ By comparison, at present minimum wage rates, a British Columbian who works 40 hours per week at minimum wage has a gross monthly

¹⁷ *Making Justice Work*, (July 1, 2012), 19.

¹⁸ *Refugee Reform and Access to Counsel in British Columbia*, Sadrehashemi, Edelmann, Baustad, pp. 24-27

income of \$2192. Household assets may disentitle applicants whose income meets the eligibility requirements.

In 2017/18 LSS authorized 19,339 criminal referrals, 3,342 family referrals, 2,280 child protection referrals, and 1,334 immigration referrals.

The hourly tariff rate is presently \$83.90/hr. for lawyers of less than 4 years call to the bar, \$88.10/hr. for lawyers of 4-10 years' call, and \$92.29/hr. for those lawyers of 10 or more years' call.

For family, child protection, and immigration tariffs, lawyers are paid the hourly tariff but capped for specific services. For example, the family law tariff provides for a maximum of 35 hours of general preparation (increased from 25 hours in April 2018).

The vast majority of criminal law services are compensated based on a block tariff that provides set pay for specific services. For example, payment for a bail hearing relating to a minor offence is \$100 regardless of the time involved. Using the hourly tariff as a guide, \$100.00 represents approximately 68 minutes of work at \$88.10 an hour.

Complex and lengthy criminal matters, where the Court hearing is scheduled to last more than 20 half days, or if the case is complex and the preparation time is anticipated to be more than 75 hours, are paid according to the hourly tariff and are case-managed within LSS' "Criminal Case Management" system.

In serious criminal cases if a "junior" lawyer is authorized by LSS to assist counsel, the hourly rates the junior lawyer is paid range from \$62.93 to \$69.22, depending on the lawyer's experience. Sometimes quite senior lawyers do that work at the junior counsel rates.

In a small number of the most serious criminal cases an enhanced fee is provided to attract experienced counsel to complicated files. That fee is \$125/hr. Of those complex

cases, a small number that are deemed to be exceptionally costly, complex and serious may attract an exceptional responsibility premium for senior counsel who meet certain criteria. That premium is 15% above the enhanced fees hourly rate.²⁰

Duty counsel are paid pursuant to the hourly rate tariff. Immigration duty counsel provide legal advice to persons detained in custody and represent detainees before the Immigration and Refugee Board. Family duty counsel attend at courthouses where Supreme Court and Provincial Court matters are being heard, provide legal advice to eligible persons, and may sometimes appear with those clients in Court. Out-of-custody criminal duty counsel provide summary advice to accused persons making initial appearances and, in some cases, assist clients with simple bail variations, negotiations, or guilty pleas. In custody criminal duty counsel interview accused who are in custody, provide them with legal advice, obtain from the accused the background information and instructions necessary to represent them in court, and attend with them in court for bail hearings, remands, variations of bail, adjournments, guilty pleas, and other proceedings.

5. Deficiencies of Present B.C. Legal Aid Funding

a. Coverage and eligibility

i. Limitations on coverage and eligibility

As noted above, financial eligibility rules are such that only a small percentage of low-income British Columbians qualify for legal aid. A.L.L. submits that financial eligibility rules ought not to deprive low-income British Columbians of legal aid funding when they are facing marital breakdown, criminal charges or other serious legal issues and cannot afford a lawyer.

Eligibility rules are furthermore inflexible. In 1989 the *Legal Services Act* included flexible eligibility rules, which meant that LSS had the discretion to consider a variety of factors in

²⁰ A very small number of high-cost cases, those where fees and disbursements exceed \$175,000, are funded outside the LSS Budget through special funding agreements..

determining whether or not an individual could afford a lawyer, and assessment as to whether there was a subjective need of legal services was the guiding principle. Subsequently LSS removed that flexibility and instituted strict financial eligibility rules.

Lack of flexibility regarding eligibility criteria means that in criminal cases a number of those who do not meet financial eligibility requirements for legal aid bring *Rowbotham* applications to the Court, seeking Court-ordered funding as a constitutional remedy. The Province then hires counsel to defend the applications, and investigations of the applicant's finances take place. Many *Rowbotham* applications ultimately result in government agreement to fund the defence, after both the government and the applicant have incurred legal expense. In some cases, the Court orders funding. *Rowbotham* applications also involve expense associated with utilization of court and judicial resources.

Were LSS' eligibility criteria lower and/or more flexible, many *Rowbotham* applications could be avoided.

Many needy low-income persons do not have the knowledge or financial wherewithal to bring a *Rowbotham* application. If eligibility rules were more flexible and based on subjective need, LSS could approve funding without the necessity of any application to the Court, thus enhancing access to justice.

LSS' coverage rules for family law are such that only in cases of threatened violence can even the most impecunious citizen qualify for legal aid. This represents a huge change from the legal aid system of the 1990s. Prior to the 2002-04 cuts, referrals were available for many family law matters and accounted for 19.7 per cent of the LSS budget. By 2004/05, funding for family law tariff referrals (other than for child apprehension) had fallen to a sum that represented less than 1 per cent of the LSS budget.²¹ While family law coverage has expanded in recent years, it remains far below the coverage levels of

²¹ *Legal Aid Denied, supra*, p. 22

a generation ago. Only a small number of family lawyers are willing to take on any family cases at the low tariff rates and with capped hours.

The severe 2002-2004 cuts to legal aid, including the elimination of poverty law services and the decimation of family law legal aid, disproportionately affected British Columbia women, whose need for legal services and representation is overwhelmingly in the areas of family and civil law.²² That gender disproportionality in funding has not been remedied in the intervening years, and much more of every legal aid dollar goes to funding of legal services for men than was the case prior to the 2002-2004 cuts.

In criminal cases there is no coverage for even the poorest British Columbians unless there is a prospect of jail time. As a result, lower-income British Columbians who face criminal convictions that may interfere with their ability to obtain or maintain employment have no legal aid coverage unless there is the prospect of jail.

Given the highly-restrictive rules regarding coverage and eligibility, most low-income British Columbians do not qualify for legal aid assistance when facing a criminal charge, a child custody dispute, or a contested divorce. Generally speaking, A.L.L. submits that both eligibility and coverage are very much inadequate. As Mr. Doust observed:

...the level of coverage for every type of legal problem is inadequate. We have fallen from being a leader in legal aid provision to seriously lagging behind other jurisdictions on the legal aid front. We can no longer avoid the fact that we are failing the most disadvantaged members of our community.²³

ii. Self-represented litigants

One major consequence of the current deficiencies in legal aid coverage and eligibility in B.C. is the rate of self-represented litigants. The B.C. Supreme Court's 2017 annual report cites the growing number of unrepresented litigants as a significant reason for the increasing complexity of trials. The report notes that these litigants are often poorly versed

²² *Legal Aid Denied: Women and the Cuts to legal Services in B.C.*, Canadian Center for Policy Alternatives, West Coast LEAF, 2004, p. 7

²³ Doust, *supra*, 42.

in court procedure, resulting in lengthier hearings and an increased burden of vigilance on judges to ensure that parties' legal rights are protected.²⁴

A University of Toronto study concluded that self-represented litigants not only create a burden on the court system, but also tend to be less satisfied with the outcomes of their cases than represented litigants. Adequate legal aid funding can ameliorate both of these undesirable outcomes by providing counsel for many of those who would otherwise self-represent.²⁵

Self-represented litigants have become so commonplace that the justice system participants have begun to refer to them using acronyms such as 'SRLs' or 'self-reps.' In the mid-1990s, it is estimated that only five percent of litigants went unrepresented. Twenty years on, between 10 and 80 percent of litigants are self- or under-represented, depending on the type of claim and level of court. This growth has led to concerns of a two-tier justice system, where self-represented litigants are not afforded the same opportunity to exercise their legal rights as their represented counterparts.²⁶ It is axiomatic of course that powerful corporate or state entities are always represented by counsel.

Self-represented litigants require more court time and more court services. Registry staff often find themselves struggling to provide legal information. Judges and lawyers strongly perceive that self-represented litigants are less likely to have the wherewithal and knowledge to settle civil matters. Judges have noted the difficulty in preserving their neutrality while also meeting the needs of unrepresented parties.²⁷

²⁴ *Annual Report*, Supreme Court of British Columbia (2017), 2.

²⁵ *Making Justice Work*, *Supra*, 23.

²⁶ *Equal Justice*, *Supra*, 44-45.

²⁷ *Ibid*, 45.

The House of Common Report of the Standing Committee on Justice and Human Rights observed that “self-represented litigants often clog up the court system and contribute to court delays.”²⁸

Of course, self-representation causes additional burden not only to other parties and the court system generally, but also to the unrepresented parties themselves. More than 200 U.S. studies have shown that self-represented litigants are unsuccessful in their cases more often and more substantially than parties with counsel. Furthermore, the experience of self-representation has been shown to result in health, financial, and social consequences.²⁹

Importantly, improved funding to legal aid can ease this burden by providing greater assistance not only to otherwise unrepresented litigants, but also to under-represented litigants. The Canadian Bar Association’s report, *Equal Justice*, defines under-represented litigants as those who “may have received some legal help short of full representation but require full representation for their matter.”³⁰ This definition can be expanded to include those litigants that have been provided counsel through legal aid, but have had their representation impeded by the limitations on coverage such as caps on hours of lawyer service or necessary disbursements.

In criminal law, Crown Counsel face difficulty in engaging in informal plea negotiations in the absence of defence counsel. Further, unrepresented accused may plead guilty without a real comprehension of the consequences of conviction, or ‘just to get it over with,’ in cases where valid defences may exist.

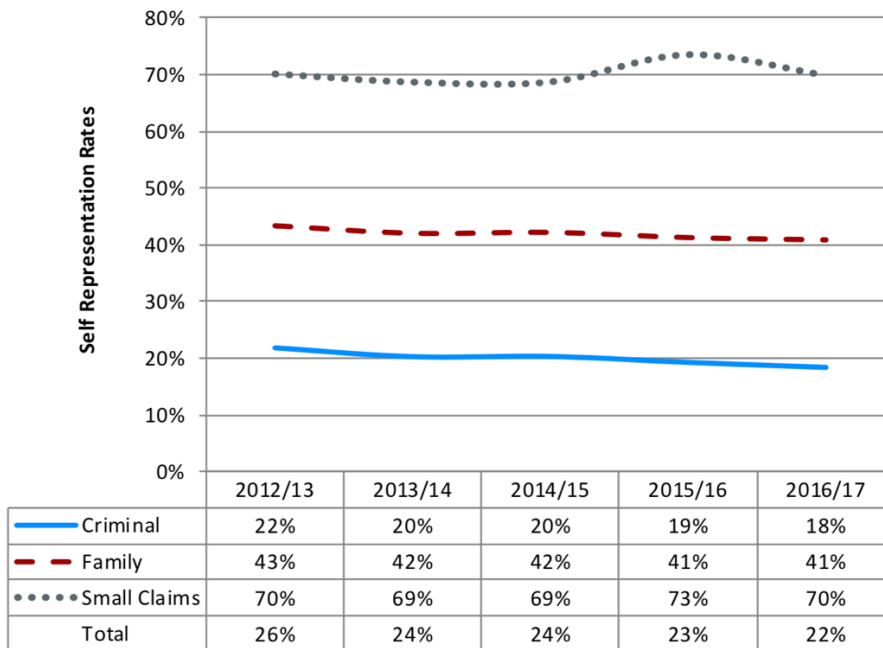
²⁸ *Access to Justice Part 2: Legal Aid*, House of Commons Report of the Standing Committee on Justice and Human Rights (October 2017), 7.

²⁹ *Equal Justice*, Supra, 45-46.

³⁰ *Equal Justice*, Canadian Bar Association (November 2013), 44.

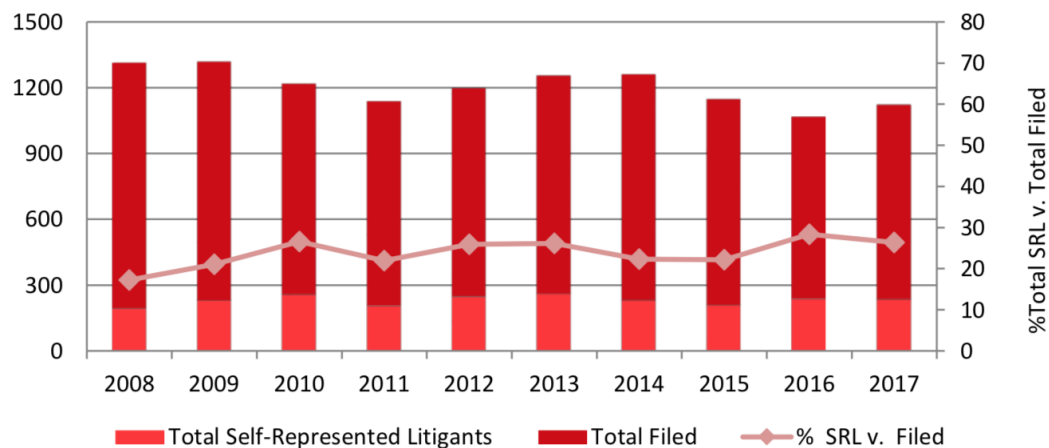
The B.C. Provincial Courts have data for the rates of self-representation before them:³¹

RATE OF SELF-REPRESENTED APPEARANCES BY DIVISION, 2012/13 - 2016/17



The B.C. Court of Appeal has similar data:³²

Total Appeals Filed with Self Represented Litigants/Total Appeals Filed 2008 - 2017



³¹ *Annual Report*, Provincial Court of British Columbia (2016/17), Figure 4, p. 51.

³² *Annual Report*, Court of Appeal for British Columbia (2017), Figure 5, p. 18.

The Registrar of the Court of Appeal has provided A.L.L. with data that describes the burden posed to the system by self-represented litigants who pursue criminal appeals.

The data labelled “Set 1” provides the number of BCCA case management hearings in a given year. Though the number of criminal appeals has remained fairly constant, the number of court hearings related to case management have steadily increased.

Set 1: Number of Yearly Criminal Case Management Hearings

YEAR	TOTAL CM Hearings
2010	0
2011	44
2012	139
2013	137
2014	140
2015	209
2016	248
2017	275
2018 (Jan-Jun)	182

Set 2 is data related to criminal case management hearings involving at least one self-represented person. The percentage of court case management hearings involving self-reps have also been steadily increasing, from 20% of hearings involving self-reps in 2011 to an estimated 41% in 2018, based on the data for the first half of the year.

Set 2: Number of Criminal Case Management Hearings Involving Self-Represented Persons

YEAR	TOTAL CM Hearings	Total Self Reps	% With Self Rep
2010	0	0	0
2011	44	9	20%
2012	139	34	24%
2013	137	26	19%
2014	140	52	37%
2015	209	77	37%
2016	248	86	35%
2017	275	101	37%
2018 (Jan-Jun)	182	75	41%

Set 3 provides the Court's actual sitting time (minutes) conducting case management in criminal matters.

Set 3: Total Actual Sitting Time in Chambers Conducting Criminal Case Management, to the Minute (Total, and by Quarter)

YEAR	Total By Year	Q1 (Jan-Mar)	Q2 (Apr-Jun)	Q3 (Jul-Sep)	Q4 (Oct-Dec)
2010	0	0	0	0	0
2011	663	20	0	275	368
2012	2921	653	1318	560	390
2013	2150	546	723	271	610
2014	2496	512	593	845	546
2015	2837	764	776	603	694
2016	2751	605	714	527	905
2017	3887	827	1328	682	1050
2018 (Jan-Jun)	2655	1127	1528		

In considering the financial expense associated with self-represented litigants whose lack of legal expertise leads to protracted or unnecessary court hearings, one aspect of that cost is courtroom staffing expenses for judges, court clerks, registry staff and sheriffs. Based on research LSS commissioned regarding costs of court hearings, the hourly cost

has been assessed for provincial family court at \$581/hr., provincial criminal court at \$747. /hr., Supreme Court at \$653/hr. In addition to those staffing costs, there is cost associated with facility costs (facility lease expense, capital costs, tenant improvements;) court overhead (management, administration, automated systems;) out-of-court sheriff expenses (document service, prisoner escort, jury administration;) and judicial support (administration, trial scheduling, secretarial).

Thus, from a “business case” perspective inadequate coverage and eligibility create expense burdens related to increased utilization of Court time. From the more important social and access to justice perspectives, lack of representation impedes the ability of those with low income from accessing justice and leads to consequential impairment of their lives in a variety of ways.

iii. Over-representation of indigenous persons

The current limitations on legal aid coverage and eligibility have as one consequence the reality that there is inadequate state-funded legal representation available to combat the significant over-representation of indigenous children in care. A 2015 review of child protection in B.C. found that of the 7,200 children and youth in care, a staggering 60.6 percent were indigenous. Despite government efforts to address this substantial disparity, the proportion of indigenous children in care has continued to grow.³³

As Mr. Doust commented in his 20-11 report, “Indigenous children and families involved with the child protection and family court systems are particularly vulnerable to rights violations. Early access to legal advice is critical.”

Limitations on coverage and eligibility are also one factor, A.L.L. submits, that has contributed to the failure of successive governments to curb the over-representation of indigenous persons in criminal courts and in our correctional facilities. For example,

³³ Bob Plecas, *Plecas Review, Part One: Decision Time. A review of policy, practice and legislation of child welfare in BC in relation to a judicial decision in the J.P. case*, p. 9.

obtaining and making effective use of “Gladue” reports takes considerable time, skill and experience, which can only be provided by counsel.

b. The Tariff

i. Stakeholder commentary

The inadequacy of present tariff rates was addressed by the Canadian Bar Association – BC in its publication *Agenda for Justice (February 2017)*, at page 6: “Current rates, which have been increased just once since 1991, do not provide adequate compensation for the services needed to assist the low-income people who qualify for legal aid. They are less than the cost of most lawyers’ hourly overhead. As a result, the number of lawyers in BC who are prepared to take on legal aid cases has dwindled as they cannot afford to act.”

The Law Society of BC, in “A Vision for Publicly Funded Legal Aid in British Columbia,” published the results of a November 2016 survey of BC lawyers. Forty percent of lawyers indicated that they operate at a loss by providing legal aid, 46% reported they break even, and 12% make a profit. Lawyers reported on average that they would need to make \$150 an hour to break even on a legal aid retainer.

ii. The Criminal block tariff

The present-day tariff for the vast majority of criminal cases is based on a block-fee structure. It is only the most serious of cases that counsel is paid on an hourly basis.

In a typical criminal file, counsel learn of the case through a call from a client or from an LSS intake office inquiring as to whether the lawyer will accept a referral.

If the client is in police custody, the circumstances may then require counsel to travel to the police station where the accused is held to meet with the client and provide initial advice. On the first appearance date in court, counsel will typically attend at the courthouse and interview their client in person or by video link to the institution where they are held and discuss with Crown Counsel whether the client’s release on bail is consented

to. If Crown Counsel is seeking the detention of the accused, or if proposed terms of release are contentious, more work must be done by counsel to prepare for a bail hearing before the Court.

The tasks that are essential to preparation for a bail hearing include obtaining the written charge details and the circumstance of the alleged offences and reviewing them. Another critical task is interviewing the client to determine their circumstances including work history, residence or living situation, health issues, immigration status, language skills, previous criminal record, relationship to any proposed sureties, co-accused and the alleged victim(s), and potential defences to the charges that may be relevant at the bail stage. This information is essential in order to assess whether there is a reasonable prospect of bail based on the strength of the Crown case, potential defences, and the legal and factual matters that are relevant to bail. If a bail hearing is to proceed, then a proposed release plan must be crafted, and the facts and law relevant to the various matters that will be relevant to potential release must be assembled.

As many legal aid clients are among the most marginalized citizens in the Province and present with complicating factors such as financial insecurity, substance abuse issues, inadequate housing, language barriers or mental health issues, counsel in preparation for a bail hearing may need to undertake the following additional steps: calling treatment centers to locate an available bed for their client; locating a bed at a shelter or other transitional housing provider; liaising with existing treatment providers, mental health workers and social services to determine what supports are available in the community to assist the accused if he is released.

The legal aid lawyer must then prepare for the bail hearing and attend Court for that hearing. As there may be numerous other bail and other matters being addressed in remand Court, counsel frequently face long waits for their matter to be called.

For all of the work the lawyer has done up to this point they will be paid, other than for the most serious offences, \$100-\$150 for the bail hearing depending on seriousness of the

charge. If they visited their client in custody at a location other than the courthouse, then they will be able to bill one such visit in the entire history of the case at \$90.

Following the bail hearing more detailed interviews with the client will be required. All of the disclosure materials must be obtained, which typically requires counsel review what has been provided, identify deficiencies, and bring them to the attention of the prosecutor. If there is disagreement about what must be disclosed, those must be brought before the Court.

Under the present-day tariff, few Court appearances are paid for explicitly, other than trial days, bail hearings, and sentencing hearings. Data from 2009/10 indicates that at that time the average criminal file involved 5.9 court appearances. Thus, the block fee the legal aid lawyer receives for a case notionally includes compensation for all of those appearances – but in reality, most court appearances are not compensated at all.³⁴

Counsel must review disclosure and take instructions from their client as to whether to schedule a trial versus attempt to negotiate potential resolution through guilty plea, potential resolution through the dropping of the charges, or potential resolution through diversion. These determinations require knowledge of the file, the legal issues, and the client's version of events. Obtaining these instructions may require travelling to the institution the client is in custody if they have not been released on bail (for which trip the lawyer will receive no fee if they have already met with the client once in custody.) Research may be required into the offence and potential defences so a thorough picture of the client's options can be provided. Where a client is inexperienced with the justice system, mentally ill or otherwise requires additional time and effort to obtain appropriate instructions, more than one meeting may be required. None of this legal work is directly compensated under the block tariff other than the \$90 fee to visit the client in custody if it is the first such visit.

³⁴ Ministry AG Annual Service Plan, 2011/2012 – 2013/14 revised, p. 15

While this additional work is being conducted the lawyer will be required to appear in court at regular intervals and update the Court on the progress of the case. The lawyer will not be paid for any of these subsequent appearances.

If the matter is resolved prior to trial, as most cases are, the lawyer will then be permitted to bill a further flat fee, regardless of amount of work that went into bringing about that resolution as follows.

First, if counsel successfully negotiates with Crown Counsel and a stay of proceedings is entered, or Crown agree to refer the matter to diversion (alternative measures,) or if the file is referred to Drug Treatment Court, the lawyer may bill an additional \$160 - \$300 for a (depending on seriousness of the offence) for “Non-Trial Resolution.” In addition, for each criminal case in provincial court, counsel may bill an additional \$70-\$100 per case as a “provincial court fee.”

Alternatively, if the client enters a guilty plea and his sentencing hearing is conducted over up to ½ day in court, counsel would bill the \$160- \$300 non-trial resolution fee plus the \$70-\$100 provincial court fee plus an additional \$80-\$125 to conduct the sentencing hearing.

If the matter does not resolve and proceeds to trial, then a flat trial fee is payable. This fee includes compensation for all preparation time, legal research, reviewing disclosure, interviewing witnesses, and conducting the trial. For all but the most serious category of offences, the range of the block fee, depending on seriousness of the offence, is \$480-\$800 for the first day of trial and \$315-\$490 for each subsequent half-day of trial. Thus for, say, a 1½ day trial, the lawyer is paid \$795-\$1290. This means for a typical indictable sexual assault trial of, say, 1½ days, the defence lawyer will receive for the trial and all preparation \$1290.

A.L.L. notes that prior to the 1991 job action the fee paid for a one-day trial was \$500.³⁵ That sum in 1990 dollars is the equivalent of \$835 today. Funding at present is thus arguably worse than it was prior to the successful 1991 job action.

As can be seen from the above, because many court appearances are unfunded, and advocacy work for clients (including crafting release and resolution plans) is unpaid, much of this work is done *pro bono* by counsel. The multiple court appearance, liaison with drug and alcohol treatment providers, housing organizations, and other community services is essential legal aid work because these tasks are often impossible for many clients to undertake themselves as they are already highly marginalized people, and are often homeless, mentally ill and/or addicted. Counsel are obliged to undertake this work because of their professional obligations as counsel.

A recent anecdote from A.L.L. Director Kasandra Cronin illustrates the reality of a legal aid lawyer serving her clients. One of her clients was homeless, mentally ill and, as a result, disorganized. Ms. Cronin appeared in Court on the matter 12 times between September 2018 and February 5, 2019. The client was often late or did not appear at all. Each appearance took approximately an hour of her time. The sentencing finally took place on February 5, 2019. Ultimately, Ms. Cronin was able to bill \$445 for all of her work on this file.

It is a misconception that the system as presently constituted “incentivizes” proceeding to trial as opposed to achieving early resolution: the fact is that only 15% of criminal cases result in a trial.³⁶

There is, however, a significant need for funding for early work on criminal files including consultation with clients, research, review of particulars, liaison with community supports. All of this work presently goes completely unpaid.³⁷ Having lawyers who are extremely

³⁵ Vancouver Sun, March 20, 1991

³⁶ Making Justice Work, LSS, 2012, pp. 11, 12

³⁷ LSS, *Making Justice Work*, 2012, pp. 15-17

modestly paid to begin with also work for free is not a proper funding model and has precipitated the present crisis.

As LSS noted in *Making Justice Work*:

By any reasonable measure, LSS tariff compensation remains low. The gap between legal aid rates and what lawyers can charge private clients is growing steadily, which makes taking legal aid cases a major sacrifice or risk. Block fees and capped hours require lawyers to perform work that is not directly compensated and do not reflect the growing complexity of cases. In addition, many legal aid clients face multiple social and mental health issues that make their cases more challenging and time-consuming than those of the average private client.³⁸

6. The legal aid bar, and lawyer remuneration

a. Why lawyers become members of the legal aid bar

Legal aid work attracts lawyers who are interested in public service. The members of the legal aid bar act as counsel for the most vulnerable members of our society; refugees; women fleeing violent relationships; parents of children who have been apprehended by the state; those who are involved in conflict with the law. The financial eligibility rules of LSS, as described above, mean that only those whose economic status renders them exceedingly financially vulnerable qualify for legal aid. LSS' coverage rules mean that the legal issue must be serious for it to entitle a client to state-funded counsel.

Thus, financial vulnerability coupled with a serious legal issue are the starting points for our clients. Typically, our clients face other challenges as well. Clients with refugee claims are often new to a country whose language is unknown to them and have fled persecution and trauma in their home country. Clients who qualify for family legal aid have faced the trauma of violence in their relationships. Clients whose children have been apprehended frequently have complex social stressors in their lives: they also include a high number of indigenous parents. Criminal clients frequently suffer from mental health and/or substance abuse difficulties.

³⁸ *Making Justice Work*, *supra*, 22.

Lawyers who do legal aid work have made professional choices to forgo more lucrative career alternatives and to advocate for the legal interests of these clients rather than those of corporations, institutions, the wealthy, the powerful, because they are committed to dedicating their professional lives to the less advantaged. They receive little public credit for doing so, for advocating for the disadvantaged, because our present-day social climate largely devalues their work.

The public devaluation of the work that legal aid lawyers do has been reinforced, it is submitted, by the manner in which government has treated our members over the last decades. Legal aid lawyers have suffered frozen incomes since 1991, save for one small increase, because successive governments have not valued the work we do and our role in the justice system. No other labour force in British Columbia has in modern times has ever faced essentially frozen wages for twenty eight years.

An additional component of who we are as legal aid lawyers is that we have now united to confront the systemic underfunding that threatens our clients' interests.

b. The legal aid bar – demographics

LSS data indicates 1,038 lawyers accepted LSS representation contracts in 2016/17. Of these 1,038 lawyers, approximately 40% had offices in the Lower Mainland (Burnaby, Richmond, Vancouver and Surrey), and approximately 60% had offices in Kamloops, Kelowna, Prince George, Terrace, Surrey, Victoria, and Vancouver.

The number of B.C. lawyers who accept at least one LSS referral a year has declined quite dramatically from approximately 1,500 in 1991³⁹ to 1,038 in 2016/17, notwithstanding that the bar has increased in size from 7201 members to 11668 members over that time period: this represents a drop in involvement in legal aid from around 21% of the bar in 1991 to just under 9% of the bar in 2016.

³⁹ Jack Olsen, Executive Director of LSS, quoted in Vancouver Sun, 15 April 1991

c. The legal aid bar – income from legal aid files

In 2017/18, 650 lawyers accepted a criminal legal aid referral. The average income of those lawyers for their LSS criminal files was \$46,325, and the median \$25,184. For the 520 family lawyers the average income from LSS for the family files was \$21,050 and the median was \$11,775. For the 39 Child protection lawyers, the average LSS income for their child protection work was \$15,605 and their median income was \$7,994. For the 90 immigration lawyers, the average income was \$18,163 and the median \$8,314.⁴⁰

Of the 1055 lawyers who accepted at least one legal aid contract in 2017/2018, 911 (or 86%) had LSS income of less than \$99,000 and 669 (or 63%) had income from LSS of less than \$50,000.⁴¹

Only 12% of those who accepted family law referrals had more than \$50,000 in family law income from LSS. Only 6.5 % of those who had Child protection file income from LSS in 2017/2018 had income from those files that exceeded \$50,000.⁴²

d. The legal aid bar – women members

In 2016, 39% of practicing lawyers in B.C. were women.⁴³

LSS data shows that in 2016/2017 only 24.6% of members of the criminal legal aid bar were women. Further, only 18.8% of legal aid criminal contracts and 28.6% of immigration contracts were issued to women lawyers. LSS data also indicates that female lawyers who do legal aid work have lower earnings than their male counterparts. In 2016/17, the average fees billed by female lawyers were 74% of the average fees billed by male lawyers.

⁴⁰ LSS BC Legal Aid Statistics, Dec. 2018; Adequate Tariffs to Meet Client Needs, May 2018

⁴¹ LSS BC Legal Aid Statistics 2018

⁴² LSS BC Legal Aid Statistics 2018

⁴³ Law Society of British Columbia, *2016 Report on Performance*, p. 20

e. The legal aid bar – the greying of the bar

The average years of call of legal aid lawyers increased from 8.9 years in 1990/91 to 17.7 years in 2016/17. In 2016/17 tariff lawyers' average years of call was 17.9 for criminal, 13.8 for family, 14.7 for CFCSA and 12.4 for immigration.⁴⁴

The criminal tariff bar is the most senior and has the largest number of lawyers with over 40 years of call: in 2016/2017, 6% of lawyers who accepted criminal contracts were more than 40 years called to the bar, as were 3% of family and CFSA lawyers.

The highest proportion of tariff lawyers are in the year-of-call ranges of 0–5 years (26.1%) and over 25 years (26.6%).

The data shows clearly an increasing percentage of legal aid contracts being taken by very junior and very senior lawyers and a sharp decline in legal aid bar members of intermediate level of experience. Significantly, tariff lawyers between 15 – 20 years of call decreased between 2011/2012 to 2016/2017 from 13.7% to 7.7% of the total legal aid bar. Even more strikingly, while in 2006/2007 the LSS contracts taken by lawyers between 10 and 20 years of call represented 38.7% of all contracts, by 2016/2017 the contracts taken by lawyers of 10-20 years' call had dropped from 38.7% to 18.2% of all LSS contracts.

There are furthermore significant regional variations in the age demographics of the tariff bar. Of the 82 B.C. communities where tariff lawyers had offices in 2016/17, approximately 30% of those communities had legal aid bars whose lawyers' average years of call exceeded 25 years.

Over the past five years, the proportion of all newly-called BC lawyers who have taken out billing numbers with LSS has decreased from about 24.5% of all new lawyers in 2012 to approximately 22% of the new calls in 2016.

⁴⁴ All data cited in this section is from LSS BC Legal Aid Statistics, 2018

Only 47% of the new lawyers who took out LSS billing numbers between April 1, 2012 and June 30, 2015 had three or more legal aid files (contracts) within their first six months of obtaining billing numbers, and only 62.7% had three or more contracts within their first two years of obtaining billing numbers. Approximately 23% of the new lawyers became inactive with LSS because they did not have any legal aid work within their first year.

These statistics bear out what many of A.L.L.'s members have anecdotally observed. First, many members of the legal aid bar have continued to practice beyond their anticipated retirement ages. This is likely in part because depressed earnings over the latter years of their careers have not allowed for sufficient savings for retirement. Further, while young lawyers continue to enter legal aid practice, many soon leave legal aid practice as they determine that they cannot make a living given the exceedingly low tariff rates. More will be said about this below.

f. The legal aid bar – challenges faced by young criminal lawyers

In criminal law the greying of the bar is particularly acute and reflects the greatly diminished opportunities for young criminal lawyers.

Traditionally, commencing in the 1970s, most criminal lawyers in B.C. began their careers with practices that included a substantial component of legal aid files. The typical model was that in the early years of their practices criminal lawyers would represent clients charged with less serious offences, and also act as junior counsel to senior lawyers on major cases, most often while working as associates to senior counsel in criminal law firms.

The business model of such law firms were traditionally centered not on profit-making from the work of criminal associates, but rather a “break even” model, whereby the senior lawyers gained practice benefits from having junior lawyers available to assist them, and the legal aid billings of those lawyers funded the expense of their remuneration and overhead, while the young lawyers gained mentorship, experience, and a basic level of income in the early years of their practice. Over time as they gained experience, the junior

lawyers would take on more serious cases. Some of them would come to include private paying work in their practices, while others would remain primarily or entirely dependent on legal aid for their income. Either way, in time they would bring young lawyers into their firm as the cycle of training and mentorship would continue. This “apprenticeship” model is the best way to train the next generation of defence counsel, some of whom will go on to become Crown Counsel or Judges.

That model has today been undermined by LSS underfunding. First, the opportunities to junior more senior lawyers on large cases have been reduced. A murder charge, for example, does not today necessarily lead to LSS authorizing junior counsel to assist counsel of record. Secondly, tariff rates are so low that the opportunities for young lawyers to work as criminal associates to senior lawyers and work in law firm legal aid practices have shrunk enormously. Many senior legal aid lawyers have given up hiring associates, and some indeed have given up their offices, because the legal aid billings of an associate can no longer come close to covering a modest salary and overhead. As the senior lawyers’ earnings from legal aid are also extremely modest, they often simply cannot afford to have associates whose salaries exceed their incomes and deplete the senior lawyer’s already modest income.

Many young lawyers nonetheless still begin their careers in criminal practice, albeit not typically in a law firm structure. They typically have only limited mentorship opportunities with senior counsel and enjoy few junior counsel assignments in major cases. They soon learn the reality that our present tariff system de-incentivizes trials, and incentivizes guilty pleas, and the trial experiences they gain may accordingly not be optimal. By necessity they may take on large caseloads, and burnout becomes a substantial risk. They struggle with student loan burdens at a level unknown to earlier generations.

Within a few years the fact that they cannot make a living or foresee any potential for improvement in future leads many young criminal lawyers to leave criminal legal aid practices for other work.

While some young criminal lawyers manage to hang on and continue to practice beyond the five-year mark, at all stages as they become more senior their numbers decline as

they leave criminal practice for the Crown, the bench, or other types of legal practice. The shrinking of their numbers is particularly acute for the female members of the criminal bar, who more often face the additional burden of child care expenses and the difficulties associated with managing the demands of a criminal practice while raising young children.

For the criminal bar, the many years of underfunding of legal aid have resulted in a numerically depleted bar at the critical career phase of 5-25 years of experience at the bar, and especially for those of 10-20 years' call. The consequences for the criminal justice system are only beginning to be felt, and A.L.L. submits they will become more acute with time as the present generation of senior lawyers moves into retirement.

Criminal law clients are among the most vulnerable of our citizens. The poor, the mentally ill, and our indigenous populations are over-represented in our criminal Courts. These clients require the assistance of skilled, experienced, resourceful and compassionate lawyers sensitive to their clients' needs and knowledgeable in the law, to navigate the criminal justice system. A skilled pool of such counsel existed for many years in B.C., but that pool is fast-shrinking.

The institutional risks that the depletion of the criminal bar will lead to are addressed below. In brief, client outcomes will be compromised. The potential for delay in resolution of criminal cases is another negative outcome. Successful claims of ineffective assistance of counsel, leading to the overturning of criminal convictions and further delay, are another.⁴⁵ Given that the criminal bar is one of the chief sources of judicial appointments, this means a shrinking pool of qualified judicial candidates with criminal law backgrounds. Under-representation of women in the criminal bar is another consequence of a poorly-funded legal aid system. Loss of public confidence in the justice system is an inevitable result, A.L.L. submits, of a system that devalues criminal counsel and fails to ensure that funding is sufficient to allow for a well-trained and professional bar.

⁴⁵ See, for example, *R. v. Hamzehali*, 2017 BCCA 290

g. The legal aid bar – overhead costs

Past surveys of members of the bar who accept legal aid work, undertaken in this province and in Ontario, have assessed that the average overhead of expenses of lawyers who do legal aid work follow very closely the average overhead expense of exclusively private bar lawyers, and amount to approximately 50% of gross annual billings. Further, the 2005 BC survey indicated that the average overhead cost of the legal aid lawyers surveyed, when calculated on an hourly basis, was less than the LSS tariff hourly rate: thus it appeared legal aid work was failing to cover overhead costs, and private clients were subsidizing the lawyers' legal aid work.⁴⁶ In the intervening 14 years since that data was published, the one modest increase in the tariff has been considerably outstripped by 25% inflation,⁴⁷ and thus the tariff rates are that much lower than hourly overhead costs.

7. Assessment of the LSS Budget Funding Shortfall

a. Introduction

One method of assessing the extent of present legal aid underfunding is to examine per capita funding of LSS over time, factoring in inflation and population increases.

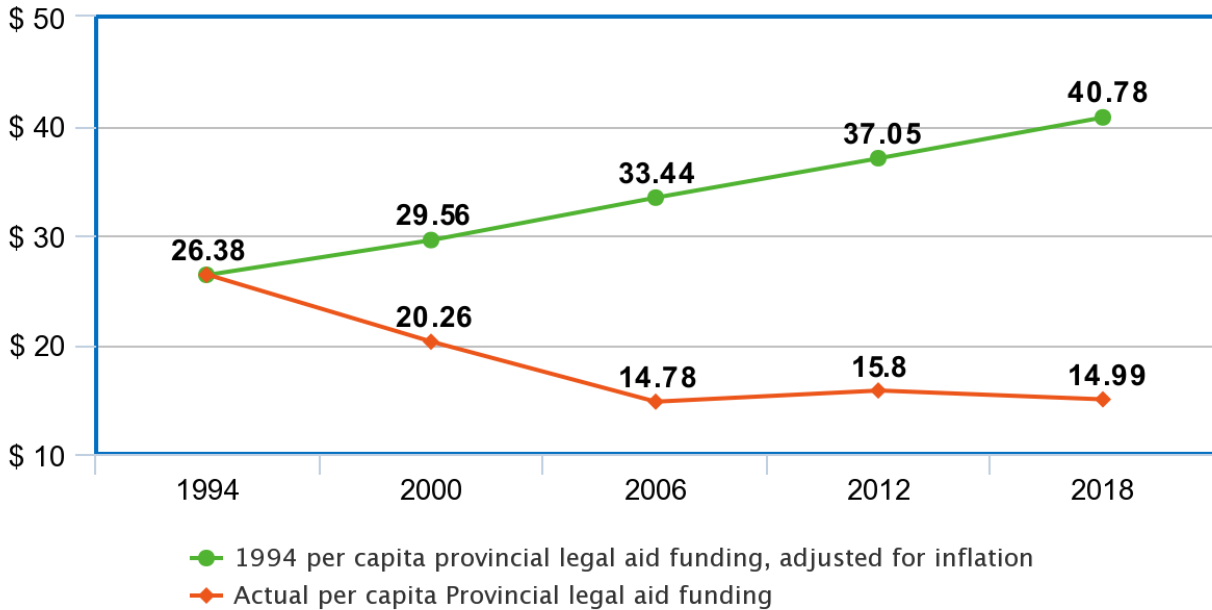
Another approach is to examine present per capita LSS funding relative to per capita funding of other provincial legal aid programs.

By any metric, British Columbia's present state of legal aid funding is severely inadequate. A.L.L. submits that these modes of analysis all demonstrate that legal aid coverage, eligibility, and tariff (including not only lawyer rates but the disbursements such as for experts that are a necessary part of representing clients) all demonstrate this funding inadequacy. Details are set out below.

⁴⁶ *Managing for Results: LSS Tariff Renewal*, 2005, pp. 16, 32, 35, 152-154

⁴⁷ The Bank of Canada inflation calculator shows inflation since 2004 = 26.57%, and since 2005 = 23.98%.

1994 Provincial per capita legal aid funding, as adjusted for inflation, compared to actual per capita Provincial legal aid funding
Government British Columbia population statistics; Bank of Canada inflation calculator, LSS funding data



meta-chart.com

b. Per capita LSS funding 1990s versus the present

In 1992/1993, after job action by legal aid lawyers had resulted in an increase in LSS' funding, per capita spending on legal aid in B.C. was \$25.22.⁴⁸ Applying the Bank of Canada inflation calculator, the per capita spending on B.C. legal aid in 1992/1993 was the equivalent of \$39.72 in 2018 dollars. Alternatively, the 1994 provincial funding was \$96,988,622, which per capita was \$26.38. Adjusted for inflation, that per capita figure would today be \$40.78.

By 2016/2017, per capita legal aid funding in BC had decreased to a mere \$15.97.⁴⁹ By 2017/18, the per capita provincial rate was \$14.99. Thus, in real dollars, by 2016-2018 there had been a reduction in per capita expenditure on legal aid in British Columbia of **approximately 60%** from the per capita expenditure levels in 1992-1994.

⁴⁸ Legal Aid for the Poor, 1995 p. 22

⁴⁹ LSS 2018 BC Legal Aid Statistics p. 8

The Provincial contribution to LSS in 2017/18 totaled \$76,548,645.⁵⁰ The additional federal contribution totaled \$16,208,801. In order to match 1992/1993 per capita funding levels, and accounting for inflation, annual funding for LSS would need to be $5,106,322 \times \$39.22 = \$200,269,948$. To match the 1994 funding levels that figure would need to be \$208,235,811.

Given that LSS funding was just under \$100,000,000 in the early 1990s, that there has been close to 50% population growth in the interim as well as decades of steady inflation, to say nothing of the increasing complexity of legal matters (and growing length of court proceedings), A.L.L. submits that LSS funding at this level is the minimum required for a legal aid system that meets the needs of British Columbians.

A.L.L. observes that returning legal aid funding to the levels in the early 1990s levels with gross-up for inflation and to reflect population growth would in any event not match the growth in funding over those same years of other key participants in the justice system: the expenditures over time for Crown, the judiciary, and police have all increased at a level beyond inflation and population growth. In part this no doubt reflects the increasing complexity of legal issues in the intervening years, and the increasing length of legal proceedings. However, those factors have an impact on the need for legal aid just as they do with respect to other justice system participants.

The state of provincial funding of LSS over time is reflected in the graph on the following page, prepared by a local economist commissioned by A.L.L. to examine funding issues:⁵¹

The “Per Capita Expenditure Index” line in the graph reflects a combination of price level growth over time and population growth. For a given expenditure to have the same per

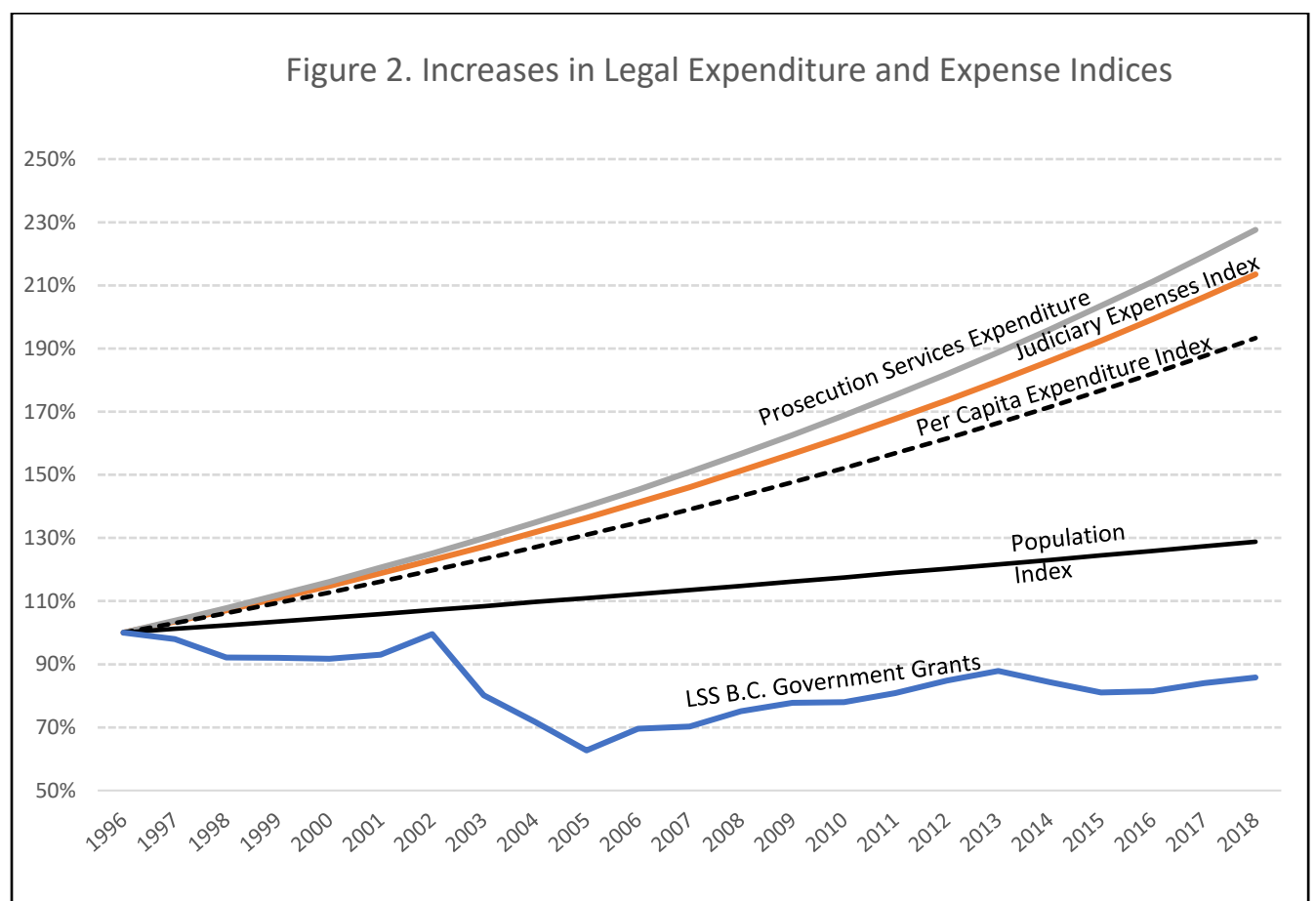
⁵⁰ Provincial funding to LSS for justice innovation projects represented in 2017/18 an additional \$4 million.

⁵¹ Rob Carson, Associated Economic Consultants, 2019

capita purchasing power in 2018 as it did in 1996, it would have to have increased by 93.3% in the intervening years.

The index for provincial expenses associated with the judiciary reflects a 113.5% increase in those expenses since 1996. The line in the graph related to Prosecution Services expenditure reflects an increase of 127.6% since 1996.

The line in the graph related to provincial LSS grants shows the grant in 2018 was 85.8% of that in 1996. However, in price-adjusted terms the grant in 2018 had about 57% of the purchasing power of that in 1996.



Another manner of assessing the extent of present underfunding of LSS is to take 2002 “pre cut” LSS funding figures, and update those to present-day dollars, taking into account inflation and population increase.

In 2002, “pre-cut,” LSS revenue from the Province was \$88,776,475. To simply keep pace with inflation, the budget would need to have increased to \$117,139,285 by 2018.⁵² However in 2002 B.C.’s population was 4,100,161, whereas Statistic Canada’s B.C. population estimate published October 1, 2018 is 5,106,322. This represents an 24.54% increase in population over the years 2002-2018.

Accordingly, simply to keep pace with inflation and the increase in provincial population, 2002 LSS revenues of \$88,776,475 would be the equivalent of \$145,885,265 as of 2018.

A.L.L. notes that LSS funding in the years leading up to the cuts had essentially stagnated as it had failed to keep pace with population increase or with inflation. Inflation from 1992-2002 was 19.36%⁵³ The B.C. population increased from 3.469 million in 1992 to 4.1 million in 2002, an 18.2% increase. LSS funding would need to have increased, then, by 41% over this period simply to keep pace with population growth and inflation. However, LSS revenues had stagnated over these “lost years” as the following data regarding LSS’ annual grants from the Provincial government discloses:⁵⁴

1996	\$89,183,195
1997	\$87,422,924
1998	\$82,171,365
1999	\$82,034,961
2000	\$81,810,541
2001	\$82,953,371
2002	\$88,776,475

⁵² Bank of Canada online inflation calculator

⁵³ Bank of Canada online inflation calculator

⁵⁴ LSS Annual Reports. A.L.L. has not obtained full particulars of data from the early 1990s.

It is accordingly submitted that a mere restoration of the 2002-2004 cuts would inadequately address the chronic underfunding of LSS that pre-dated those cuts.

c. Per capita funding of LSS versus other provincial legal aid programs

British Columbia ranks 10th out of the 12 provinces and territories in per capita legal aid funding. The average per capita funding of legal aid for the 10 provinces (including federal contributions) for 2016/2017 was \$23.98. BC's per capita funding was \$15.97.

(As noted above, per capita spending on legal aid in BC in 1992/1993 was \$25.22.⁵⁵ In 2018 dollars that sum would be \$39.72.)

British Columbia per capita funding for legal aid in 2016/2017 was thus 50% below the national per capita average.⁵⁶

Based on the 2016/2017 data, the average per capita legal aid funding of the four provinces with the highest per capita rates was \$29.20. In order for BC to match that rate of funding, total funding for LSS would need to be $5,106,322^{57} \times \$29.20 = \$149,104,602$.

A.L.L. submits that at this level of funding the legal aid system could make strides toward remedying the present deficiencies with respect to tariff, eligibility, and coverage, but would only partially address the decades of underfunding.

8. Evaluation of the Inadequacy of the Tariff Rate

a. Introduction

In assessment of the extent to which legal aid rates fail to adequately compensate counsel, one mode of comparison involves examination of legal aid lawyers' hourly compensation rates over time, factoring in inflation.

⁵⁵ Legal Aid for the Poor, 1995, p. 22

⁵⁶ All data from LSS 2018 BC Legal Aid Statistics, p. 8

⁵⁷ B.C. Population October 2018 per Statistics Canada

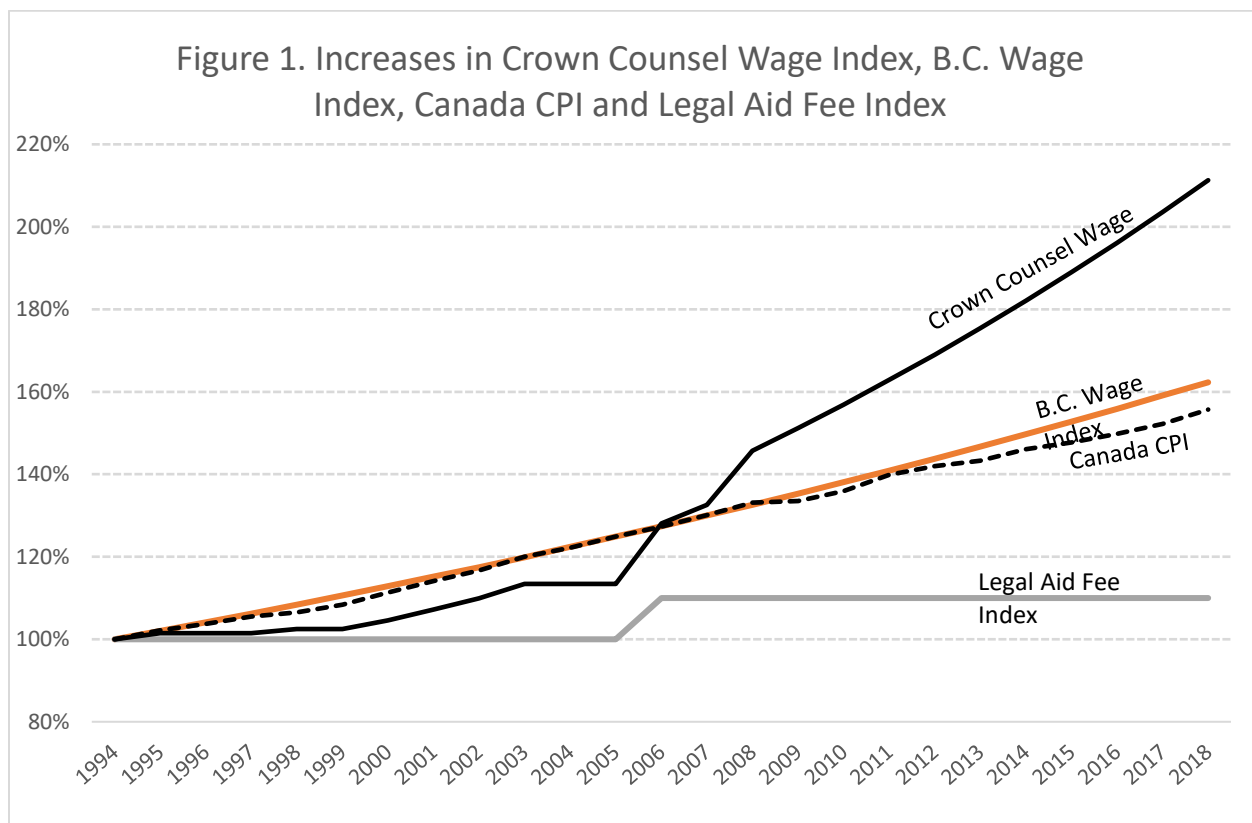
The growth of the tariff rate over time may also be compared to the growth of average BC earnings.

Another approach compares BC legal aid lawyers' hourly compensation rates to those of legal aid lawyers in other provinces.

Legal aid lawyers' compensation and its growth over time may also be compared to that of Crown Counsel.

The tariff rate, and how it has changed over the years, may also be contrasted with the hourly rates paid to those doctors whom LSS pays for expert assistance on LSS files.

Regardless of the mode of analysis, British Columbia's funding of legal aid lawyers is grossly inadequate, as the chart below, prepared by economist Rob Carson, illustrates.



b. The effect of inflation on hourly tariff compensation rates

The present hourly tariff rate ranges from \$83.90-\$92.29, depending on experience. As noted above, much of the work done on block fee criminal files by legal aid lawyers is not compensable, and thus the hourly rate as it relates to block fee cases, which are a very high percentage of all criminal billings, is entirely notional and, it is submitted, a fiction.

Nonetheless, it may be of some assistance to consider the hourly rate as one mode of assessing the shrinking of legal aid funding over time.

By June 1991 the hourly rate had been raised by LSS to \$80 after job action resulted in increased funding to LSS. There has been only once modest increase in the hourly rate since then, a 10% increase in 2006.⁵⁸

In order to keep pace with inflation, the hourly rate would need to have increased 61%, from \$80 in 1991 to \$128.73 in 2018.⁵⁹ The present average tariff rate would need to be increased 46.3% from its present average level of \$88 to match an average rate of \$128.73.

Tariff expenses for payments to lawyers are estimated for 2018/19 at approximately \$50.8 million.⁶⁰ Thus additional funding of approximately \$23.5 million would be required to fund an across-the-board increase of the various present tariff rates by 46.3%.

A.L.L. notes that other major players in the justice system such as Crown Counsel, judges and police have enjoyed remuneration increases in the same time period that have *significantly outpaced* inflation. Accordingly, a 46.3% increase in tariff rates represents a relatively modest increased level of tariff funding.

⁵⁸ All references in this section are to data in LSS Adequate Tariffs to Meet Client Needs, 2018

⁵⁹ Bank of Canada online inflation calculator

⁶⁰ Figure from LSS.

c. Hourly tariff compensation rates compared to average BC earnings

Economic data commissioned by A.L.L. establishes that since 1994 the average weekly wages in B.C. have increased by 62.3%.⁶¹

In the same time period, the LSS tariff rate has increased only 10%. In order to match the rate of increase since 1994 of wages of the average BC wage earner, the hourly tariff rate would need to be \$129.84.⁶²

d. Hourly legal aid rates in B.C. versus other provinces

As outlined above, in B.C. the present tariff rates are \$83.90/hr. for those with less than 4 years' call, \$88.10 for those of 4-10 years' call, and \$92.29 for those with more than 10 years' call. For some files of an "exceptional" nature LSS may fund "junior" counsel to assist the lawyer with primary responsibility for a file. In such cases the second lawyer, if funded as "junior counsel," will be paid an hourly rate, depending on the case, of 75% of the tariff rate, or a rate of between \$62.93 and \$69.22, depending on number of years of call.⁶³ (As reviewed above, a small number of criminal cases attract enhanced fees.)

In Ontario, following job action in 2010, the government of Ontario and the Criminal Lawyers' Association of Ontario negotiated a significant increase in funding for legal aid. Prior to the job action, Legal Aid Ontario had been dealing with a funding crisis similar to that in British Columbia, caused by decades of cuts to funding and a failure to increase rates to keep pace with inflation.

Prior to the job action, the hourly rate in Ontario began at \$85.51, and increased with experience. Prior to 2010, the junior counsel rate was \$64.13, for lawyers who were authorized to assist senior lawyers on major files.

⁶¹ Rob Carson Report, Table 1

⁶² A.L.L. notes that figure should be viewed in light of there having been an additional 2/3 years, 1991-1994, with no tariff increase.

⁶³ LSS Tariffs – General terms and Conditions, pp. 15, 16, 18

Following the job action, lawyers received a series of increases between 2010 and 2015. Their current hourly tier rates based on experience are \$109, \$123, and \$136. For those working on the north of Ontario, a northern premium results in rates of \$120, \$135 or \$150/hr., depending on level of experience. As a result of the 2010 job action, the junior counsel rate was eliminated, and junior counsel are now paid according to the rate tier applicable to their level of experience tier.

Comparing the two systems, it can be seen that the B.C. standard hourly rates would need to increase by 30% for junior counsel, 40% for intermediate counsel, and 48% for senior counsel in order to match Ontario rates (not including the northern premium.) Junior counsel rates would need to increase 70% and up to match the Ontario equivalents.

Another province whose hourly rates bear comparison is Newfoundland and Labrador. While staff defence lawyers handle the majority of criminal cases, in cases where a conflict of interest arises, and for clients charged with murder or manslaughter, the NL Legal Aid Commission allows them to retain private counsel. Until 2014, the base experience rate paid to private lawyers was \$45, with a maximum rate of \$60 per hour. Following an external review, the base experience rate was increased to \$120 per hour. B.C.'s base rate would need to increase by 43% to match Newfoundland and Labrador's.

In Alberta, the government committed to increased funding for legal aid in October 2018.⁶⁴ Prior to the increase, the hourly rate in Alberta was \$92.40, and \$81.40 for students. Legal Aid Alberta has not yet announced how the increased funding will affect the hourly rate.

A.L.L. notes that increasing the BC hourly legal aid rates so that they are in line with Ontario's would be approximately equivalent to taking the \$80 tariff rate in effect in 1992 and providing an inflation adjustment, as set out above.

⁶⁴ <https://www.cbc.ca/news/canada/edmonton/alberta-legal-aid-ndp-government-notley-1.4859006>

e. Tariff rate growth over time compared to Crown Counsel compensation

The inadequacies of the rates paid to legal aid lawyers may be illustrated by comparison to the salaries of BC Crown Counsel. Crown Counsel wages have steadily risen over the many years during which LSS tariff rates have remained frozen save for one increase. At present Level 1 Crown Counsel salaries for lawyers from 1-5 years of call range from \$87,615.96 to \$113,483.24, Level 2 from \$121,030.09 to \$156,960.01, Level 3 from \$161,625.82 to \$185,603.45, and Level 4 from \$186,856.26 to \$225,785.93. Crown Counsel furthermore have government benefit packages which add to the value of their compensation packages, unlike legal aid lawyers. In addition, they are not required to fund their office overhead expenses from their wages, as are legal aid lawyers.

The stark contrast between Crown Counsel salary increases over the past decades and the LSS tariff hourly rates is illustrated by the data provided by economist Mr. Carson, which demonstrates that since 1994 Crown salaries have increased 111.3%. Had the hourly tariff increased between 1994-2018 by the same percentage then it would today be \$169/hr.

f. Comparison of tariff rates to other lawyer compensation comparables

Comparable hourly rates for lawyers who perform work for government include Ministry of Children and Families director's counsel services for counsel in Vancouver, who are paid at \$135/hr., and the tariff rate of the Legal Services Branch for outside counsel in civil matters, which ranges from \$100/h for a lawyer with one year's experience to \$250/hr. for lawyers with seven or more years' experience.⁶⁵

The rates paid to legal aid lawyers may also be compared to the salaries of lawyers employed as counsel with the Ministry of the Attorney General. The most junior lawyers,

⁶⁵ LSS, *Adequate Tariffs to Meet Client Needs*, 2018, p. 2

Legal Counsel Level 1, earn from \$87,615.96 for lawyers who are first year calls to \$113,483.24 for lawyers called five years. Legal Counsel Level 2 earn between \$121,030.09 for lawyers called to the bar 6 years to \$156,960.01 for lawyers called 11 years. Legal Counsel Level 3 earn between \$161,625.82 and \$185,603.45. Legal Counsel Level 3B earn between \$173,600.03 and \$200,549.23, while Legal Counsel Level 4 earn between \$186,856.26 and \$225,785.93. Legal Counsel Managers earn to a maximum of \$241,590.83. Lawyers employed by the Ministry of the Attorney General are provided with benefits in addition their salaries and are not required to fund their office overhead from their wages.

In private law, the \$88/hr. average LSS billing rate may be compared to the rates charged by lawyers in private practice, who like legal aid lawyers must fund overhead and benefits from their billings. The April 2018 edition of *Canadian Lawyer Magazine* contains billing figures obtained by survey of members of the bar. The survey discloses the following data for Canadian lawyers:⁶⁶

- Lawyers called to the bar 1 year or less: average hourly rate criminal law \$207.33; family law \$199.52; immigration law \$201.67.
- Lawyers called to the bar 2-5 years: average hourly rate criminal Law \$259.60; family law \$239.93; immigration law \$238.33.
- Lawyers called to the bar 6-10 years: average hourly rate criminal law \$347.06; family law \$300.17; immigration law \$308.33.
- Lawyers called to the bar 11-20 years: average hourly rate criminal law \$382.38; family law \$331.17; immigration law \$347.50.
- Lawyers called to the bar more than 20 years: average hourly rates criminal Law \$431.01 family Law \$382.64 immigration law \$416.67.

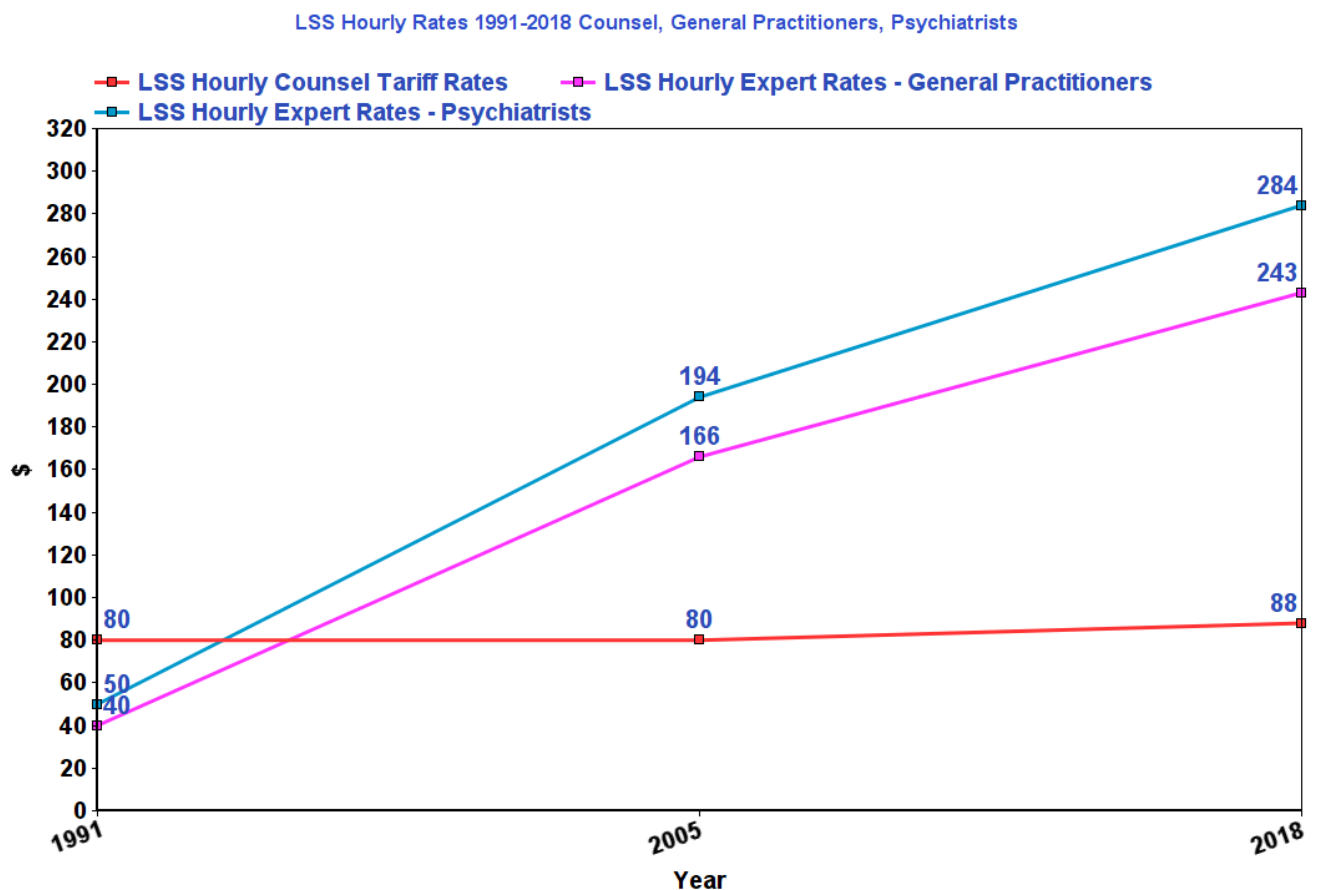
The average LSS hourly rate of \$88 may be compared to these rates when considering Ted Hughes' 1984 recommendation that tariff rates be 75% of those charged by the private bar. The average of the various criminal law rates is \$325.48: the LSS average rate represents 27% of that rate. The average of the private bar family rates is \$290.69:

⁶⁶ Canadian Lawyer, April 2018, *2018 Legal Fees Survey*

the LSS average rate represents 30% of that rate. The average of the private bar immigration rates is \$302.60: the LSS average rate represents 29% of that rate.

g. Lawyer tariff rate growth versus growth of LSS expert rates

The legal aid tariff rate may also be compared to the hourly rates over time that LSS has paid psychiatrists and family doctors to provide expert opinion evidence on legal aid files.



9. Future Risks if the Status Quo Continues

a. Introduction

The risks to the justice system should the status quo of ongoing underfunding of legal aid continue are manifold. Underfunding has the potential to damage public confidence in the justice system, it imperils fair trial rights of citizens, and it impedes the ability of lawyers to work within the legal aid system in a manner that accords them with the support and respect that should form part of the environment of this difficult legal work.

Among the most significant risks if change is not forthcoming are the following:

- a) Unequal access to justice for those of low income;
- b) Increasing number of self-represented litigants;
- c) Risk of the legal issues of those with low incomes not forming part of the development of the law;
- d) Reduced ability of the legal aid system to retain and attract quality counsel;
- e) The increasing “greying” of the bar and retirement of experienced counsel will increasingly lead to a deficit in experienced legal aid counsel;
- f) Reduced ability to train and mentor junior counsel;
- g) Women lawyers will increasingly be under-represented in legal aid practice
- h) Increased risk of court challenges to underfunding of legal aid;
- i) Risk of legal work not being performed due to low rates and caps on hours;
- j) Demoralization and discontent among the labour force of legal aid lawyers;
- k) Decline in public confidence in the justice system;
- l) Immediate lawyer service withdrawal.

b. Unequal access to justice for low income British Columbians

A significant consequence of the continuing dramatic disparity in funding between Legal Aid counsel and other government funded counsel is the “David vs. Goliath” scenario faced by low income British Columbians in our Courts. This scenario is the natural consequence of government dramatically underfunding legal aid, including (for criminal, immigration and child protection matters) government’s legal opposition in the hearing room or courtroom. The decision of a prior government to remove the historic

independence of the Legal Services Society, and to allow government to intrude directly into how its funds are spent, compounds the perception that government has chosen to impede access for justice for those citizens involved in legal disputes in which the opposing party is government-funded.

When the government funds lawyers to act on its behalf it does so at a dramatically higher hourly rate than when it funds counsel for low income individuals. For example, on an average child apprehension file the Government will fund counsel for the Ministry of Children and Family Services in Vancouver at a rate of up to \$135 per hour to commence proceedings to remove a child from his or her home and follow those proceedings to their conclusion. Conversely, if the parent or guardian of that same child obtains legal aid coverage to resist the seizure of their child that lawyer will only be paid \$83.90 - \$92.29 an hour and the number of hours they will be funded to prepare will be capped.⁶⁷

Similarly, for a low-income individual who faces criminal charges and qualifies for legal aid, the reality is that the compensation and resources of the prosecution will inevitably far outstrip that of his legal aid counsel.

For example, for a bail hearing in Supreme Court that takes a full day, legal aid defence counsel will be paid \$400.00, inclusive of preparation time.⁶⁸ That fee includes compensation for interviewing the client, reviewing the disclosure, crafting a release plan, discussing the file with Crown Counsel, gathering letters of support and checking references, locating the client a bed in a treatment facility or other housing, and appearing in court to argue the matter. Conversely, for the same matter non-staff Ad-Hoc Crown

⁶⁷ Adequate Tariffs to Meet Client Needs, May 2018 at page 2. & CFCSA Tariff, Legal Services Society p. 4-5

⁶⁸ Criminal Tariff, Legal Aid at p.

Counsel may expect to be paid in the range of \$1,437 for legal work related to opposing the release of the accused.⁶⁹

The Crown Counsel Agreement which governs the compensation of prosecutors in British Columbia explicitly provides that staff Crown Counsel be appropriately resourced to allow them to fulfil their professional obligations and therefore recognizes that two days preparation time are required for every 3 days in Provincial Court and one day preparation is required for every one day in Supreme Court.⁷⁰ For legal aid lawyers the preparation time needed to defend these same proceedings is not funded.

c. Increasing number of self-represented litigants

The data above related to self-reps illustrates that their numbers are growing. Providing them with “legal information,” as has been the focus of recent efforts of both government and some proponents of access to justice, is quite simply no substitute for providing them with lawyers. If government does not address the issue through increased legal aid coverage and eligibility, then their numbers will continue to grow, the stresses they place on the justice system will be exacerbated, and the legal outcomes they experience will continue to be compromised by reason of their poverty. Pamphlets are not a meaningful alternative to having a lawyer.

d. Legal Issues of those with low income

There is furthermore the potential for gaps to develop in substantive law with respect to legal issues associated with lower-income citizens if legal aid continues to be underfunded.

As Mr. Doust described in his Report:

There is rich case law on impaired driving issues for example. There are many estate-planning ideas for the wealthy. If legal resources are not allocated to middle- and low-income individual's legal issues, then those parts of the community are left out of one of the great benefits from the rule of law and an unbalanced legal system grows. Solicitors develop legal

⁶⁹ Ad hoc criminal services for Supreme Court work is funded at a rate of \$125/h. This estimate includes 1 day of preparation, 7.5 hours, plus one day in Court, assuming just 4 billable hours. See “Adequate tariffs to Meet Client Needs” at p. 2

⁷⁰ Crown Counsel Agreement, Letter of Understanding #12

ideas and devices for clients they serve, so allocation of legal resources to solicitor services is also important for low income people.⁷¹

e. Reduced ability of the legal aid system to attract & retain counsel

Lack of appropriate funding also imperils the legal system's ability to attract and retain counsel to the legal aid bar as the current rates do not provide adequate compensation. Furthermore, the student debt carried by many entering the profession as young lawyers means that taking on legal aid files is financially impossible. Without additional funding it will become increasingly difficult for those who qualify for legal aid to obtain representation. This is already becoming acute in family law, where in some regions contracts are difficult to fill, as are family duty counsel positions.

f. Risks arising from the greying of the Bar

Summarized above is data that shows the increasing decline in lawyers with mid-level experience undertaking criminal legal aid.

The data confirms what more senior members of A.L.L. have anecdotally observed: that there is a large and growing gap in the criminal bar, which increasingly consists of members who are either very senior or very junior. Members of A.L.L. have observed young lawyers abandoning criminal law after five or ten years of struggle bring home to them that they cannot financially survive given the present tariff. Meanwhile, criminal lawyers who are very senior have increasingly chosen to continue to practice. Some of those senior lawyers have deferred retirement as the tariff has not allowed them incomes sufficient to save enough money to retire.

The present imbalance in the legal aid criminal bar poses great risks for the future if not remedied. As the most senior of our criminal lawyers finally enter retirement, there will be a paucity of criminal lawyers with the requisite experience to take on major cases. If young and inexperienced lawyers begin to take on murder cases, or guns and gang cases,

⁷¹ Foundation for Change, Report of the Public Commission on Legal Aid in British Columbia, at 22

before they are at a stage where they have adequate training and experience, then some of those cases will inevitably go awry. The result will be mistrials, delays, successful appeals based on ineffective assistance of counsel. Public confidence in the administration of justice will be jeopardized.

Another risk posed by the absence of mid-level lawyers practicing criminal law is that this is a prime pool of lawyers from whom judicial appointments are made. A balanced and strong judiciary has traditionally included a large complement of former defence lawyers and former prosecutors. The skewing of the criminally-experienced appointees heavily in the favour of the Crown would create the appearance of an unfairly Crown-weighted bench, would reduce the necessary diversity of the bench, and would deprive the bench of the valuable defence perspective.

g. Reduced ability to train and mentor junior counsel

Low tariff rates in criminal cases and lack of funding for junior counsel to work on a file with senior counsel mean that there are limited opportunities for young lawyers to be trained and mentored in the manner that formerly occurred.

Under the LSS Tariff, a senior lawyer may request the assistance of junior counsel on a case. However, currently, approval is limited to “exceptional circumstances.” Thus junior lawyers are not getting the opportunity to gain valuable training, trial experience and mentoring that comes from working as a junior assisting senior counsel.

The effects of this are illustrated in the recent Registrar’s decision in *Martland & Saulnier v. Legal Services Society*, 2018 BCSC 1110. Counsel funded by the Legal Services Society requested LSS provide funding for a junior lawyer (at the junior rate of around \$66/hr.) on a complex murder trial, prosecuted by two experienced Crown Counsel. The junior lawyer was not funded, and undertook 112.7 hours of work on the file, unpaid. The Registrar declined to provide any relief regarding the disputed non-funding.

The danger posed by the failure to train and mentor junior criminal lawyers through funding as junior counsel on major cases is that, first, the junior lawyers fail to receive critical training. Secondly, the senior lawyer who undertake highly complex and demanding cases are deprived of the assistance and support of junior counsel. From both perspectives the result risks imperiling the fair trial rights of the accused and significantly increases the possibility of wrongful convictions.

h. Women lawyers' under-representation in legal aid practice

While the bar faces significant challenges retaining women overall, the problem is particularly acute with respect to legal aid criminal practitioners,⁷² and is also noticeable in immigration practice. Low wages and a corresponding inability to provide appropriate benefits, including family leave, that would allow them to stay in practice if they choose to have children has meant low retention rates for female lawyers in the criminal legal aid bar.

Women legal aid lawyers also struggle with the cost of childcare. For example, the median income of criminal legal aid billings in 2017/18 was \$25,184, while average childcare costs the same year for a toddler in Vancouver were \$15,504 per year.⁷³

These same barriers are not faced by government counsel working in the criminal justice system. For example, Crown Counsel are eligible to receive a maternity allowance that amounts to the difference between 85% of their basic pay and the Employment Insurance (EI) gross maternity benefit for the duration of their eligibility (35 weeks).⁷⁴ In addition to paid leave, Crown Counsel are entitled to up to 78 weeks of extended unpaid parental

⁷² A 2009 report by the Law Society of British Columbia estimated that of all women called to the bar in 2003 only 66% retained practicing status in 2008, while 80% of men called the same year remained practicing in the same time period. At p. 4

⁷³ Time Out, Child Care Fees in Canada 2018, Canadian Center for Policy Alternatives, Macdonald & Freeland, Executive Summary; LSS BC Legal Aid Statistics, Dec. 2018; Adequate Tariffs to Meet Client Needs, May 2018

⁷⁴ Crown Counsel Agreement, Article 11 & Terms & Conditions for Excluded Employees & Appointees; Maternity, Parental & Pre-placement Adoption Leave for B.C. Government Employees

leave.⁷⁵ Furthermore, upon returning to work they enjoy higher salaries, which make funding of childcare less problematic.

The financial barrier to women in private practice resulting from poor legal aid funding is borne out by the number of women taking on criminal tariff work generally, and “major cases,” in British Columbia today.

The data illustrates, for example, that women take on only 18.8% of all LSS criminal contracts, and only 28.6% of immigration contracts. There exists no similar parallel gender imbalance in the ranks of Crown Counsel, where the percentage of women prosecutors is high.

With respect to major criminal cases, of the 130 lawyers in the province who have worked on LSS major cases (either as counsel or in the role of an assisting junior lawyer) since 2016, only 38 were women. Of that number only fourteen had been practicing law for more than ten years, from which it can be concluded that the balance of 26 women were likely assisting as junior counsel. There were only eight women lawyers with more than 20 years’ experience who acted as counsel on a major case in the last 3 years.

i. Increased risk of Court challenges to the underfunding of legal aid

In 2017 a suit was filed challenging B.C.’s failure to provide adequate family law legal aid to women fleeing violent relationships. (*Single Mothers’ Alliance of BC Society et al. v. HMTQ in right of the Province of B.C. et al.*) The Province faces the risk of additional future court challenges from those who feel they are unfairly disadvantaged by legal aid underfunding.

Access to justice issues are at the forefront of the concerns of our courts, to a greater degree than in the past. The development of constitutional remedies in situations where

⁷⁵ Parental Leave for B.C. Government Employees
(<https://www2.gov.bc.ca/gov/content/careers-myhr/all-employees/leave-time-off/maternity-parental-pre-placement-adoption/parental>)

poverty imperils access to justice will potentially be a focus of future consideration by A.L.L.'s membership in the event that legal aid funding remains in crisis.

j. Risks arising from lawyers having to work for free, and caps on hours

The current tariff does not compensate counsel for much of the work on a file that is essential to its successful resolution. Many tasks arise because legal aid clients are often among the most marginalized citizens in our province and present with complicating factors such as financial insecurity, substance abuse issues, inadequate housing, language barriers or mental health issues. In assessing the client's situation so as to be able to make appropriate referrals of the client to community supports in furtherance of a bail application, a sentencing submission, or for the purpose of negotiating with Crown Counsel an appropriate disposition of a criminal charge, counsel frequently investigate community options and assist clients with accessing mental health, housing and addictions services in their communities.

Part of the work of legal aid lawyers is communicating with clients' treatment professionals and services providers. Mentally ill clients in particular require substantial investment of time on the part of their legal aid lawyer, as building a relationship with the client and understanding their particular circumstances can be critical to coming to an understanding as to the best legal options for them. The essential work that legal aid counsel does liaising with external service providers, writing letters on their client's behalf and advocating for them outside of the courtroom is not compensated under the tariff.

Furthermore, as counsel are not paid on the criminal tariff for multiple interviews with a client, most face-to-face or telephone contact with a legal aid client is done on a purely pro-bono basis.⁷⁶ As with much of the work of a legal aid lawyer, if it is to be done then it must be done without any financial compensation.

⁷⁶ Legal Aid Tariff, August 2018 at p. 15

For legal aid cases paid hourly but involving caps on lawyer-hours, such as in family law, the reaching of the cap leads to the balance of legal work required to be done going undone or falling on the shoulders of the now-self-represented client.

For legal aid cases paid by way of block fees, such as most criminal cases, the underfunding of legal aid means that clients are entirely dependent on the overburdened and systemically impoverished counsel to bear the financial burden of acting in their clients' best interests and safeguarding their legal rights by undertaking on every file work that is effectively completely unpaid.

For example, the lawyer who prepares for a bail hearing in Provincial Court for a client charged with assault causing bodily harm where the Crown proceeds summarily may spend an hour travelling to the police station and interviewing her client in the police lockup over the weekend, another hour the following day reading the police reports and witness statements so as to be familiar with the allegations and so as to be in a position to point out to the judge potential weaknesses in the case, a half an hour tracking down and speaking with family members and community supports to assist in putting together a proposal for a release plan, fifteen minutes waiting to speak to Crown Counsel and then negotiating with Crown about bail terms, a half an hour researching case law and copying case authorities, and most of an afternoon sitting in court waiting for the case to be called before being called upon to make oral submissions regarding bail. The block tariff fee for all of that work is \$125.

The impact of low rates for legal aid counsel work on quality of service is significant as counsel are not paid for even basic preparation work under the tariff, or for interim court appearances. Lawyers may in some instances take on a higher volume of files than they should, in order to earn a living. Some counsel may not have time to devote on a *pro bono* unpaid basis to the legal work that may be required to defend a case adequately. That being said, in the vast majority of cases legal aid lawyers provide a high quality of service by doing much of their work for free.

k. Demoralization & discontent among the labour force of legal aid lawyers

The legal aid lawyers who form a substantial majority of the membership of A.L.L. perceive that their work is not valued or respected by government, and indeed that it is actively *disrespected*. Despite the fact that the adversarial criminal justice system is tripartite, the defence bar does not receive anything close to the respect it deserves.

No other conclusion is possible when their rate of pay has only seen a single 10% increase in 28 years, a time period in which the inflation rate has been 60%. No other conclusion is possible when government provides in 2018 a modest increase to LSS' budget but specifically directed those monies not be applied in whole or in part to the tariff. No other conclusion is possible when the cuts ostensible motivated by fiscal austerity are not reversed in times of fiscal bounty. No other conclusion is possible when our legal colleagues in the Crown Counsel offices and civil lawyers employed by government have in the same time period enjoyed very significant pay raises, well in excess of inflation, while the legal aid tariff rates have remained frozen.

In addition to the demoralizing impacts of low pay, legal aid lawyers are further demoralized by the strictures on their ability to represent their clients. Lawyers struggle to obtain funding for the experts that are necessary to meet the case put forward by the opposing parties. Family lawyers face hourly caps that confine their ability to perform the legal work their clients require. Many lawyers have given up their modest offices because their incomes cannot support them, and struggle to practice in isolation from the support of their peers and without necessary staff assistance. Criminal lawyers attend court appearances that they are not paid to attend and that are then adjourned because other players are not ready to proceed.

The destabilizing impacts of job action and labour unrest are now commencing and will not conclude until there has been a substantial remedying of the status quo.

I. Decline in public confidence in the justice system

In 2013 the Canadian Bar Association published its *Reaching Equal Justice Report*. The data collected disclosed that public confidence in the justice system is declining. People interviewed randomly ‘on the street’, and in meetings with marginalized communities consistently described the system as not to be trusted, only for people with money, arbitrary, difficult to navigate and inaccessible to ordinary people.⁷⁷

Len Doust QC concluded in the *Doust Report* that while the social costs of the lack of legal aid in essential matters were difficult to measure precisely, a clogged inaccessible system of justice necessarily resulted in “unfair and arbitrary outcomes, often accompanied by human tragedy, and breeds contempt for the justice system and the rule of law.”⁷⁸

The 2012 report to the Attorney General, *Making Justice Work*, produced by the Legal Services Society confirms the demographics of the clientele legal aid lawyers are serving:

Legal aid clients are among the province’s most marginalized citizens. They lack the financial means to effectively access the justice system when their families, freedom, or security are at risk. Almost 70% have not graduated from high school, and many struggle with basic literacy. Others face linguistic or cultural barriers. Over 25% are Aboriginal; in some communities, this rises to 80%. A key metric of success for justice reform must be increased access to justice for these vulnerable clients.⁷⁹

Mr. Doust elaborated on the damage done to public perception of the system of justice in British Columbia because of grossly underfunded legal aid:⁸⁰

Many of the submissions described the very real struggles experienced by unrepresented persons trying to resolve their legal problems through the court system as a result of the elimination of legal aid for poverty law matters and the steady erosion of family, criminal, child protection, mental health, and immigration/refugee legal aid services. Individuals, community advocates, and numerous organizations expressed the view that the

⁷⁷ CBA, *Reaching Equal Justice Report*, p. 16

⁷⁸ *supra*, p. 56

⁷⁹ *Making Justice Work* at p. 8

⁸⁰ *supra*, p. 21

devastating impact of the 2002 cuts has resulted in a widespread feeling of abandonment and loss of trust in government.

Individuals provided detailed accounts of unbearable stress and hopelessness and of feeling overwhelmed and unable to understand many facets of the legal system, let alone deal with managing the seemingly endless obstacles to resolving their problems. Numerous submissions highlighted the spiraling and multiplying effect of inadequate legal assistance when a legal issue surfaces. Many voiced a deep sense of betrayal and unfairness in having to go it alone regardless of whether the outcome was acceptable to them and the dread of having nowhere to turn when things go terribly wrong.

Many more listed in concrete terms the injustices that have had a negative, long-lasting impact on their ability to meet their basic needs. In criminal cases, people pleaded guilty, not fully understanding their rights. In family and criminal cases people entered into consent orders without thinking out or understanding the consequences, or were bullied by opposing parties with greater financial or personal resources. People lost their homes and their ability to access basic social benefits. In litigation, unrepresented people were unable to identify the relevant legal issues or focused on irrelevant issues wasting a great deal of court time, undermining their cause and enhancing systemic costs. These perverse effects tend to be especially steep when one party is represented and the other not; however, an unrepresented bully can also wreak havoc inside and outside the courtroom. More often than not the harm is irreparable.

British Columbians recognize that legal aid is an important system that requires funding. In polling done by Ipsos Reid in 2008 at the request of LSS, 93% of British Columbians indicated that they support legal aid, with 61% strongly support it, up from 54% in 2006. Only 6% of people polled opposed legal aid. The support for legal aid was noted to be broad-based across all regions and demographic groups.⁸¹ Further, 98% of those polled agreed that everyone should have access to the justice system. 78% agreed government should give legal aid the same priority as health care, education, welfare and child protection.⁸²

m. Immediate lawyer service withdrawal

This will be addressed below.

⁸¹ Ipsos Reid, Legal Aid in BC, p. 3

⁸² *supra*, pp. 4,5

10. The Solution

a. Increase LSS Funding

A.L.L. describes below various funding options. E then advise of our position.

Option 1: Return to 1992 overall LSS funding levels, adjusted for inflation and increased population level

In order to match 1992/1993 per capita funding levels, and accounting for inflation, annual funding for LSS from all sources would need to be $5,106,322^{83} \times \$39.22 = \$200,269,948$. This represents an increase in funding of approximately \$114,000,000 above present revenues from all sources.

Option 2: Return to 1996 level of provincial funding for LSS, adjusted for inflation and population growth

This may be is calculated by reference to Mr. Carson's Table 2-A. In order to match 1996 government grants to LSS, taking into account inflation and B.C. population growth, the 1996 sum would need to be increased in 2018 by 93%. In 1996 the provincial grant to LSS totaled \$89,183,195.⁸⁴ To reflect inflation and population growth that sum in 2018 would be \$172,123,566. Thus, the Province would need to increase its funding of LSS by \$95,574,921.

Option 3: Restore the 2002-2004 cuts, adjusted for inflation and population increase

⁸³ Stats Can, Oct 2018 BC population

⁸⁴ Carson Table 2

Using Mr. Carson's Table 2, it may be seen that to keep pace with inflation and the increase in provincial population, a 2002 sum must be increased by a factor of 1.61 today. Thus, the LSS provincial revenues of \$88,776,475 in 2002 translate to \$142,930,124 in 2018 if inflation and population growth are factored in. Thus, additional funding of approximately \$54,000,000 would be required over and above present levels of funding.

Option 4: Increase the LSS budget to equal the average per capita legal aid expenditures of Ontario, Manitoba, Nova Scotia, Newfoundland and Labrador

Based on the 2016/2017 data, the average per capita legal aid funding⁸⁵ of the four provinces with the highest per capita rates was \$29.20. In order for BC to match that rate of funding, total funding for LSS would need to be $5,106,322 \times \$29.20 = \$149,104,602$. The most recent LSS budget would thus need to be increased by approximately \$60,000,000 or 76% in order to meet this level of funding.

Option 5: Increase the hourly tariff rate to \$150

Based on the estimated expenditure on tariff for 2018/19 of \$50.8 million, and an average rate of \$88/hr., the cost associated with an increase of that rate to \$150/hr. would be \$35.8 million.

Option 6: Increase the hourly tariff to match MCFD Directors' rate (Vancouver) of \$135/hr.

The estimated expenditure for tariff payments to lawyers for 2018/19 based on present tariff rates is \$50.8 million.⁸⁶ The associated cost for an increase in the average tariff rate of \$88 to a rate of \$135 is roughly estimated at \$27 million.⁸⁷

⁸⁵ Including federal contributions

⁸⁶ per LSS.

⁸⁷ *LSS, Adequate Tariffs to Meet Client Needs, 2018*

A.L.L.'s Position

A.L.L. submits that significant additional funding needs to be provided to L.S.S. so that legal aid coverage, eligibility and tariffs may be restored to previous levels. That required level of additional provincial funding is \$100,000,000.

b. Ensure stable funding in the future

LSS has endured decades of catastrophic budget cuts. Successive governments have failed to remedy the errors of their predecessors. The removal of LSS' independence has furthermore allowed successive government to attach strings to funding in manners that may advance short-term interests in innovative projects but has compromised the critical need for stability of funding.

Legal aid tariff rate funding has in turn for decades lacked stability, as is amply demonstrated by the years of wage "holdbacks" from the modest sums payable to legal aid lawyers. A.L.L. questions whether any other labour group in British Columbia history has experienced a decade of wage holdbacks such as those that were routine for legal aid lawyers for many years.

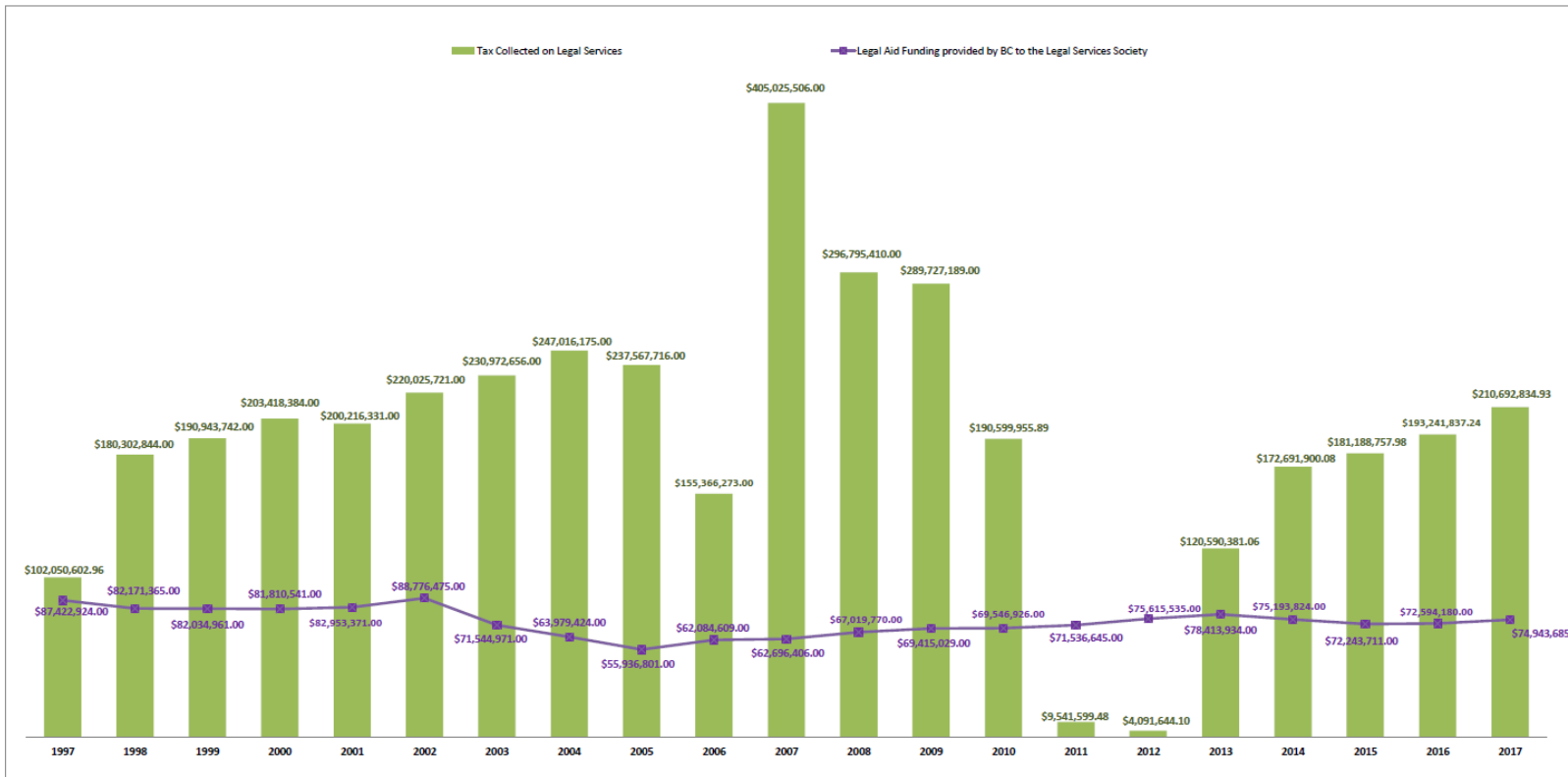
A.L.L. members seek stability in funding of the tariff compensation through linkage to other key participants' compensation, such as that of judges and Crown Counsel.

Stability in overall funding for LSS is an overlapping consideration to that of stability in tariff funding specifically.

The PST on legal services, instituted in the early 1990s, was intended to assist in funding of legal aid. The amount collected has enormously exceeded LSS funding in the years since, and ought to have been more than sufficient to allow for stability in LSS funding.

This is illustrated by the graph on the following page prepared by A.L.L. member Mike Mulligan.

Tax Collected on Legal Services and Legal Aid Funding 1997 - 2017



In a properly-funded legal aid system criminal lawyers are provided with the funding required to consult with their clients, review the files, research the relevant legal issues, negotiate with Crown Counsel and liaise with community supports at an early stage of proceedings. A properly-funded system does not fund only one visit per case by a lawyer to a client in custody, and that at less than \$100. A properly-funded legal aid system compensates a lawyer for consultations with her client, writing letters to Crown Counsel, and attending Court. A properly-funded legal aid system compensates a lawyer's time spent reading witness statements and police reports, arranging for a rehab facility to accept a client, or interviewing witnesses.

A properly-funded legal aid system does not preclude eligibility for family law cases save for those situations involving serious risk of physical harm. Nor does it cap family law lawyers at just a specified number of hours on each case. Rather, it provides counsel to those who face serious legal matters within the scope of services legal aid funds if they otherwise cannot afford counsel. In doing so, the properly-funded legal aid system minimizes the numbers of self-represented litigants, and hence court backlogs.

The providing of adequate and sustainable funding ensures the retention of experienced counsel and ensures junior counsel are mentored. It increases the likelihood of efficiency and of optimal results. It recognizes that increases to legal aid funding are necessary to reflect the increasing time required to address complex clients and increasingly legal issues. It ensures that issues of addiction and mental health, which contribute to increasingly complex client issues and legal problems, are appropriately addressed. As noted by the CBA in its recent submission to the External Review of Legal Aid Service Delivery, examples of new requirements that impact lawyer time and the scope of services include, for example, *Gladue* requirements in criminal matters and Family Case Conferences in family cases.⁸⁸

Legal aid has been described as “our most important access to justice program.” It has been concluded that funding for civil legal aid represents a good social and economic investment. In her analysis of several studies on the economic benefits of civil legal aid, Dr. Laura Abel has found that legal aid can save public money by reducing domestic violence, helping children leave foster care more quickly, reducing evictions, alleviating homelessness, protecting health and helping low-income people participate in federal safety-net programs.⁸⁹

The CBA *Reaching Equal Justice Report* notes that a number of international studies have contributed to the business case for adequately funding legal aid by quantifying the

⁸⁸ pp. 14, 15

⁸⁹ CBA, *Reaching Equal Justice Report*, p. 55

return on investment for legal aid dollars spent. For example, a PricewaterhouseCoopers study 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. A 2009 Texas study found that investment in legal aid led to economic growth by increasing jobs, reducing work days missed due to legal problems, assisting in creation of more stable housing, resolution of debt issues and stimulation of business activity. The Texas study concluded that for every dollar expended for indigent civil legal aid services, the overall annual gains to the economy were quantifiably significant, and that reductions in legal aid spending created an economic burden on the community. A British study reached the same conclusions.⁹⁰

Similar conclusions have been reached in Canada. *The Report of the Standing Committee on Justice and Human Rights of the House of Commons, Access to Justice, Part 2: Legal Aid* (2017) reviewed a number of sources that concluded there was economic benefit to proper funding of legal aid. Among them was a 2014 report, *Maximizing the Federal Investment in Criminal Legal Aid*, commissioned by the Department of Justice, which concluded that “evidence indicates that investments in legal aid can save money in areas of government spending such as health and social assistance.”⁹¹

Within the justice system, there are obvious financial benefits to a properly funded legal aid system. In such a system the number of self-represented litigants would decline. That in turn would lead to savings. For example, average LSS case costs in family and child protection matters have risen considerably over the years even though LSS’s coverage policy has not changed. For family cases, the average cost was \$1,910 in 2007/2008 and was estimated to have reached more than \$2,500 by 2012-2013. One of the reasons for the increase, according to LSS, is court backlogs that prevented lawyers from scheduling trials on consecutive days: as a result, hearings were fragmented over several months

⁹⁰ CBA, *supra*, pp. 55, 56

⁹¹ pp. 7-9

and required additional preparation time for each hearing day, due to the passage of time.⁹²

A.L.L. submits, however, that the funding of legal aid is not a business case decision any more than is the funding of health care or welfare or education. As argued above, it is an essential service for those British Columbians whose income otherwise precludes them having meaningful access to justice.

c. Lawyer job action is imminent

A.L.L. was incorporated as a Society in the summer of 2018 to represent members of the legal aid bar, and to further the Society's constitutional goals, which include advocating for improved funding for legal aid.

Our members are from around the province. They include criminal, family, immigration, and child protection counsel. While most of our members accept legal aid referrals, a small number of our members do not but have a strong interest in legal aid and access to justice. Included in the latter group of A.L.L. members are counsel and executive members from the Community Legal Assistance Program, the BC Civil Liberties Association, Mosaic, and the Together Against Poverty Society. Five Benchers of the Law Society are A.L.L. members, including the Society's present President.

A.L.L. represents a substantial majority of those lawyers in the province who accept criminal legal aid referrals. The criminal membership is strong among the group of senior lawyers who accept referrals in major cases, such as murder charges. Our immigration bar membership also represents a substantial proportion of the members of the bar who do that work. Our family law membership includes many who provide critical duty counsel services. Our members from the child protection bar also stand ready to support the goals of A.L.L.

⁹² LSS, *Making Justice Work*, 2012, pp. 20, 21

A.L.L. is supported in its work by key legal stakeholders, including the Canadian Bar Association and the Trial Lawyers Association. A.L.L. has liaisons who will be communicating with the Crown Counsel Association and with the bench.

A.L.L. is hopeful that through negotiation with government adequate funding for legal aid will move beyond being a subject for discussion and become a reality. However, our Directors have recommended to our 475 members that in the event provincial funding is not immediately significantly enhanced, that members commence withdrawal of their legal services on April 1, 2019.

Ted Hughes wrote in his 1984 Task Force Report on legal aid that “It is the view of the Task Force that, as a matter of principle, the ultimate goal must be to ensure that individuals who are eligible for legal aid coverage are to be represented by legal counsel who are paid a reasonable fee. Otherwise, in the medium to long term, the legal aid delivery system will suffer a major crisis.”⁹³ That major crisis is now upon us.

Members will soon be voting on the proposed withdrawal of services. Based upon our polling of our members, feedback at community meetings, and communications directly from members to A.L.L. and its Directors, we have assessed that there is a high degree of support for a very strong job action. A previous more nuanced and limited withdrawal of services in 2012, organized by a predecessor organization, failed to achieve the goals of its members. Those lessons have been learned. This job action will be neither nuanced nor limited.

A.L.L.’s membership has come together in solidarity with the dedicated purpose of achieving change. That change must be significant, and it must come soon. These are not times of austerity: rather, the Province is anticipated to be facing a very large budget surplus. There has never been a time like the present to remedy the past harms done to

⁹³ Cited in LSS Managing Results, Tariff Renewal Report, 2005 p. 11

the legal aid system and to restore it to what it should be, a strong pillar of the social service network of British Columbia.

d. Future Legal Aid Structural Reform

One of the key recommendations of the Doust Report was that government increase long-term, stable funding of legal aid: “The provincial and federal governments must increase funding for legal aid and provide this funding through a stable, multi-year granting process. The provision of essential public legal services is a governmental responsibility and the delivery of core services should not depend upon charitable contributions from the Law Foundation, the Notary Foundation, community groups, and pro bono efforts of the legal profession, paralegals and others.”⁹⁴

Mr. Doust further observed that “[T]he requirement of increased, stable, long-term public funding for legal aid is non-negotiable — without it there will be no movement forward. Without this additional, assured public funding the social and economic costs will continue to mount and public confidence in the justice system will continue to deteriorate. The suffering of innumerable people will not stop; if anything, it will continue to escalate. Our society cannot afford to let our legal aid system fail our fellow citizens and thereby fail us all.”⁹⁵

In 1992 Mr. Agg advised the then-government in his report on legal aid that there should be a reasonable, permanent relationship between the legal aid tariff and comparables such as Crown Counsel wage scales, legal services staff lawyer scales, and contract counsel rates.

A.L.L. supports these findings wholeheartedly. While structural reform of the modes of delivery of legal aid services, of the tariff structure, of the means of assessing eligibility, of the parameters of coverage, may all yield benefits, the legal aid system is in crisis not because such reforms have not been actualized, but because the legal aid system has

⁹⁴ Doust, p. 10

⁹⁵ Doust, p. 58

been systemically, severely, underfunded, When fiscal times have been lean, cuts have been savage. When fiscal times have been bounteous, cuts, as well as the slow strangulation of budgets that do not increase to reflect population growth or the increasing costs of living, have been the rule.

While A.L.L. is open to providing input of its members to government into future innovations to the legal aid system and appreciates that growth and modernization of the system are desirable, piecemeal new projects cannot be substitutes for proper and stable legal aid funding. An approach that tinkers on the margins amounts to no more than rearranging the deckchairs on the sinking ship that is our legal aid system.

We are living with the shame of a crippled legal aid system in British Columbia. The members of the legal aid bar have united to bring pressure to bear to achieve the overarching goal of restoration of that legal aid system to what it once was and securing its future.

The 2019 Select Standing Committee on Finance and Government Services Report on the Budget 2019 Consultation recommended that government “Improve access to legal aid services across the province by increasing tariff rates to the level necessary to attract and retain legal counsel, and to restore and expand coverage for family law and criminal law legal aid services, particularly in rural, remote and Indigenous communities.” The fiscal situation of the province is such that there exists no reason to defer what must be done.