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April 8, 2023

The Honourable David Lametti, PC, KC, MP
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8

Dear Mr. Attorney:

I am writing with respect to the Government of Canada's approach to legal aid, and particularly Legal Aid BC. I am sharing this letter with the Association of Legal Aid Plans of Canada (ALAP), but the views expressed herein are those of Legal Aid BC alone. The letter is as much a response to the 2023 Budget as a proposal for the next. Although you are the addressee, as the accountable Minister, the letter is also intended for an audience less familiar with legal aid, such as your Treasury colleagues. Parliament may have once been dominated by the legal profession, but those days are long gone; the *raison d'etre* of legal aid is unknown to most Canadians today.

## The Crown's Legal Aid Obligations

Nobody wakes up wishing for legal aid in their lives. Parliament and Crown make legal aid necessary for low-income residents who find themselves in legal distress, not necessarily of their own making. The legal distress, to take criminal, family, and immigration matters, arises through state regulation and enforcement. Legal aid is not a privilege born out of compassion. It is a shield necessary to one facing the Crown's arsenal; it is the corollary to the exercise of enormous powers by Canadian legislatures and executives.

To separate and divorce, legally, Canadians have no choice but to work within the system that DOJ built. Upon being charged with federally legislated offences, defendants have no choice but to face a prosecutorial juggernaut, pursuant to procedures that DOJ built. Upon entering Canada, non-citizens must comply with a process, if they expect to stay. These legal systems are your systems, or at least the ones for which DOJ is accountable.

Is the federal Department of Justice (DOJ) playing an appropriate role when it comes to the criminal, family and immigration system faced by Canadian residents? The question posed is not about the more popular issues of community safety, narcotics legalization, family autonomy, or Canadian refugee policy – all of which are featured in Canada's 2023 budget. It is about the integrity of the system itself, and whether that system renders fair treatment and

processes for Canadian residents. Your legislative and executive jurisdiction, after all, frames the system within which Canadians are legally bound to compliance, including the treatment of:

- those who cannot afford market rates for a criminal, family, or immigration lawyer;
- black, indigenous and people of colour;
- single mothers fleeing abusive relationships, or simply the freedom of Canadians to revisit their family structure; and,
- new Canadians trying to comply with immigration laws.

Can you say with confidence that Canadians have equal treatment by your federally constructed legal systems, or equal access to due process, no matter their income, race, gender? In fact, publicly funded legal aid was created by nations in the 20th Century to address the legal injustices that follows from economic disparities. In the 21st Century, we have all (belatedly) come to see that racism and colonialism are further, crushing burdens upon our legal systems, making legal aid all the more necessary.

What is the state of legal aid in Canada today? It's a threadbare system, overall. Because that racism and colonialism has rendered a *de facto* tautology where people are unfairly targeted and trapped within a system unwittingly designed to feed itself with more charges, entrenching a revolving door of wrongful stops, searches, detentions, charges, prosecutions, trials, and over-sentencing, with impossible bail conditions throughout. Most of the criminal legal docket in Canada today is a heap of over-charging, over-incarcerating, and under-defending of folks over-represented by their race, poverty, mental health, and addiction. And because those thrown to the wolves are an anonymized, diffuse, statistically small, politically weak, and highly stigmatized minority of minorities.

Those of us who work in legal aid do all we can with what we've got. But eligibility for and coverage of legal aid services is so extremely restrictive, wherein the vast majority of Canadians are not eligible for legal aid, left to fend off a criminal legal charge for themselves, the presumption of innocence notwithstanding; and those eligible receive far, far less of a legal defence than people of privilege, like me.

If the Minister agrees that legal aid is falling short, for Canadians, on all fronts – criminal, family, child welfare, immigration, and poverty law – then it cannot plead jurisdictional immunity for legal aid failures, citing our constitutional division of powers. It would be untrue for Canada to claim that legal aid is a provincial matter exclusively. In fact, legal aid jurisdiction is concurrent, or shared, however you slice it, given federal legislative mandates over criminal, family, and immigration law; given the special priority cited by your Ministry on matters directly impacting the work of legal aid lawyers: anti-racism and reconciliation strategies, alongside your contradictory strategies on community safety, bail reform, and the 70+ mandatory minimum punishments left on your legislative books. Your ministry and federal parliament contribute to downstream demand for legal aid, as Niagara Falls to the Great Lakes.

The first step to bettering the integrity of your legal systems, of building a legal aid system you could defend with a straight face, requires a *strategy* that permits for the prioritization of legal

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aid services, along with the identification and measurement of desired *outcomes* for legal aid clients, and then subsequently bettering those outcomes. For example, given that women facing intimate partner violence cite a lawyer as what they need most, we ought to govern legal aid accordingly.

This letter hereafter focusses primarily upon criminal law legal aid -- for Canadians often arrested by RCMP, sometimes prosecuted by DOJ Crowns, and always charged pursuant to federally legislated offences. The outcomes we seek would include increasing the depth and breadth of the legally aided (eligibility and coverage), with an eye to particular priorities regarding anti-racism and reconciliation, for instance. Particular goals could be set for decreasing indigenous detention, for instance, as a corrective to their overincarceration; for decreasing miscarriages of justice; for increasing productive socioeconomic outcomes, via reasonable bail results, and more diversion outcomes. All those outcomes are currently being achieved by legal aid lawyers. Your leadership would mean we could do more of that good work, and then some.

How? In order to achieve these ends, legal aiders will need to be retained or employed, to deliver services consistent with their fiduciary duties to their clients, but also in pursuit of those strategies prioritized by legislatures and Justice executives -- federal, territorial, and provincial. The nature of legal aid in Canada is a mish mash of infrastructure or administration, more or less at arm's length, as is the case with prosecutorial services, all forming a loose patchwork of services from a variety of organizations, including provincial ministry programming, legal aid corporations, and NGOs, all with mostly public and some private revenues.

Providing the means to those ends will require a change to the *status quo*, when it comes to federal government expenditures. Each province has its own strategic and operational direction, with more similarities than differences. The systems are all lean from fiscal undernourishment and rigorous efficiencies wrought through decades of sizeable cuts by provincial and territorial chancellors amid constant, insatiable treasury controls. Substantial operational expertise has thereby developed in provincial and territorial legal aid operations. You articulate preferred ends with accompanying means; Legal Aid BC, for one, can deliver.

As I will explain, our proposal builds on the logic of your pathbreaking work on criminal justice reform addressing systemic racial discrimination, including Canada's Black Justice Strategy, and the proposed Indigenous Justice Strategy. Those strategies will eventually address policing, prosecution and judiciary, no doubt.

However, the front lines of anti-racism and equality work done in the Canadian legal system is now undertaken, everyday, by provincial legal aid lawyers, who are defending those wronged by systemic racial discrimination, and those groups wrongly overrepresented in the criminal

legal system: the poor, mentally ill, addicted, and racialized. Having recognized the wrongs, the federal government ought to fund provincial legal aid systems accordingly, to fill the legal aid funding gaps caused by racism, including those exacerbated by federal mandatory punishments, and to mitigate the discriminatory nature of Canada's criminal justice system, especially on Indigenous and Black accused.

In this letter, I will elaborate on anti-racism and Legal Aid BC (LABC), as one of the following five grounds for the Government of Canada to change its position on federal funding of provincial legal aid. We submit that the primary mechanism of federal funding for provincial legal aid, the Canada Social Transfer, is inadequate. It renders a Fiscal Federalism Process Gap for provincial legal aid programs (mindful that territories have a separate mechanism). Instead, the Department of Justice ought to address Canada's investment in legal aid through grant and contribution programs, on the following grounds.

1. The federal government can mitigate systemic racial discrimination in the criminal legal system by bearing a fair proportion of the expense of provincially funded legal aid counsel. Provincial legal aid is the primary *corrective* to racism and discrimination today in our legal system. This will be called the DOJ Anti-Racism and Pro-Reconciliation Strategy.

> *Legal aid is the front line of anti-racism and systemic discrimination work in Canada's legal system. Activists, allies, governments, and legislators all do indispensable work too, but they can't be in court. However necessary may be those (and your) commendable efforts to prevent escalations and future instances of discrimination, that policy work is one thing; actively fending off systemic racism through criminal legal defences is another. Legal Aid does that front line work, and Canada's financial contribution to that work is needed. It is not the hopeful but speculative work of prevention; it is the irrefutable outcome that you seek.*
> */ LEGAL AID BC*

2. The Supreme Court of Canada's call-to-action in *Jordan* was directed at the DOJ, *inter alia*, to reverse the culture of complacency towards delay.[1] This involves not only adequate court administration, adjudication, and prosecution, not only adequate rosters of judges and prosecutors, by both levels of government, but also adequate legal aid. In our view, sections 7 and 11(d) of the *Charter* requires the federal government to bear a fair proportion of the cost of state-funded legal counsel (either court ordered and/or implicitly *Charter*-mandated) in criminal cases, because of the linchpin of the Criminal Code, and pursuant to the majority judgement in *Jordan* -- a BC appeal, after all.

[1] *R. v. Jordan*, [2016] 1 SCR 631 at para 45: "along with other participants in the justice system, this Court has a role to play in changing courtroom culture and facilitating a more efficient criminal justice system, thereby protecting the right to trial within a reasonable time."

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3. Federal legislation and Department of Justice Canada (DOJ) programming drives up demand for and costs borne by provincial legal aid systems. For instance, the bail reforms you recently proposed and the 70+[2] mandatory minimum punishments (MMPs) accumulated by Parliament have a direct fiscal impact on provincial legal aid. Even the recently repealed MMPs will take years to work their way through the system. Ordinarily, fiscal federalism recognizes not only the division of powers under the *Constitution Act, 1867*, but also the downstream impact of federal Parliamentary and Executive action. Hence the federal contributions to provincial health administration. Not so with commensurate funding of provincial legal aid funding arising from federal upstream impacts. We call this the Fiscal Federalism DOJ Substance Gap.

4. The Fiscal Federalism Process Gap, meanwhile, exacerbates the Substance gap. The nature of fiscal federalism for provincial legal aid today involves a fiction. The Canada Social Transfer is an inadequate mechanism for addressing constitutional shortcomings in the criminal legal system. While it is true that every provincial ministry subject to the Canada Social Transfer, but for Health, could have similar objections, from a policy standpoint, our submission is not one of policy, but constitutional law. Given that all our criminal clients face a federally legislated criminal charge, the federal contribution to provincial legal aid has *Charter* implications. Federal parliament creates the jeopardy for defendants, triggering *Charter* rights to counsel and a fair trial. So, the federal government's fiscal federalist obligations are not satisfied by the current artifice that all is covered by the Canada Social Transfer. An alternative mechanism is needed to fulfill the federal government's *Charter* obligation, such as DOJ grants or contributions to LABC, like federal Health Canada Grants and Contributions.

## LABC Fiscal Supply and Demand

Let me begin by sharing some basic information about Legal Aid BC's criminal law docket and finances, highlighting the federal role in both. You may find this information in Legal Aid BC's *2021/22 Annual Service Plan Report* (August 2022).

In 2021/22, Legal Aid BC provided representation contracts to 24,845 individuals. 17,661 (71%) of these contracts were for criminal law representation. The percentages for 2020/21 and 2019/20 were comparable – 69% and 71%, respectively. All these criminal matters involve either *Criminal Code* offences, or drug offences under the *Controlled Drug and Substances Act* (*CDSA*). The jurisdiction of federal prosecutors notwithstanding, you will know that is it often

[2] For the quantum, see DOJ and CBA sources, which cite figures of 100 and 73 respectively: 1.0 Introduction: An Overview of Canadian Mandatory Minimum Penalties - Mandatory Minimum Penalties in Canada: Analysis and Annotated Bibliography (justice.gc.ca); National - Canada's web of mandatory minimum sentences (nationalmagazine.ca). We acknowledge the 20 MMPs repealed by Bill C-5.

the case that a BC Crown attorney will manage a prosecution against a defendant including both *Criminal Code* and *CDSA* offences for reasons of efficiency and efficacy. While the cost sharing for this arrangement is addressed by your Ministry at the prosecution level, it is not addressed for legal aid matters, other than through the fiction of the Canada Social Transfer.

In addition, defending federal *Criminal Code* and federal *CDSA* charges increasingly becomes a provincial legal aid matter, because those federal offences are increasingly more likely to carry the risk of incarceration, because of the accumulation of new offences and new sentencing amendments by federal Parliament, at the behest of DOJ Bills, particularly for MMPs, to which your Government has both added and subtracted. (Ironically, so many MMPs nullified by the court were at the behest of legal aid clients). Therefore, the proportion of our criminal cases where incarceration is a real prospect is almost entirely generated by federal offences and punishments. This we call the Fiscal Federalism DOJ Substance Gap.

Federal funding for Legal Aid BC takes two forms. *Indirect federal funding* is said to flow to Legal Aid BC through the Canada Social Transfer, but this is an artifice, because that Transfer includes no earmarked funds for BC legal aid; it enters the consolidated revenue fund, from which the Ministry of the Attorney General is allocated an annual budget, or an envelope, within which the Attorney General prioritizes its spending, amongst a host of competing demands for funding. Therefore, our current system of fiscal federalism does not include a mechanism for the federal government to fulfill its *Charter* obligations regarding criminal justice, anti-racism, and reconciliation, at least as it applies to your Ministry. This we call the Fiscal Federalism Process Gap.

In any event, according to the Department of Justice Canada's report, *Legal Aid in Canada 2020-21* (2022), Legal Aid BC received $22,257,421 under the CHST in 2020/21, which theoretically amounted to 21% of our total expenditures of $105,352,818 for that year. While the federal government asserts that it provided $18,057,944 for criminal law, this fails to account that the federal funds are non-earmarked, as described above. On a prorated basis, the indirect federal financial contribution for criminal law in 2021/22 was $12,190,364.13 – that is, 21% of the $58M we spent on criminal representation. To be clear, there is no transfer from DOJ to BC for Legal Aid. There is no transfer from the federal Treasury to provincial Treasury, for Legal Aid BC, outside the direct funding below. Canada does not fund 21% of the LABC budget. BC funds all of LABC, but for direct federal funding for *ad hoc* projects, Federal Court matters, and legal aid for immigration matters, discussed below.

*Direct federal funding* was $60,467 (0.05%). These federal monies relate to Federal-Court Ordered Counsel cases, pursuant to the *Canada-Legal Aid BC MOU* (dated July 25, 2022). In addition, there is direct funding for non-legal aid matters, such as your 2022 tech grant to Legal Aid BC, said to address pandemic effects to legal aid practices. And direct funding for immigration legal aid, which was referenced in the 2023 Budget of this week.

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In summary, the Division of Powers is not aligned with the fiscal supply and demand for LABC -- with fiscal federalism's treatment of provincial legal aid -- due to the aforementioned Fiscal Federalism DOJ Substance and Process Gaps.

## 1. DOJ Anti-Racism & Pro-Reconciliation Strategy = New Federal Legal Aid Grants/Contributions

We know that you have, as Attorney General, openly acknowledged systemic racial discrimination in the criminal justice system and prioritized concrete steps to tackle it. Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, SC 2022, c 15 was a landmark achievement. We recognize that it eliminated MMPs for 14 *Criminal Code* offences, and for all six offences in the *CDA*. (Although that ought to reduce some demand for legal aid services in the future, that will take years, as all those charges laid prior to November 17, 2022 work their way through the system. Moreover, there remain over fifty MMPs untouched by your 2022 Act). Our point herein is that you and your government have committed to anti-racism goals through parliamentary and executive action.

The Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, Mr. Gary Anandasangaree, speaking on behalf of the government in the House of Commons on second reading on December 13, 2021, expressly made the link between Bill C-5 and the fight against systemic racism.[3] 2022 data from Corrections Canada illustrates the scale of the racism,

[3] "The proposed reforms represent an important step in our government's continuing efforts to make our criminal justice system fairer for everyone by seeking to address the overrepresentation of indigenous people, Black Canadians, and members of marginalized communities. Bill C-5 focuses on existing laws that have exacerbated underlying social, economic, institutional, and historical disadvantage and which have contributed to systemic inequities at all stages of the criminal justice system, from first contact with law enforcement all the way through to sentencing.
Issues of systemic racism and discrimination in Canada's criminal justice system are well documented, including by commissions of inquiry such as the Truth and Reconciliation Commission, the National Inquiry into Missing and Murdered Indigenous Women and Girls, and the Commission on Systemic Racism in the Ontario Criminal Justice System. More recently, the Parliamentary Black Caucus, in its June 2020 statement, called for reform of the justice and public safety systems to weed out anti-Black racism and systemic bias, and to make the administration of justice and public security more reflective of and sensitive to the diversity of our country. I was pleased to sign this statement, as were numerous cabinet colleagues, including the Minister of Justice, many members of Parliament and senators representing the different political spectrums.
The numbers speak for themselves. Black Canadians represent 3% of the Canadian population yet represent 7% of those who are incarcerated in federal penitentiaries. Indigenous people represent roughly 5% of the Canadian population yet represent 30% of those who are federally incarcerated. The number is profoundly higher for indigenous women, who represent 42% of those who are incarcerated. Indigenous people and Black Canadians have been particularly marginalized by the current criminal justice system. The calls for action recognize that sentencing laws, and in particular the broad and indiscriminate use of MMPs, or mandatory minimum penalties,

especially in relation to Black and indigenous persons.[4] The corollary to this link is that past federal action, legislative and executive, has contributed not only to the disproportionate racialized proportion of defendants and inmates, but also to the increased demand placed upon LABC by DOJ.

The recently announced Canada's Black Justice Strategy, and the proposed Indigenous Justice Strategy, provide promising platforms to build upon Bill C-5. We look forward to partnering with you and your colleagues as you develop the programmatic details of these strategies and implement them.

A crucial tool to mitigate the effects of systemic racism is effective legal representation. With effective legal representation, accused persons have a better chance at every stage of the criminal legal process. Indeed, Mr. Anandasangaree acknowledged that systemic discrimination exists "at all stages of the criminal justice system, from first contact with law enforcement all the way through to sentencing." With a lawyer, racialized and indigenous defendants can better obtain bail and avoid pre-trial detention; they can have charges amended or dropped; they can mount an effective defence and obtain an acquittal; and they can obtain a proportionate sentence that reflects the reality of systemic racism. Put another way, as the Ontario Judges' Association states:

> In the criminal justice system, there is an inevitable imbalance between the power and resources of the Crown and the power and resources of an individual accused. Legal aid is intended to bring some balance to the field.[5]

Regardless, the only public sector entity within Canada's criminal legal system whose primary job is to defend the racialized, the indigenous, the mentally ill and addicted, is provincial legal aid. It would be an overstatement to say that the federal *Criminal Code* and *CDSA* are the problem, not the solution; that federal and provincial/municipal police are the problem, not the solution; that federal and provincial prosecutors are the problem, not the solution. But it is no exaggeration to say that provincial legal aid has always been the only solution available to a

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and restrictions on the use of conditional sentences have made our criminal justice system less fair and have disproportionately hurt certain communities in Canada. This is precisely why Bill C-5 proposes to repeal a number of mandatory minimum penalties, including for all drug-related offences and for some firearm-related offences, although some MMPs would be retained for serious offences such as murder and serious firearm offences linked to organized crime. Data shows the MMPs that would be repealed have particularly contributed to the over-incarceration of indigenous people, Black Canadians, and members of marginalized communities."

[4] *Ethnocultural Offenders in Federal Custody: An Examination of Admission, In-Custody, and Community Supervision Indicators*, 2022 Nº R-446: Indigenous men represent 4.8% of the Canadian public, but 25.3% of men in custody and 16.7% of men under community supervision. Indigenous women represent 4.9% of the Canadian public, but 36.1% of women in custody and 25.9% of women under community supervision. Black men represent 3.4% of the Canadian public, but 9.1% of men in custody and 6.8% of men under community supervision. Black women represent 3.5% of the Canadian public, but 5.5% of women in custody and 8.4% of women under community supervision.

[5] McCamus JD, Trebilcock MJ, Thomas N, Newton L. *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services*. Brief by Ontario Judges Association.

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wrongful arrest, wrongful prosecution, disproportionate sentence, and miscarriage of justice. All we do at Legal Aid BC is defend the very people you've acknowledged to be objects of racism. So, to leave provincial legal aid funding out of your federal anti-racism justice efforts is *non sequitur*.

Legal aid is the front line of anti-racism and systemic discrimination work in Canada's legal system. Activists, allies, governments, and legislators all do indispensable work too, but they can't be in court. However necessary may be those (and your) commendable efforts to prevent escalations and future instances of discrimination, that policy work is one thing; actively fending off systemic racism through criminal legal defences is another. Legal Aid does that front line work, and Canada's financial contribution to that work is needed. It is not the hopeful but speculative work of prevention; it is the irrefutable outcome that you seek.

Legal Aid BC strives within the scope of its limited resources to fund effective legal representation in criminal matters to those who qualify. But with greater federal support, we would be able to expand both our eligibility criteria and coverage. Since our client base is disproportionately Indigenous and Black, increases in federal financial support would directly tackle systemic racial discrimination.

## 2. *Jordan* Call-to-Action

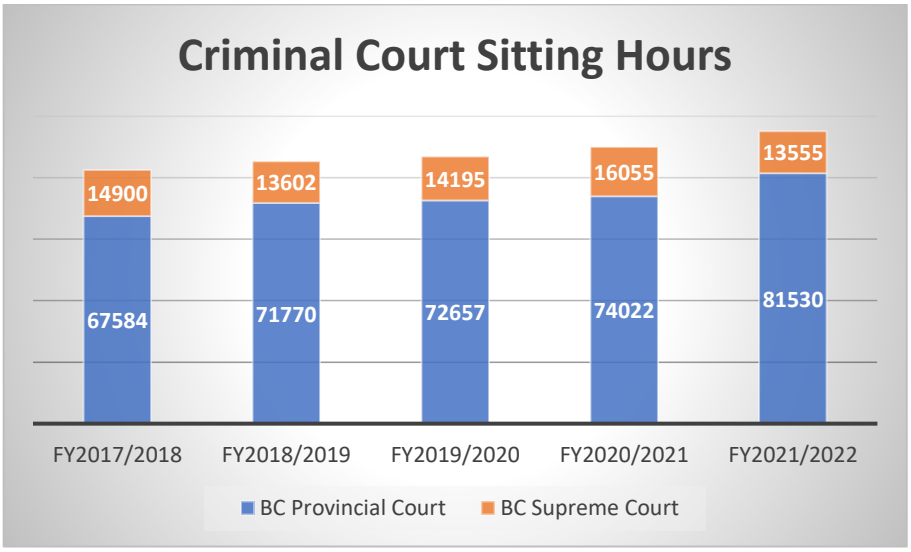
The cliché of court backlogs; the culture of complacency leading to delay; the toleration of "excessive delays": this is the charge against which a majority of the Supreme Court of Canada pled guilty, on behalf of the judicial, legislative and executive branches of the state, and its divided constitutional jurisdictions.[6] The sentence rendered against the totality of the criminal legal system was reform, and a stay of those proceedings exceeding the *Jordan* ceiling. The *obiter* remarks, however beyond justiciability, were no doubt taken very seriously by the DOJ and your provincial and territorial counterparts.

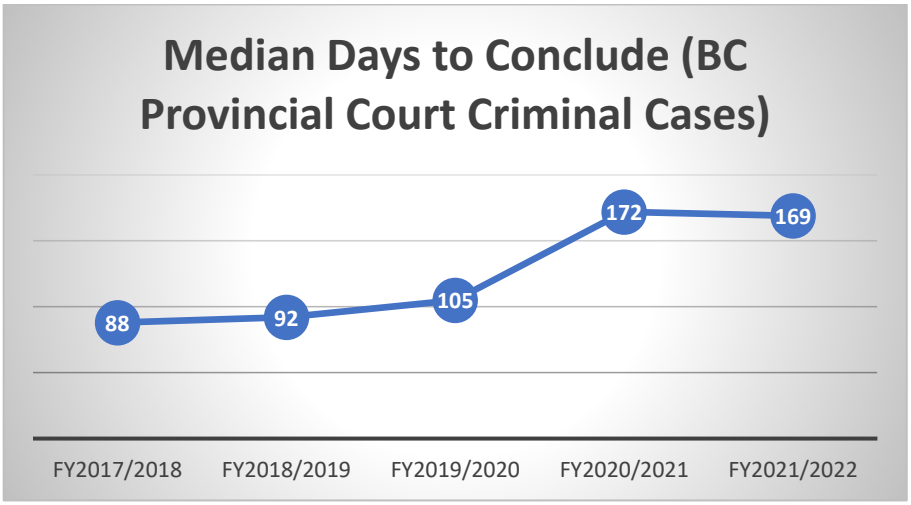
The artifice and inadequacy of the Canada Social Transfer to address the *Jordan* call-to-action, when it comes to provincial legal aid, is rank toleration and complacency, at its worst, by pretending that the downstream financial impacts of DOJ initiatives on provincial legal aid systems need not be addressed by the federal budget. The continued Fiscal Federalism Substance and Process Gaps do not live up to the duty on all justice system participants to respond to the current crisis in our criminal courts.

A leading variable contributing to criminal court backlogs remains unchanged since *Jordan* (2016): unrepresented accused and under-funding of legal aid. The result is a system that risks

[6] *R. v. Jordan*, [2016] 1 SCR 631 at paras. 1-4.

constitutional violations, undermines access to justice, and does not serve the public interest. Notwithstanding the Court's clear direction for all justice system participants to work together to solve these problems, the situation has gotten worse. In British Columbia, courts are sitting longer hours, but criminal cases are still taking longer to resolve, and fewer matters are being disposed of each year.[7]




[7] The underlying data presented in the charts below is available at https://app.powerbi.com/view?r=eyJrIjoiYjcxZTlhNDctZGU5Yy00YWZjLWE0MGQtZTViMWE4ZGU3YTA2IiwidCI6IjZmZGI1MjAwLTNkMGQtNGE4YS1iMDM2LWQzNjg1ZTM1OWFkYyJ9

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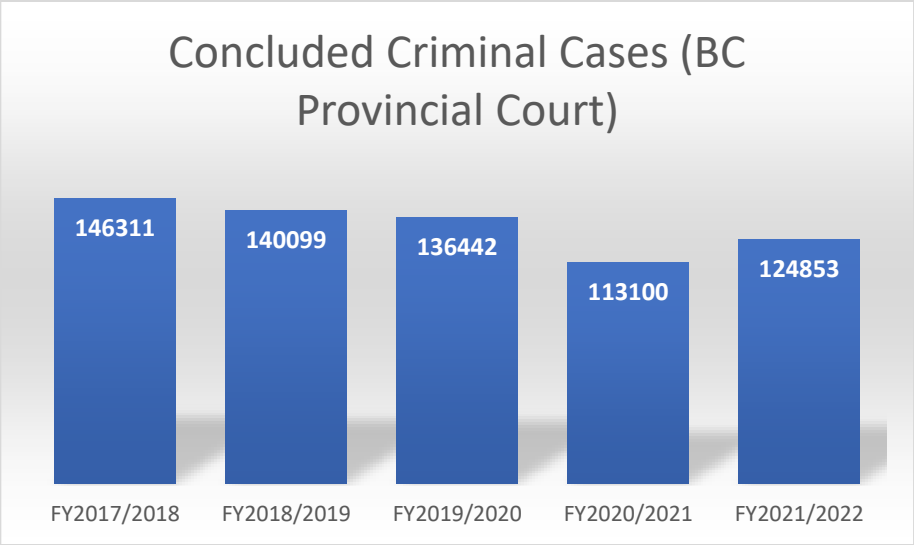


While sobering, there is nothing surprising about these figures. Canada-wide data also show that cases are taking longer to resolve, and fewer cases are being processed by the system. In 2016/2017, 10% of all criminal cases in Canada took more than 1 year to resolve. In 2020/2021, that number increased to more than 25%.[8] During the same period there was a 34.6% decrease in the number of decisions being reached in criminal cases per year.[9]

These trends are also not new. Numerous studies have pointed to a long-term trend in Canada of increasing delays in the criminal justice system. Justice LaSage and Professor Code (as he then was) wrote in the 2008 *Review of Large and Complex Case Procedures*:

> [N]o one should be surprised that criminal trials have become increasingly long and complex in the last 20 to 30 years. Both elected lawmakers and judicial lawmakers are themselves responsible for much of the transformation that we have witnessed, and it is now a well-known phenomenon.[10]

Increasing complexity and delay in the criminal justice system places burdens on all justice system participants. Judges must sit for longer hours. Federal and Provincial Crown Prosecutors must manage increasingly difficult files. Police officers must be removed from active duty for longer periods to assist in prosecutions. Witnesses must attend courts more frequently and for

[8] Juristat, *Adult criminal courts, cases by length of elapsed time*, Table 35-10-0028-01. Online: https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510002801
[9] Juristat, *Adult criminal courts, number of cases and charges by type of decision*, Table 35-10-0027-01. Online: https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510002701
[10] The Honourable Patrick J. LeSage & Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures* (Queen's Printer for Ontario, 2008) at 5-6.

longer. Further, accused persons must languish, often under restrictive bail conditions or while in detention, while their matters proceed slowly to court.

Legal Aid BC is hardly immune from these pressures. Longer and more complex cases create greater and greater demand for legal aid services, yet legal aid funding has been essentially flat lined over over the past twenty years, budgetary per capita, without even accounting for inflation. The overburdened court system impacts Legal Aid BC's ability to deliver meaningful and effective legal aid services to its clients, and to ensure that indigent accused have access to justice.

## 3. Fiscal Federalism DOJ Substance and Process Gaps

Federal parliamentary and DOJ policy choices are major drivers of the trends discussed above, and on the budgetary pressure on Legal Aid BC. The LeSage/Code Report identified Federal criminal law policy initiatives as one of the most significant contributors to this problem:

> Over the past 20 years Parliament has constantly altered and added to the existing body of statute law found in the Criminal Code, the Canada Evidence Act, the previous Young Offenders Act and the new Youth Criminal Justice Act. The Criminal Code is about double the size it was 30 years ago. The new legislation is complex, unfamiliar, and untested and it too has led to lengthy new proceedings.[11]

This trend has continued. Over the last decade, Parliament (through Government Bills) has created over sixty new offences. While your government has also repealed several offences, most were already declared unconstitutional[12] or were archaic and not actually enforced.[13] The net size of the criminal law continues to expand dramatically.

Similarly, the last decade has seen a massive expansion of specialized sentencing provisions, including at least 30 new or increased mandatory minimum punishments, aggravating sentencing factors that lead to more severe punishments, and additional orders or conditions that may attach to a conviction.[14] While your Government has worked to repeal some of the mandatory minimum sentences enacted by the prior government, it has retained others, and has added several statutory aggravating factors on its own initiative.

More offences and more severe sentences place significant burdens on the justice system. Increased sentences, whether in the form of mandatory minimums or mandatory aggravating factors, leave Crown Attorneys with zero incentives to offer deals to defendants who might otherwise consider a guilty plea; defendants have zero incentive to reduce the length of trial, or

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[11] *Ibid*., at 10.
[12] For example, sections 181 (spreading false news), 210 (bawdy house), 230 (constructive murder), 287 (procuring miscarriage), 462.2 (offences in respect of instruments of illicit drug use).
[13] For example, sections 49 (alarming His Majesty), 71 (dueling), 179 (vagrancy), 365 (pretending to practice witchcraft), 413 (falsely claiming royal warrant).
[14] See Appendix B.

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concede any issues because of the significant sentence awaiting a conviction. This imposes added pressure on Legal Aid BC to fund more services for defending every such offence.

This Government has also engaged in criminal procedure reforms that further add to the complexity of the legal system. A particularly significant example is the new regime for the admission of records in the possession of an accused person related to complainants in certain sexual offence cases (the Section 278.92 regime). The Supreme Court's 491-paragraph decision upholding the regime's constitutionality reflects the extreme complexity.[15] Determining the admissibility of a single text message can now require three distinct pre-trial hearings, each of which may involve third party participation.[16] Once again, the burden of representing accused persons navigating these proceedings falls at the feet of the legal aid system.

## Remedies: LABC Supply & Demand Redux

Far be it from a provincial Crown corporation CEO to speak for the Government of BC, particularly when it comes to fiscal federalism reforms. We can diagnose the cause and effect of LABC's supply and demand, including references to fiscal federalism, but the prescriptions are best left to people accountable to the legislature and electorate. This former law school teacher of Fiscal Federalism can make one humble observation, however: multi-billion-dollar transfer payments from Canada – some $9B for BC in 23/24, says Canada's Finance Minister -- address provincial treasury pressures on a scale rendering irrelevant the revenues of LABC. My own experience on a provincial Executive Council included six budgets, none of which involved early consultations with ministries budgeted under $10B. To be sure, BC's Treasury Board seeks a rigorous accounting of LABC revenues and expenses as if we were camel-breaking budgetary straws, but nary a major federal transfer in the 21st Century has contemplated a provincial legal aid budget.

Budgeted around $100M annually, Legal Aid BC is a creature of statute[17] and develops its eligibility for and coverage of legal aid services, governed by a board of directors, a majority of which are appointed by BC Order in Council, the remainder by our Law Society. Practically speaking, eligibility and coverage rules for provincial legal aid services have become as complicated as a tax code, and are governed by provincial treasury board. By statute, every year we must balance our budget to the penny, with penalties accruing to Ministers who account for deficit or surplus, for Ministry and Crown Corporation alike. Most provinces budget for a contingency fund for their legal aid programs, given that projecting demand for legal aid services has so many variables, but particularly for mega-cases, for which a Large Case

[15] *R. v. J.J.*, 2022 SCC 28.
[16] *J.J.*, *supra* at paras. 103-105.
[17] Legal Services Society Act (gov.bc.ca)

Management system applies to Legal Aid BC. The Air India prosecution is one example of a mega-case; another arises from federal-provincial Guns/Gangs Task Forces, which undertake operations involving dozens of defendants and hundreds of charges.

The demand for provincial legal aid services has increased incrementally as a result of the aforementioned expansion of new charges and MMPs caused by federal amendments. That expansion becomes multiplied when it intersects with the mega-cases, because all those defendants facing all those charges are often facing MMPs legislated by your parliament.

At the edge of eligibility and coverage for provincial legal aid services comes judicially-ordered counsel for defendants or for *amicus curae*. These are hotly contested matters where the provincial Attorney resists any judicial encroachment into its executive discretion to fund legal aid appropriately. Officials within each provincial justice ministry warn against 'floodgates' and 'slippery slopes,' said to upset the budgetary apple cart. We are not aware of any economic or accounting evidence submitted to courts to support this reasoning. Either way, a *Rowbotham* application (described further below) amounts to moving the line drawn by provincial legal aid systems. It is not a new category of legal aid; the *Rowbotham* constitutional principles are the untested bedrock of modern legal aid, post-*Charter*.

In particular, a court may order Legal Aid BC to provide publicly funded legal representation to an individual who otherwise does not qualify for legal aid. The leading precedent is the Ontario Court of Appeal's 1988 decision in *R. v. Rowbotham*, which held that under sections 7 and 11(d) of the *Charter* (at para. 167):

> a trial judge confronted with an exceptional case where legal aid has been refused, and who is of the opinion that representation of the accused by counsel is essential to a fair trial, may, upon being satisfied that the accused lacks the means to employ counsel, stay the proceedings against the accused until the necessary funding of counsel is provided. … there may be rare circumstances in which legal aid is denied but the trial judge, after an examination of the means of the accused, is satisfied that the accused, because of the length and complexity of the proceedings or for other reasons, cannot afford to retain counsel to the extent necessary to ensure a fair trial.

*Rowbotham* was followed by the British Columbia Court of Appeal in 2015 in *R. v. Crichton*. At present, any lawyering pursuant to *Rowbotham* orders are funded out of the aforementioned contingency fund for LABC.

It follows therefore that there is a right under sections 7 to 11(d) of the *Charter* to legal aid. This is the implicit premise in *Rowbotham*. If provinces were ever to eliminate legal aid for criminal representation, there is no doubt that courts would order the provision of state-funded counsel, under section 24(1) of the Charter, where essential to a fair trial for those who cannot afford counsel.

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Also, Legal Aid BC may be required to fund counsel for individuals in the following other exceptional cases: a court appoints counsel as *amicus curiae* in a criminal matter; or a court or the Review Board appoints counsel under sections 486.3 (appointment of counsel in cases involving cross-examination of vulnerable witnesses), 672.24(1) (appointment of counsel where a court has reasonable grounds to believe that an unrepresented accused is unfit to stand trial), 672.5(8) (appointment of counsel where an accused is unrepresented at a disposition hearing), 684 (appointment of appeal counsel by Court of Appeal) and/or 694.1 (appointment of appeal counsel by Supreme Court of Canada) of the *Criminal Code*. All these demands placed on legal aid are triggered by federal (and some provincial) amendments necessitating counsel, thereby incorporating *Charter* rights to state-funded counsel, pursuant to the implicit premise in *Rowbotham*.

If major transfer payments are not the answer (given the mismatch between multi-$Billion federal transfer payments and fractionally smaller legal aid revenues), and presuming *Rowbotham* remedies are no way to run a legal aid system, one solution could be DOJ grants or contributions, with anti-clawback provisions to ensure that the purpose of any federal change to legal aid funding could not be undermined. These new federal grants or contributions could be calculated in various ways, mindful that any spend would be offset by savings accrued by the efficiencies of fair trials, absent unrepresented accused, not to mention the inestimable value of preventing miscarriages of justice. Lastly, it would be substantially less than the liability arising if legal aid tariffs and staff lawyer remuneration went the way of judicial association litigation.

I would be happy to discuss these issues with you and members of your Ministry at your convenience.

Thank you for your consideration.

Sincerely,

Michael J. Bryant, CEO