Legal Services Society

Providing legal aid in British Columbia since 1979

Suite 400
510 Burrard Street
Vancouver, BC V6C 3A8

Tel: (604) 601-6000
Fax: (604) 682-0914
www.lss.bc.ca

Adding Value Through Independence: Legal Aid Governance in British Columbia

Mark Benton, QC
Chief Executive Officer, The Legal Services Society (British Columbia, Canada)

Aspects of added value of Independent legal aid plans

1. Introduction

This short paper provides an overview of the governance of legal aid plans in Canada and examines two aspects of how independent legal aid plans add value using examples from the Legal Services Society in British Columbia. The first example demonstrates how an independent legal aid plan can provide objective advice on justice reform to the government. The second is an illustration of how an independent legal aid plan protects rule of law values in a highly politicized environment. Together these examples illustrate how point to important aspects together these examples suggest that the independence of legal aid plans adds substantial value to the machinery of the justice system.

Legal Aid Governance in Canada from legal professional oversight to strategic independence

In Canada's federal system, the constitution divides legislative authority between the federal and provincial governments according to subject matter but does not assign the responsibility for legal aid to either level of government. Because the administration of justice is a provincial responsibility legal aid has tended to develop separately in each of Canada's 10 provinces and three territories.

In the early 1970s, the federal government began contributing to the cost of the legal aid services delivered by the provinces and territories on condition that the services conformed to minimum guidelines for service delivery. This development had no apparent influence on the development of legal aid governance frameworks in Canada[1] but has increased the complexity of legal aid funding and operations.

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[1] Note however the Australian experience where a substantial federal funding presence appears to have contributed to a much more consistency in governance and services. See D. Crerar, A Cross-Jurisdictional Study of Legal Aid…" Report of the Ontario Legal Aid Review, Volume III: Background Papers (Toronto, 1997) 1071

The reality for legal aid plans is that while funding comes chiefly from provincial governments with some federal contribution there is a need for institutional independence of legal aid programs from both levels of government. This is to ensure that neither the provincial Attorneys General nor the federal Minster of Justice, who are ultimately in charge of prosecutions, can interfere or have the appearance of being able to interfere in the defence of persons criminally accused or in the enforcing any rights or entitlements against the interests of either level of government. For example, the state is usually adverse in interest to parents where the state is seeking guardianship over their children; similarly the state's interest and those of individuals claiming refugee status are unlikely to be aligned, an example that is explored later in this paper. In these circumstances the institutional independence of the legal aid program is important to preserve both the reality and the appearance of justice. In Canada, all legal aid programs are dependent upon government funding, and 12 of the 13 legal aid programs operate with material independence from government decision making[2].

The leading work on Canadian legal aid governance is Professor Martin L. Friedland's 1997 paper, "Governance of Legal Aid Schemes[3]." At that time, Friedland identified several governance models in Canadian legal aid:

- governance by provincial law societies,
- free standing statutory agencies,
- commissions established by government, and
- government departments.

Since that time, the role of law societies (which regulate the legal profession and are independent of government) in the direct governance of legal aid has diminished substantially and the number of board-governed legal aid corporations, a model recommended by Friedland, has grown.

The most common model that has developed in the last 20 years, board governed corporations, borrows heavily from the model of crown agencies. In Canada these have been important vehicles for the fulfillment of public policy initiatives in a country comfortable with a mixed economy. Crown agencies are created by governments (federal or provincial) to achieve public policy objectives that government feels can best be achieved in a corporate environment. The

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[2] The exception is Canada's smallest province where the legal aid program functions as part of the provincial government

[3] Martin L. Friedland, "Governance of Legal Aid Schemes" Report of the Ontario Legal Aid Review, Volume III: Background Papers (Toronto, 1997) 1017

concept is that the policies and procedures by which a government must conduct itself provide too many constraints to achieve certain specifically defined objectives that can operate more effectively in a business setting. The objective is to create a framework in which the Crown Corporation, having received its policy mandate by statute and operating within a transparent accountability framework, then operates at arm's length from government.

Typically, the legal aid adaptation of this model is a board-governed statutory entity that is formally independent of government. In the past two decades, the value of legal aid plans being independent from the legal profession has been reflected in the structure of legal aid boards and in the disappearance Law Societies directly operating legal aid programs.

In those provinces that employ a statutory corporation, the structure of the boards and their governance independence varies. In some Canadian jurisdictions, the board elects its own Chair and appoints its own chief executive officer. In others, these are government appointments typically made on the recommendation of the board. Common to each of the boards 'roles is to preserve the independence of the legal aid services from inappropriate government interference. It is common for the board to be responsible for risk oversight and the strategic direction of the organization within the framework of the statutory objectives set for the organization.

The statutory governance framework established in British Columbia, one of Canada's thirteen legal aid jurisdictions, provides an example of an evolving statutory aid mandate.

The Legal Services Society (LSS) was created by the *Legal Services Society Act*[4] in 1979 as a non-profit organization that remains independent of government. Its priority is to serve the interests of people with low incomes. Under section 9 of the LSS Act, the society's mandate is:

- to help people resolve their legal problems and to facilitate access to justice;
- to establish and administer an effective and efficient system for providing legal aid to people in BC;
- and to provide advice to the Attorney General about legal aid and access to justice for people in BC.

The Act also provides that:

- the society is to consider the perspectives of both justice system service providers and the general public;

[4] Legal Services Society Act SBC 2002 c.30
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_02030_01

- is to coordinate legal aid with other aspects of the justice system and with community services;
- is to be flexible and innovative in the manner in which it carries out its objects; and,

In addition the legislation limits spending of the resources received from government to those services articulated in a negotiated memorandum of understanding (MOU)[5] and obliges the society to limit its spending to the resources available. The use of a three-year memorandum of understanding is intended both to provide some certainty in funding over the three years and to manage the risks of both government and the legal aid plan regarding demand and sufficiency of revenue. Typically, the society manages its fiscal risk in service provision by limiting tis obligation to provide services under the MOU to the annual revenue received from government.

The legislative framework and the MOU are the principal formal accountability mechanisms utilized in British Columbia. These are supplemented by three more mechanisms that are common to all Crown corporations in BC, an annual Government Letter of Expectation provided to the corporation by the government, a Service Plan published by the corporation and an Annual Report on the corporation's progress in relation to the Service Plan and the Letter of Expectation. Together these provide for both accountability and engagement on issues of consequence to delivery of justice services. One of the drivers of this process is the board's role in defining the legal aid position in the relationship with government. This is only one of several tools legal aid boards utilize to shape their independence from government.

In the British Columbia legal aid plan, the Board of Directors has deliberately articulated its position on independence and has published its orientation to legal aid independence as a central element of its board governance role. The policy was originally conceived as a key strategy of the organization as it struggled to address significant budget reductions in 2003 and that strategy proved to be a key part of the organization's success in rebuilding its credibility and expanding its influence. The policy has been endorsed cited by government reviewers[6] as a model that legal aid plans might use to ensure that independence can be maintained and enhanced. The policy provides:

> *The society's independence…, can be measured by the degree to which it makes choices about how it will pursue its statutory objects; the primary*

[5] The Memorandum of Understanding is available online at http://www.lss.bc.ca/assets/aboutUs/memorandumOfUnderstanding.pdf

[6] "A Review of Legal Aid Manitoba", Province of Manitoba 2004 at p. 80 http://www.gov.mb.ca/justice/publications/pdf/legalaidreviewfinal.pdf

one being, to assist low-income individuals resolve their legal problems and to facilitate their access to justice…

The need for independence in the administration of legal aid has traditionally been linked to the need for government to not control, or not be seen to control the funding of legal aid representation, given that the Crown is adverse in interest to the accused. While this is an important rationale, it is not a sufficient justification for an independent society to administer legal aid.

Systems can, and have been, set up within governments to protect decision-making on government funding of defence lawyers from undue pressure by Crown prosecutors. Another important rationale for the society's independence is that it is good public policy. An organization dedicated to the goal of serving the legal needs of low-income individuals is more likely to achieve that object efficiently and effectively than a large bureaucracy that has to balance various other interests and objectives.

How can the society be independent from government, given that such a high proportion of its budget is government-funded?

- ***Clarity of purpose:*** *If the society has thought through its objectives and strategies, and roots its "independent" positions in its statutory objects, the society's assertion of independence has a legitimacy that is difficult for government to undermine.*

- ***Accountability:*** *The government funds the society because the society is undertaking core responsibilities of government. The society must be able to show government that the funds it provides are being used for the purposes that the legislature and government intended. Lack of accountability to government is likely to lead government to infringe on the society's independence. Conversely, if the government perceives that the society is meeting its objects, it will be more comfortable allowing the society wider discretion in how it pursues these objects. Accountability does not preclude independence; it supports it.*

- ***Clarity of expectations and mutual understanding of interests:*** *The society will be better able to function independently within its sphere of influence if the government's expectations are clearly defined and understood. The Memorandum of Understanding is an instrument for clarifying government's expectations. The society will likely accommodate its independent interests in the Memorandum of Understanding with government if it understands government's interests, clearly conveys its own interests to government, tying them to its statutory mandate, and identifies common interests with government.*

- ***Public support:*** *The government seeks accountability from the society because it, in turn, must be accountable to the public for the use of public funds. Public support for the society will increase government's willingness to permit the society to function independently.*
- ***Legal profession engagement:*** *The provision of legal aid was seen historically as an obligation of the legal profession — an obligation related to the privilege of self-governance. Independence in administering legal aid was, therefore, connected to the accepted independence of the legal profession. Engagement of the legal profession in the business of the society and advocacy by the profession's governing bodies with government on behalf of the society are important counterbalances for the power that government exerts as a result of being the primary funder of legal aid. While the legal profession's support of legal aid is an important tool for LSS's independence from government, LSS must also be independent from the legal profession. Lack of independence from the Law Society is not only inconsistent with the act, but also risks loss of public (and therefore government) support. The society must avoid being perceived as "for lawyers." It must be keenly aware of its statutory mandate to serve the interests of low-income individuals.*

- ***Demonstration of effectiveness:*** *Government (and the public and the legal profession) will more likely respect the society's control over the means of pursuing its objectives if the society is, and is*

demonstrated to be, effective in fulfilling its objectives. These prescriptions for enhancing independence from government are also prescriptions for good governance. Independence will more likely be achieved if the society has:

- *directors who understand that their fiduciary obligation is to pursue the interests of the society, not the interests of their appointing bodies; and*
- *a board that:*
  - *sets clear direction for the society,*
  - *ensures that an executive director ("ED") is in place who will implement its strategic plan and effectively administer the society,*
  - *monitors the society's performance,*
  - *manages the risks of the society, and*
  - *communicates effectively with government, the legal profession, the public, and other stakeholders.*

Good governance requires the society to be independent; independence is achieved by good governance." [7]

While this formal and public statement of the independence of legal aid governance is unique on the Canadian scene the values underlying it are common among Canadian legal aid plans. This articulation of the board's own assertion of the importance of institutional independence is more than a decade old. This element of the board's work at LSS, coupled with a structured strategy for engagement with government, has made a substantial contribution to the development of a robust and arm's length working relationship with the provincial government which provides 94% of LSS's funding.

2. Adding value to the development of justice policy

In recent years, the BC legal aid plan has been a partner in a number of projects designed to improve the efficiency and effectiveness of the justice system in BC and as a result its statutory mandate was expanded in 2005 to include providing advice to government on access to justice.

Like many governments in Canada and elsewhere, the British Columbia government has been obliged to respond to declining public confidence in the administration of civil and criminal

[7] LSS Board Governance Policy 1-1 at http://www.lss.bc.ca/about/boardGovernancePractices.php

justice. In response to a critical audit of justice services, the BC Ministry of Justice introduced a green paper, *Modernizing British Columbia's Justice System*[8] that highlights a number of issues affecting the justice system and identified a number of areas in need of reform. To advance this work, the Attorney General appointed a former LSS board chair and prominent civil litigator to review the criminal justice system; appointed a former chief prosecutor from another jurisdiction to review the criminal charge approval process; and asked LSS for its advice on how legal aid services could be part of the solution to the problems identified in the green paper.

The advice requested was provided in a formal report, *Making Justice Work; Improving Access and Outcomes for British Columbians*[9]. This report stressed the importance of an outcome focussed justice system as a the way forward to a more effective justice system and identified areas where investments in legal aid would contribute to justice system efficiencies, suggesting that costs avoided could be reinvested in legal aid services. The thrust of the recommendations was for incremental, scalable initiatives that would be the subject of evidence-based evaluations.

The report was well received by both government and the opposition critic, and received positive reviews in the media and legal community. Its recommendations were adopted by a number of other stakeholders, and elements of the report and increased funding for legal aid were supported by both major political party platforms in a recent provincial election.[10]

Providing advice of this nature to the government was only possible because LSS is independent of government. As an independent entity, LSS sees more sides of the justice system than any other stakeholder. LSS can offer the perspective of the criminal defendant, the family litigant, the fee payer, the trial manager, the policy developer, and the public interest. Nor is LSS require to develop its advice within the confines of government policy.

The work in this area has renewed the legal aid plan's interest in and commitment to supporting justice change that benefits low- and middle-income people. The LSS board of directors is currently working on a core strategy to support systemic justice reform on an ongoing basis.

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[8] www.ag.gov.bc.ca/public/JusticeSystemReviewGreenPaper.pdf
[9] http://www.legalaid.bc.ca/assets/aboutUs/reports/submissions/makingJusticeWork.pdf

[10] The content of the report was reworked into a number presentations for the public and legal community that can be reviewed at http://www.legalaid.bc.ca/assets/aboutUs/reports/presentations/makingJusticeWorkPart1.pdf And an article for a lawyers monthly that can be found at http://www.legalaid.bc.ca/assets/aboutUs/reports/articles/advocateSept2012_MakingJusticeWork.pdf

3. Adding value to the machinery of justice

In Canada immigration policy is a federal jurisdiction and all aspects of its administration and adjudication are determined by the federal legislation and the Federal Courts. Legal Aid is a provincial responsibility and provinces receive a federal contribution for a portion of the cost of providing immigration legal aid.

In Canada, as in many other countries, the acceptance of refugees is a politically charged issue. Over the past 50 years Canada has developed a reputation for accepting significant numbers of refugee claimants. Many of these claimants arrive overland or by air and only a few by sea. In recent years, BC has received less than 10% of Canada's refugee claimants; in 2009 this was about 800 people.

That changed on August 13, 2010 when the MV Sun Sea carrying 492 Tamil refugees was escorted by the military into the harbour at Victoria, BC. This was not the first refugee ship in recent history. The previous year 76 Tamils arrived aboard the Ocean Lady, and in 1999 1,400 Chinese refugee claimants arrived by sea.

Unlike previous arrivals, there was an immediate political reaction. Before the ship had docked, Canada's Minster of Public Safety stated that the voyage had been arranged by a terrorist group and that those aboard would be investigated to determine whether there were terrorists or human smugglers among them[11]. The issue continues to have a political profile in Canada.

It is relatively rare for refugee claimants to be detained in Canada and many in the local immigrant settlement community were surprised when the Canadian Border Security Agency took a very restrictive approach to releasing any of the 380 men, 63 women and 49 children who arrived on the Sun Sea. In Canada, refugee claimants who are held in detention have a right to have their detention reviewed every thirty days. Those hearings began in September 2010; investigations into identity were a key reason for continued detention. Decisions on a detention review are subject to review in the Federal Court and the release order is stayed pending a hearing which will be more than thirty days away.

Most of the lawyers representing the refugees were funded by LSS. They were surprised to be faced with applications to the Federal Court when they had successfully obtained an order releasing the client on a detention review and more surprised when this became a pattern. Eventually, a case got to court but only after the claimant had been ordered released three

[11] CBC News, August 13 2010, Sunni Dhillon, Globe and Mail, January 20, 2011

times, the judge who heard the case ordered him released, finding that the process of serially appealing the release decisions was, in the circumstances, an abuse of court process.[12]

The difficulty faced by the legal aid plan was the extraordinary cost of these cases given their numbers and the adversarial nature of the proceedings involving the government. Shortly after the Sun Sea's arrival it was clear that the entire annual budget for legal aid to refugees would be exhausted within 90 days. After consulting with the provincial Attorney General, the legal aid board chair wrote to the federal Ministers involved advising that the entire legal aid immigration program would be shut down if additional funding was not committed within the 90 days. The funds were secured (in fact all plans received an increase for immigration services that year as a result).

By March 2013, 80 passengers had been accepted as refugees and only 25 of the 492 on the ship had been ordered deported (the crew and 11 who were found to be members of a terrorist group members). Only two remain in custody. The criminal prosecution of the crew for smuggling people was dismissed although that decision is under appeal.

The Sun Sea case was one that was imbued with partisan politics before the ship arrived at the dock in Victoria. It is one that required significant resolve and commitment to the process required by the rule of law to resolve. It is difficult to imagine that the legal process and the rule of law would have been served so well if the legal aid plan was not independent of government.

4. Conclusion

Canadian legal aid plans have a history of balancing the legitimate need to be and appear to be independent with the political reality that follows fiscal dependence. In the Canadian setting austerity has obliged legal aid plans to become more politically astute and more adept at both promoting their value and using their own networks to address systemic problems. As these legal aid plans mature a number of opportunities to redefine legal aid's role are emerging. Legal aid representatives are increasingly prominent in justice reform initiatives nationally and locally. In that role the legal aid perspective tends to be client centred, focussing on process that promotes just and timely outcomes for the individuals in the justice system. Legal aid programs are also are offering their expertise in case management, program design and evaluation, and collaborative networked operating models to better serve access to justice in their jurisdictions.

The position of legal aid plans at the intersection of the judicial and executive arms of government together with the emerging expectation from the public that the justice system

[12] *Minister of Citizenship and Immigration v. B386* 2011 FC 175 at page 4

ought to be responsive to their needs[13] puts legal aid in a position that presents opportunities to offer pragmatic solutions to some of the more vexing problems facing the justice system today. The value of the legal aid plans' contribution to the access to justice reform and more broadly to the justice system comes in large part from the independent perspective the plans have developed as a result of being outside government[14].

[13] See for example The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report; May 2013, Dr. Julie Macfarlane www.representing-yourself.com/doc/report.pdf

[14] The further development of an independent legal aid voice in Canada is emerging as Canada's thirteen legal aid plans develop a governance framework to support work as a national authority on access to justice issues