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Chair

Mr. Anthony Housefather

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• (1105)

[English]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): Good morning, ladies and gentlemen. It is a pleasure to call this meeting of the Standing Committee on Justice and Human Rights to order.

Today we are joined by three distinguished organizations to testify before us in our study on access to justice. We're joined by the Canadian Bar Association, represented by Kerri Froc, who is from the legislation and law reform group, and Doug Ferguson, who is a member of the access to justice committee. Welcome, Ms. Froc and Mr. Ferguson.

We're joined by the Canadian Council of Criminal Defence Lawyers, represented by Richard Fowler, who is the British Columbia representative. Welcome, Mr. Fowler.

We're joined by the Metro Toronto Chinese and Southeast Asian Legal Clinic, represented by Avvy Go, the clinic director. Welcome, Ms. Go.

We have agreed that the Canadian Bar Association will start, so I'm going to turn it over to you, and I think Ms. Froc will commence.

Ms. Kerri Froc (Lawyer, Legislation and Law Reform, Canadian Bar Association): Thank you, Mr. Chair and members of the committee.

The Canadian Bar Association appreciates the opportunity to comment on access to the justice system and legal aid, which is closely related to our mission.

The Canadian Bar Association is a national association representing 36,000 jurists across Canada. Among the association's primary objectives are to improve the law and the administration of justice, and it's in that context that we've provided our submission to you.

I'm appearing with Doug Ferguson, who is a member of our access to justice committee. He is also the director of the community legal services clinic at Western's law department.

I'll turn now to Doug Ferguson to address the substance of our submission to you.

Mr. Doug Ferguson (Member, Access to Justice Committee, Canadian Bar Association): Mr. Chair, it's an honour to appear before the committee today on behalf of the Canadian Bar Association. I want to thank you for inviting us to appear with you today.

The justice system in Canada today is in crisis. Many Canadians cannot afford legal representation, including the middle class. Court cases take years to come to a conclusion, and many Canadians do not understand their legal rights. Along with Parliament and the executive, the justice system is one of the three pillars of our democratic system. In other words, the justice system is the foundation of our democracy. If Canadians do not have access to the law they cannot obtain justice, and if they cannot have justice, they will lose faith in our democratic system.

Legal aid plays a major role in access to justice for many Canadians with low incomes. Our access to justice committee issued a report in 2013 on an initiative entitled "Equal Justice: Balancing the Scales". I want to draw to members' attention two points from this report. First, spending per capita on civil legal aid—that is not criminal, not refugee, but everything else—declined by over 20% from 1995 to 2012. Applications for civil legal aid that were accepted declined by two-thirds. As for criminal legal aid, federal government contributions declined from about 50% of total cost to about 20% to 30%. Per capita contribution by the federal government for criminal legal aid declined by about 10% between 2008 and 2012. What are the consequences of this decline? Let me give you some examples.

For many years in Ontario, if you made the minimum wage you made too much money to qualify for legal aid. You were deemed capable of paying thousands of dollars to a lawyer to represent you. Family law is an area that is suffering greatly. In Ontario, and I believe it's the same in other provinces, anywhere from 50% to 70% of parties in the family courts do not have representation. These people are seeking child support, or they're seeking custody of or access to their children, and they can't navigate the system. It's too complicated, and because they don't have help and don't understand the family court rules, self-represented litigates clog up the court system. Cases are delayed, costs rise, and justice is not done.

Before going further I do want to recognize there have been some positive developments since 2012. The federal government added some funding in its last budget, and some provinces have made some improvements, but not for a minute should we believe that the funding issue has been resolved. It can only be described as a very small first step.

One of the most important recommendations in the Equal Justice report was to create national benchmarks for legal aid. This is the major point I want to make to you today. Canadians have the right to equality under the law, but under our current legal aid system, they don't get it. Each province and territory has its own legal aid system with different services, coverage, and standards. Financial eligibility differs from province to province, and coverage varies too. What is covered in one province may not be covered in another. For example, a tenant threatened with eviction and perhaps homelessness by a landlord may get legal aid representation in Quebec, but not in Ontario. Someone charged with shoplifting may obtain legal aid in Alberta, but not in British Columbia.

The CBA joined forces with the Association of Legal Aid Plans, which is the national association of all the legal aid groups in the provinces and territories, to formulate national benchmarks for legal aid, and these benchmarks were released this fall. There are six proposed benchmarks, and they are aspirational in nature. First is a national system that is sustainably funded and provides comprehensive, people-centred services tailored to local needs. Second is that services are to be provided to those with essential legal needs who are otherwise unable to afford assistance. Third is that legal services will be provided on a priority basis, which will vary across each province and region.

• (1110)

Fourth is that legal services will have a broad spectrum of services tailored to meet people's needs, circumstances, and capabilities. Fifth is that services must be of high quality, fully accessible, timely, culturally appropriate, and cost-effective. Sixth is that legal service providers should work collaboratively and be mandated to innovate, and work with other stakeholders to ensure an effective justice system. They would have indicators and measurements that must be aligned with those of other relevant organizations.

These benchmarks will ensure better equality among Canadians, while addressing local or provincial priorities.

There will be a cost to implementing these benchmarks. The cost, however, will not be as much as one would think. As you saw in our submission, studies in the U.S., the United Kingdom, and Australia show that on average for each dollar invested in legal aid, the social return on investment is six dollars, so a 6:1 ratio. Much of that six dollars is comprised of government spending in other areas such as decreased income benefits, increases in tax revenues, or decreased court costs.

The CBA has, over the years, called for these measures and we believe it's time to act before the deterioration in our justice system goes further. It's not just low-income persons who are being shut out of the justice system. It's the middle class, too, who cannot afford the cost of going to court.

The CBA calls upon the federal government to take two steps. First, we ask that it endorse and implement our proposed national benchmarks. Second, we call upon the federal government to remove civil legal aid from the Canada social transfer. You may recall that the transfer includes civil legal aid. We ask that they remove it and provide a separate, dedicated transfer for funding civil legal aid at levels that will support compliance with our benchmarks.

We'd be happy to discuss this issue further with members of all parties. This issue requires recognition of the long-term risk to our democracy if justice is not being done. It also requires the political will to deal with it.

Thank you very much.

The Chair: Thank you very much, Mr. Ferguson.

We'll go to Mr. Fowler.

Mr. Richard Fowler (Representative, British Columbia, Canadian Council of Criminal Defence Lawyers): Thank you very much, honourable chair and honourable members. It's a pleasure to be before you today. Thank you very much for the invitation to the Canadian Council of Criminal Defence Lawyers.

It's a pleasure to appear before you today and to assist you with respect to this very important topic. I've been a criminal defence lawyer for over 21 years. I've had conduct of trials and appeals in all levels of court in Yukon and in British Columbia, and I've appeared in the Supreme Court of Canada. I've appeared in 14 different supreme courts in British Columbia, and 36 provincial courts. Many of my cases have been funded by legal aid, managed by the Legal Services Society in British Columbia. I have about eight minutes to summarize my 21 years of experience with legal aid.

We live in a society governed by one pre-eminent constitutional principle, the rule of law, and yet very few members of society have the ability to hire a lawyer to help them understand the laws that govern all of us. There are many thousands of offences, not just under the Criminal Code but many other federal statutes and provincial statutes, and of course thousands of regulations and municipal bylaws. The people who pass our laws and create almost innumerable offences appear to put very little thought into how citizens can possibly expect to understand and defend themselves if they are ever charged with an offence. For example, in British Columbia, we modernized the family law and allocated no resources for legal aid, so 30% to 40% of family cases in the Supreme Court of British Columbia involve unrepresented litigants and all of the attendant costs in court for judges when these individuals appear without lawyers.

Many eminent individuals and organizations have studied legal aid or aspects of the justice system and commented on the necessity of proper provision of legal aid. In a report commissioned by the Law Society of British Columbia and the CBA, Len Doust, QC, concluded that legal aid must be considered an essential service. Legal aid should not be considered an afterthought, subsidiary to the needs of health and education, but as one means by which we educate individuals and keep people and families healthy. For many people, conflict with the law is an opportunity for change. As a lawyer, I'm often the first person to advise on the need for drug rehabilitation, alcohol rehabilitation, or mental and physical health needs. I regularly direct individuals to these resources.

The proper functioning of the criminal court requires well-trained, educated judges, crown counsel, and defence counsel. The provinces, by and large, have invested in judges and the crown, but have utterly failed to invest in legal aid, the means by which defence counsel learn to become barristers and advocates. We cannot afford to mentor the next generation of defence counsel through the funding of junior counsel in court. That's the only way you can learn to be a barrister, by being junior counsel to senior counsel. Without experienced, well-trained defence lawyers, the system will continue to struggle with delay.

The Senate is currently studying delay in the justice system. I had the pleasure of addressing that committee when they appeared in Vancouver earlier in the year.

We will continue to see trials go on longer than they should. This is not just my experience, but the conclusion of the LeSage-Code report that was commissioned by the Attorney General of Ontario, and it's also consistent with the comments of the Canadian Institute for the Administration of Justice report on mega-trials in Vancouver. Efficiency requires experienced lawyers. Studies have consistently shown, as my colleague said, that for every dollar invested in legal aid, there are economic benefits of between two to seven dollars.

This is, with respect, a non-partisan issue. The proper allocation of funds to legal aid can be supported philosophically, economically, empirically, politically, and ideologically. When I started in 1994-95, parking at the courthouse in Vancouver cost \$3.50; it now costs \$16. Legal aid rates haven't changed.

Society's most disadvantaged, society's poorest, our mentally ill, our impoverished, will often come into conflict with the law. How we help them at those times can be the difference between years more conflict with the law or addressing their needs and rehabilitation.

• (1115)

Healthy individuals equal healthy families. Healthy families equal safe communities.

Thank you very much.

The Chair: Thank you very much, Mr. Fowler.

Next we'll move to Ms. Go.

Ms. Avvy Yao-Yao Go (Clinic Director, Metro Toronto Chinese and Southeast Asian Legal Clinic): Thank you.

Thank you very much for inviting me. I'm here on behalf of the Metro Toronto Chinese and Southeast Asian Legal Clinic. I should mention that I'm also a bencher of the law society. The law society has struck a working group on legal aid, studying this very important issue, as we recognize that this is a critical issue that challenges all of us.

As I mentioned in my report, the clinic is a not-for-profit organization that provides free legal services to low-income members of the Chinese and Southeast Asian communities in the greater Toronto area. We provide a wide range of services in different areas of law, including immigration, employment, social assistance, housing, human rights, tax law, charter litigation, and anything that our clients need.

We were established in 1987. We're one of 76 community legal clinics in Ontario. Many clients served by our clinic face barriers in accessing the justice system, not only because they are poor but also because of their race, their immigration status, as well as the lack of linguistically and culturally responsive services in the justice system in general. All of those issues are compounded by the chronic underfunding of legal aid programs by both the federal and provincial governments.

A significant portion of our clients are individuals with complex legal needs, including people with mental health issues, immigrant and refugee women fleeing domestic violence or living in domestic violence situations, and non-status immigrants working in precarious job situations. Recognizing that the legal system often serves to perpetuate the disadvantages faced by marginalized communities, legal clinics like ours must engage effectively in advocacy work to address the underlying and systemic inequalities in our society and the inequalities faced by our communities, including racialized and immigrant, which are plenty. They experience higher unemployment rates, earn lower income, and are more likely to live in poverty, and as such, they are more likely to be homeless or in near homeless situations. Racialized community members face systemic racism in the criminal justice system and the justice system in general and are more likely to be overrepresented in the correctional system.

For all these reasons and more, access to justice, including access to legal aid and the fair representation in the courts and tribunal system are all important issues for these communities. Community legal clinics play a critical role in promoting access to justice. Clinics that serve specific ethno-racial groups, like ours, are keys to promoting access to justice for racialized communities.

However, a community legal clinic system can only succeed if it is part of a well-funded legal aid program that also supports the judicare system as well as duty counsel services in the courts and tribunals. Notwithstanding the recent increase to legal aid funding in Ontario, access to justice for most vulnerable individuals is still woefully inadequate. This is particularly true in family law, refugee law, and other civil law areas.

In Ontario, there is currently a funding crisis due to the deficit for refugee law certificates. Although legal aid expenses in refugee law cases have gone up from \$17.6 million in 2013 to \$22 million last year, the federal contribution has stayed the same at \$7 million. We've heard about the drop in federal contributions in the criminal law area.

In attempting to address the funding crisis, Legal Aid Ontario has decided to claw back funding to legal clinics, which has affected our services as well. Given the ongoing challenges facing racialized communities and other marginalized groups in pursuing access to justice, in our paper we have made a number of recommendations. I'm going to highlight a few of them.

Number one, significantly increase the federal government's contribution to legal aid programs, and a significant portion of those increases must be earmarked for civil law and poverty law services.

Number two, adopt a racial equity impact analysis to examine and evaluate all laws and policies at the federal level to minimize, if not eliminate, the adverse impact of such laws and policies on racialized groups.

Number three, work with provinces and territories to create their own court challenges programs.

Number four, work with provinces and territories to develop a centrally accredited interpretation and translation service for all courts and tribunals.

• (1120)

Number five, develop a national access to justice strategy in tandem with the national poverty reduction strategy, based on social determinants of health, that recognizes the particular vulnerability of marginalized groups on the basis of race, gender, disability, and so on.

I know there is a suggestion about creating national benchmarks. We have some comments on that in our paper. I will make just one comment here. If you decide to develop a national legal aid benchmark, then one key suggestion that I would have is that these benchmarks not be set at a standard lower than what currently exists in Ontario, because Ontario has the best legal aid program in Canada.

In conclusion, an adequately funded legal aid program remains the key solution to promoting access to justice. As mentioned, rule of law is foundational to our constitution, and so is respect for minority rights. There is no rule of law if individuals are unable to recognize and enforce their legal rights due to a lack of legal representation. As for respect for minority rights, that rings hollow if racialized group members and other marginalized members continue to be left to their own devices when they appear before the courts and tribunals. The need to address this issue rests on all of our shoulders.

Thank you very much.

• (1125)

The Chair: Thank you very much, Ms. Go.

I want to thank all of the witnesses for being succinct and getting their statements in within the time limits. It's rare that that happens, so thank you.

We're going to start the questions with Mr. Nicholson.

Hon. Rob Nicholson (Niagara Falls, CPC): I will try to stay within the time limits myself, Mr. Chair.

Thank you very much for your testimony. This is very helpful to us to put this together. I know it's appreciated by everyone here.

I have just a couple of questions. One of the materials we were given here has a quote from an article on domestic legal aid's claim to equality, by Patricia Hughes. It's about 20 years old, but I'd just like to get your comments as to whether any progress has been made. I have a feeling there hasn't been that much progress.

Mr. Ferguson, you talked about the decrease in civil legal aid. Here's the quote from Patricia Hughes:

...men receive the assistance of the state in defending their abuse of women, while women receive less assistance fending off the abuse or removing themselves from it.

That statement is 20 years old. What's the situation today? Is it still the same? Has there been progress made in this area? It seems to me there might not be progress in terms of civil legal aid because....

Mr. Doug Ferguson: My understanding is that with respect to family law, 70% of the applicants for family law are women. They are still highly dependent on legal aid. As I mentioned, civil legal aid being decreased over the years has had a significant impact. In fact, you'll find, at least in Ontario and I can't speak to other provinces, that there's not much legal aid available in Ontario for family law except for child protection.

There are some duty counsels, of course, but they don't do trials. Their role for people is very limited.

Hon. Rob Nicholson: Let me just ask you about lawyers. One of the suggestions in the paper "Reaching Equal Justice" was to make pro bono work mandatory. I know and you know lawyers who have taken on cases for which they haven't charged the client for everything that's been done. Sometimes you just try to help somebody.

What's this idea of making pro bono mandatory? I haven't practised legal aid law in Ontario in several decades, but I remember when they used to underpay us, and they took off 25% extra from the hourly rate for every hour. Supposedly that was our "contribution" to that. I wasn't too fussy about it then. I'm kind of curious as to what mandatory pro bono work implies for the legal profession.

Mr. Richard Fowler: Can I just address your first point about funding women in domestic...?

In British Columbia, if there's no risk of jail, which there wouldn't likely be for a first offender in a domestic assault situation where there are no serious injuries, that male won't get legal aid. The woman is unlikely to get legal aid in the domestic if there's a related family situation, so both individuals are going to be floundering within the justice system. We will then have the attendant costs of the court having to appoint counsel because it's not advisable, of course, for the man.... As we know, it's more often the man than the woman, but sometimes women are charged with domestic assault, too. However, it's not appropriate for the accused to be cross-examining the complainant, whether it's the husband or the wife, so we have attendant delays because the trial will have to be adjourned while counsel is appointed.

Then, of course, the related family case will be sidetracked because they really intersect. The family case will pass protection orders. There will be bail conditions under the Criminal Code. These won't be compatible, so applications will have to be made in the family court and in the criminal court, and none of these individuals have a lawyer. It's so inefficient. That's why a dollar invested can lead to seven dollars of savings. It's not a difficult issue.

In respect of the pro bono question, every lawyer who does legal aid does pro bono. The mandatory pro bono is directed, really, at the large law firms, where lawyers are making good incomes. They're being paid big hourly rates by corporations, very often, or by wealthy individuals. I think the mandatory pro bono is really aimed at those individuals and those large firms. As for the legal aid lawyers, we all do pro bono. A large percentage of the hours we spend on a case are not compensated. That's the reality, and it's getting worse and worse and worse.

• (1130)

Hon. Rob Nicholson: Tell me the position of the groups. Should it be mandatory for the legal profession or legal firms to do pro bono work?

Ms. Avvy Yao-Yao Go: May I just suggest...?

Of course, access to justice is part of a key mandate of the law society, and it's one of our priorities. In fact, last year, at the strategic planning day at the law society, the suggestion of making pro bono mandatory for all lawyers did come up as one solution. However, it was very quickly shot down for a number of reasons. One was that it actually does not get to the heart of the problem that all of us are talking about today. In fact, it may penalize people who are already doing a lot of work, such as legal aid lawyers. It is not the solution at all.

But to address your first question, at our clinic, 25% of the clients who contact us for help seek help in the family law area. The majority of them are women. A significant proportion of them are in domestic violence situations, and a significant number of them will not get legal aid because of the very low income requirement to qualify for legal aid. Even with the new funding from the provincial government for Legal Aid Ontario, people still have to live way below the poverty line in order to qualify for legal aid. They have a slightly higher eligibility for people in domestic violence situations, but again, it's still very low and it doesn't cover all areas of law within the family law context.

Hon. Rob Nicholson: Fair enough.

Mr. Ferguson, do you have any comment on the mandatory pro bono?

What about you, Kerri Froc?

Ms. Kerri Froc: The CBA policy that was passed by our council says that lawyers should aim for 50 hours a year, or 3% of billings. Our Equal Justice report is a visioning document—what does equal justice look like in 2030? In terms of what the official CBA policy is, that's in our resolution that talks about that being an aim of lawyers.

Hon. Rob Nicholson: That's an aim for lawyers. Do you consider that it should be mandatory within the legal profession?

Ms. Kerri Froc: What our policy says is that it's an aspirational aim. It's not mandatory in our CBA policy.

Hon. Rob Nicholson: I think you'd agree with me that lawyers do that in any case, or for the most part.

Let me ask you one last question. It's with respect to the CBA position on legal aid.

You said that there should be federal leadership and responsibility for both criminal and civil legal aid. Tell me what you mean by "federal responsibility". As you know, with provincial programs, the provinces are usually pretty touchy. They usually just say, "Send us the cheque, and we'll know what to do with it." Is that responsibility something moving that jurisdiction over to the federal level, or is it just for the federal government to become more involved?

Mr. Doug Ferguson: Of course, it's a provincial responsibility. There's no question about that. However, the Criminal Code is a matter of federal jurisdiction. The administration of justice is up to the provinces, but so is health. We think the federal government can play a constructive role. It has to be negotiated with the provinces, of course. They have to consent to it. I think in the circumstances if there's political will on all sides, they can come to an agreement that satisfies both sides.

Hon. Rob Nicholson: Thank you very much.

The Chair: Thank you very much.

Mr. McKinnon.

Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.): Thank you all for being here. I appreciate your testimony.

My question is for the Canadian Bar Association. In your brief on page 5, you say that in 2003 you called for a separate federal access-to-justice transfer to emphasize that access to justice should be seen as an essential public service and given similar recognition as health care under the Canada Health Act

First, do you still call for that? Second, what would that look like? The Canada Health Act basically provides a national framework. It designates the basic services we want to see right across the country and says that in exchange for each of the provinces living up to those standards, we will write a cheque. Is that the sort of thing we're talking about?

Third, would this extend to the level of medicare, say, some sort of legal care approach, where we have a single, publicly paid, private delivery situation, if that doesn't terrify the lawyers?

• (1135)

Mr. Doug Ferguson: With respect to the publicly paid system, there has to be some kind of minimum standard for income. This is not intended to be universal legal care we're talking about here. What that minimum income is can be negotiated. Whether it's the basic poverty level, whatever that may be, or something above that or below that, it has to be something that will....

Here's my concern. If someone has been charged for shoplifting, that will affect their whole life. They may have a defence, they may not, but they should be aware of their rights and dealt with accordingly. If they have a defence, they should be entitled to it and they should use it. These issues that come up are so important to a person's life. They need the ability to deal with it in a knowledgeable manner. As I said, even the middle class is having some difficulty.

I'm going to go off on a bit of tangent here, if I may. I'm speaking for myself here, not for the CBA. There's more than one path to justice. I think we should be looking at alternatives to going to court whether it's mediation or.... Actually, our access to justice report talked about having a system of triage where people coming into the justice system can be diverted to mediation, or counselling, or to court. There are various ideas. They won't cost much money. People may still need some legal services, but it would be minimized and more timely.

Timeliness is so important in this system. I'm told that in many areas of Ontario if you're asking for a Superior Court trial or civil court trial, you're looking two years into the future. Part of the reason for this is that the criminal system has to be given priority because of the recent Supreme Court decisions. However, justice delayed, as we all know, is justice denied, and it increases costs for everyone. It's not just a case of that. We have to find ways to find efficiencies, make things move faster, and still provide justice to individuals.

Mr. Ron McKinnon: Thank you.

Ms. Go has something to say.

Ms. Avvy Yao-Yao Go: As to the federal government's role, there are two ways of looking at it. On the one hand, a lot of the laws that pass at the federal level have a direct impact on legal aid. Although the administration of the criminal justice system is provincial, criminal law itself is a federal jurisdiction. Every time the law is changed, it will affect the legal aid program. The same is true with immigration law, and with refugee law.

On the other hand, you can look at it the same way you look at the housing issue or the poverty reduction strategy. It is a strategy that includes a lot of different components. There are components that have a provincial government kind of mandate, but there are also components that fall under the federal mandate. Rather than trying to

decide which is in which mandate, if you come up with a comprehensive plan looking at how to address this issue in partnership with the provinces, I think then you will have a better solution. The different provinces may have different solutions as well.

Mr. Richard Fowler: I will just add to that. One of the...I'm going to say "problems" but it may not be the right word. However, the fact of the matter is that criminal law is a federal jurisdiction but it's administered provincially.

Let's take an example of an individual who is charged with murder, and he's convicted. He will end up going into the federal correctional system, and he may be there for a number of years. In the meantime, he has an appeal ongoing. If he is successful in his appeal, he'll be immediately taken out of the federal institution and put into a provincial institution, a pretrial. Let's say that he's then retried and he's acquitted. That's been a huge waste of two years in a federal correctional facility. It's been a waste of resources in the provincial facility, and he may have had a new trial because his first trial didn't go properly because of the inexperience of his first counsel who is a poorly trained, poorly paid young lawyer—no disrespect to that lawyer.

If we invest at the front end and ensure that the first trial goes appropriately, all of those wasted expenses won't accrue. That's why, again, we see a 7:1 or 5:1 payoff for every dollar invested in ensuring that the system runs correctly at the front end.

• (1140)

The Chair: Thank you very much.

Mr. MacGregor.

Mr. Alistair MacGregor (Cowichan—Malahat—Langford, NDP): Thank you, Mr. Chair.

Mr. Ferguson, I want to follow up on the line of questioning from Mr. McKinnon.

It's quite obvious in your report, on page 2, that you directly tie the current difficulties in access to public legal assistance to the federal government's decision to transfer funds to the Canada social transfer back in the 1990s.

Mr. McKinnon quoted from page 5 of your report. Just above where he quoted, it says that in the year 2000 you urged "the enactment of federal legislation to establish access to legal representation as an essential service".

This committee is going to be issuing a report. We're going to have some recommendations, and of course we want those recommendations backed up by witness testimony. For our recommendation to the Minister of Justice from this specific report, can you give us some ideas of what key components you want to see in that legislative framework so that hopefully we do see a government bill come as a result?

Mr. Doug Ferguson: One thing we need to recognize is that when a person has legal problems, there is a ripple effect. It affects their income, it affects their employment, it affects their health, and it affects their housing. What we have to recognize is that any framework has to take that into account. There are going to be other issues we need to deal with.

I don't think there has been a study done in Canada yet, but I'd like to see a study done by some academics, perhaps from my own institution, on that issue. There is no question that it happens, so there has to be a multidisciplinary approach to this. Also, that could involve, whether it's diversion into other... I'm talking about a triage system, and so on.

The other issue that I've come to see from working on this report is what I call the silo effect. We have 13 provinces and territories, each with an attorney general. We have, I'm guessing, 50 different courts among all the provinces and the federal system. We have the different legal aid plans and so on. It is so difficult to get all the pieces to work together and get everybody talking. We have to find a way to coordinate and have these common goals; otherwise, this will be totally in vain. We'll just be talking into the wind here. There has to be a national effort at every single level.

Mr. Alistair MacGregor: Thank you.

I think it was mentioned in the opening testimony that 70% of family law applicants are women.

Mr. Doug Ferguson: Correct.

Mr. Alistair MacGregor: Since 1995 when the government changed civil legal aid to the Canada social transfer, the consistent federal response, when pressed on this problem, has been that money for civil legal aid is in the CST; it's there. The consistent provincial response is that the federal government gives no money for civil legal aid. We see this story play out between the provinces and the federal government in so many different areas.

Given that women are such a huge majority of the users of civil legal aid, what can we do to help women access the legal system to make sure that, when we're conducting a gender analysis, there is equal treatment not only for women but also other disadvantaged groups?

Mr. Doug Ferguson: The key there is the funding, of course.

Mr. Alistair MacGregor: Yes.

Mr. Doug Ferguson: I think that taking it out of the social transfer, the CST, would be a good start. Also, the benchmarks would be helpful, too, because you're quite right; it's not just women in family law. My clinic, for example, handles a lot of landlord and tenant issues and many people with mental health issues. I had one case in which a gentleman who came to us had brain damage from an accident and was tossed out by the local housing authority. He was going to be homeless unless he found somebody to live with.

You don't hear about those stories in the newspapers, but this is real. It's out there. That's why I'm talking about having a multidisciplinary approach, having specific targeted funding by legal aid outside the social transfer, and hopefully coming to an agreement with the provinces on what that money is for. There has to be an agreement. I don't see the federal government being able to impose that, nor do I see them giving the money without strings.

• (1145)

Mr. Alistair MacGregor: For my next question, I'll get all three of you to respond, starting with you, Mr. Ferguson, because it was your report. In your "Reaching Equal Justice" report, on page 52, you go into detail on the costs to society and so on.

For the record, from all three of you, I want some of the personal experiences you've seen of the cascading effects when we don't fund legal aid properly and what that result is for society. As you mentioned, we tend to look at these things in silos, but it's important that they don't happen in a vacuum. It's a holistic approach. If we can save money in other areas by directing this targeted funding, I'd love to hear your feedback on that.

Mr. Doug Ferguson: For example, in London—and I can only speak to London—at the landlord and tenant board, there is a duty counsel who does not do any hearings. He simply meets with people ahead of time. They go in there on their own against landlords who have sophisticated lawyers or paralegals. If they're being evicted, they become homeless. Where does that go from there? Well, they go to the Salvation Army or something. There's an extra cost to the province, and perhaps, for Ontario Works and so on, or for disability payments. You name it, it's going to cascade through the system—

Mr. Alistair MacGregor: May I also, because my time is limited, get a lawyer to answer? Sorry, Mr. Ferguson.

Mr. Fowler.

Mr. Richard Fowler: Let's take a very simple situation. A young individual with a family has developed an addiction problem, for whatever reason, and he has started stealing from his employer. He's going to be charged with theft. He may or may not make bail. Let's say he makes bail. His mental health will deteriorate. His family circumstances will deteriorate. His marriage will deteriorate. What may flow from that may be some domestic conflict, and then we have the family court involved. The Ministry of Children and Youth Services will become involved.

What we need to do is look at this as a holistic unit where one of the individuals has some problems, but we need to help the whole unit. The health ministry needs to be involved. The Ministry of Children needs to be involved. The criminal justice system needs to be involved.

You've talked about what role the federal government can play. They have tremendous moral suasion, I would say, over the provinces. They transfer an enormous amount of money to the provinces. I would strongly suggest that, as a precondition to receiving some of those transfer payments, we establish national standards for legal aid and for transfer payments on health, because the criminal justice system and the health system are intimately linked.

Mr. Alistair MacGregor: Ms. Go, quickly, please, could I have your perspective?

Ms. Avvy Yao-Yao Go: I would suggest that in terms of a legislative framework, or other frameworks, you look at requiring a race impact and gender impact analysis of the programs and the funding that is being spent on legal aid. In terms of the cascading effect, basically you will be better off going on social assistance in order to get legal aid. If my clients still have low-paying jobs and are fleeing domestic violence, they will not get legal aid.

The Chair: Thank you very much.

Ms. Khalid.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): Thank you, Chair.

Thank you, ladies and gentlemen, for coming in and providing your very valuable testimony.

I have a constituent who is working at a minimum wage job, is the mother of three children, and is going through divorce proceedings. It's tough for her. She can't afford it, and she has come to me looking for help. This study is very important not just to me and not just to this specific lady, but I think to all Canadians.

Over the past year, we've really looked at how we can improve access to justice. We've looked at the court challenges program. We've allotted funding for that. We know that at the federal level we're providing transfers to the provinces. The province itself is doing the work to make sure there's access to justice, but still, access to justice is elusive for a lot of Canadians. What's lacking? The different levels of government are trying, but why are we not succeeding? Why is there this gap? If you can, please explain this.

• (1150)

Ms. Avvy Yao-Yao Go: I'll start. It's that the funding just isn't adequate at all to meet the needs. The example of Ontario is that even if you live below the poverty line, you will still not get legal aid if you don't meet the very low financial eligibility requirements, and at the same time, the government is spending more and more money on the criminal justice side. There is more investment on the other parties within criminal justice, for instance, the police, the crowns, the courts, and there is no relative increase to legal aid so the system becomes more and more lopsided.

Whether it's in criminal, whether it's in family, you just don't have the same level of funding to meet the needs.

Mr. Richard Fowler: In British Columbia, we have the provincial sales tax on legal fees, so that 7% of all legal fees is a provincial sales tax to the province. It was brought in ostensibly to fund legal aid. It now just goes into the general revenues. Last year British Columbia raised about \$160 million on the provincial sales tax on legal fees and they contribute around \$80 million to \$90 million to legal aid, so every year they are putting about 80% or 90% into general revenues from the provincial sales tax.

If we dedicated the whole amount of the PST, we would have a reasonably good legal aid plan for criminal law. It wouldn't address all of the other issues, but we have to start seeing the actuarial benefits for the investments. It's quite simple. You put a dollar in; you save this amount. Once people start looking at the system more holistically, get health involved, get housing involved, and look at not just individual people but individuals as parts of families, and

families as parts of society, we will start to see the benefit to investing, and it really is an investment in legal aid.

Mr. Doug Ferguson: It comes down to priorities. The provinces have been under a lot of pressure to fund health care and education, in particular, and as a result, the justice system has not been given a priority. We're operating now, members, with a 20th-century or even a 19th-century court system in the 21st century. We need to have a really hard look at that.

As I said earlier, this is a foundation of our democracy and that's been lost in the discussions. This is so important to our system of government.

If I may just change gears slightly, going back to Mr. MacGregor for a moment, the Commonwealth of Australia put together an agreement to set some national standards for legal aid in 2015. We have a copy of that agreement here. My point is that it can be done in a federal system.

Ms. Iqra Khalid: Is it just a matter of money? Is it just a matter of funding? Is that what the lack is, or do we have some issues with our process? How is each individual province and territory tackling the issue of access to justice? Are we lacking something at the provincial level with having an efficient process and providing that access? Do we need a national strategy?

Many of you have mentioned that we do, but how do we deal with issues of different demographics for each province and territory in coming up with a national strategy? I personally don't think that money is the only issue here. There does need to be an improvement of the process in which we provide access to justice.

I'd like your thoughts on that.

Mr. Richard Fowler: The simple fact is that every participant in the criminal justice system is talking about access to justice and making changes, so the rules committees of various courthouses, certainly in British Columbia, are revising the rules. They're revising the forms. They're simplifying the process, but it doesn't matter. At the end of the day, the law is complex. Unless individuals can get a lawyer at the front end to assist them in managing their way through the justice system, it does not take long for things to go sideways, for individuals to self-represent in the criminal courts. What happens when they self-represent in the criminal courts is that appeals are likely. In the family court it just takes so much more time.

The reality is that we have to start not only looking at all of the other processes that will increase access to justice but increase the budget for legal aid at the same time, and to understand that defence lawyers and family lawyers are an intricate, integral part of the system. They're not just an add-on. The system will not work without them, and that's been shown time and time again.

• (1155)

Ms. Kerri Froc: What we're trying to do with the benchmarks is broaden the discussion from “the system needs more money”, which it obviously does, and the need for belt tightening. We're trying to open up that discussion.

For example, there needs to be a coordination between the justice systems and other areas—health, social services, that kind of thing. That's what I think our last benchmark really speaks to, the need for a coordination of the system and also a coordination within jurisdictions. We recognize very well that there are going to be differing priorities in different jurisdictions, and we're saying that our benchmarks allow for a flexibility in that, so that local priorities can be reflected in those benchmarks. We need to have a common language to have a discussion and to know what, concretely, the goal is that we're trying to meet.

What we're trying to say with the benchmarks is that we need all of the stakeholders, provincial government and federal government, to meet and collaborate and agree upon common aspirational goals to do all of these things. Yes, it's money but it's also the need to look not just at legal representation but at triage, to look at different paths to justice and make those a reality for people.

In the example you gave of your constituent, it's also a matter that in criminal legal aid there has been seen to be and there are foundational constitutional principles at play, but there needs to be a deeper recognition, particularly for groups such as women, that there are also constitutional rights at play: section 7 rights, the section 15 right to equality, and section 28, which says that women's rights have to be taken equally seriously as those of men. The right to liberty for an abused woman, for example, has to be taken equally seriously.

Ms. Avvy Yao-Yao Go: I think money is an essential but not sufficient condition for all of these things to happen. Ontario is one of the best models in the world, second to the U.K., and we have a very mixed model wherein you see clinics' delivery of services, plus judicare, plus duty counsel. Many things are happening, as in the mixed model in which people are providing triaging services. Bundling of legal services is one thing that the law society has allowed lawyers in Ontario to do. All of this is to promote access to justice.

Many things, then, are already happening, but even with those things, even with the increase in funding, there is still a problem, because at the end of the day we just don't have enough money.

The Chair: Thank you very much.

We'll go to our second round of questions.

Mr. Bittle.

Mr. Chris Bittle (St. Catharines, Lib.): Thank you so much.

Perhaps this isn't a fair question, because I know professions are self-regulated and beyond that regulated by the provinces, but I've

seen this happen. I practised civil litigation, and it was heart-wrenching to see people walk away from legitimate, strong legal cases because my hourly rate was too high. In comparison with much larger areas than Niagara, my hourly rate is or was pretty low. What is the profession doing? It seems that there is pressure in the profession to raise hourly rates, which is creating pressures and a ripple throughout the system. Beyond the suggestion for mandatory pro bono work at the higher levels, what can the profession do?

Ms. Avvy Yao-Yao Go: I'm not speaking as a bencher of the law society, but this is an issue that we have been talking about. I think it's why we changed the rules of professional conduct to allow the unbundling of services, for precisely that reason. However, at the end of the day the person will still need someone to represent him because of the complexity of the law. I think, therefore, that this is only a small solution.

I work in a legal clinic, I don't charge people money and my salary is really low, so I don't know what the solution is for the people out there. At the same time, however, you should recognize that we've done surveys. Sole practitioners are not doing very well. There's a huge disparity within the legal profession; not everyone charges a very high fee. There are multi-faceted issues that we're dealing with.

• (1200)

Mr. Richard Fowler: In a way, the high hourly rates that some lawyers charge—and I agree with my colleague that if you go outside of the big cities, the median income for lawyers is surprisingly low.... A dedicated tax on legal fees, which is what British Columbia did—but when using the word “dedicated”, apparently somebody had their fingers behind their back and crossed, and all those other things—is a reasonable way to think about funding the legal aid system. All you need to do is dedicate the funds that are taxed.

Once you start to see legal aid as an essential service, models for funding it will quickly come to mind. We have many other essential services that we fund through either dedicated taxes or user fees. It can be done. It's just a matter of the will.

Mr. Doug Ferguson: Lawyers charge based on the market, right? They take what the market can bear, but one of the reasons the costs are so high is that they are part of the system and the system has built-in delays. It takes too long, so that's why lawyers' fees go up. I think if we could somehow simplify the system and make it more efficient, fees would come down to the benefit of everyone, except the lawyers.

The other thing is that the Law Society of Upper Canada, and I think other provinces too, now have contingency fees, so that people don't need to pay fees up front to support a civil lawsuit. Of course, that doesn't apply to the criminal side or necessarily to the family side, but it does on the civil. It doesn't help if you're defending.

Mr. Chris Bittle: It seems to be across the board that there's a desire to increase funding. If we were going to recommend an amount to the Government of Canada, does anyone have a number x by which legal aid funding should be increased? Is there any idea as to what x is?

Ms. Avvy Yao-Yao Go: I don't have a number, but I think it should be set at a percentage of something. It's either a percentage of the funding that you spend on the criminal justice system or the correctional system, or a percentage of funding you set within the transfer payment, so that it goes up as your other expenses go up.

Mr. Doug Ferguson: I think that the funding should model... I wouldn't link civil to criminal, personally. I think we need to come to that agreement I talked about with the provinces. You have to set the benchmarks. What is the income of the people you're going to provide legal aid to? Make an estimate and go from there. I think it's going to be difficult to come up with a number. I understand your need for one. I get that, but it's very difficult.

Mr. Chris Bittle: As a civil litigator, I know we talk mostly about criminal and family law. I was disappointed for my clients when there was a self-represented individual on the other side because that meant a longer process, more expenses, and likely a trial. In an ideal world or even your recommendations, what do you feel should be covered by civil legal aid?

Mr. Doug Ferguson: Civil legal aid should cover what we call "essential legal needs". My colleague has it here, if I may refer to our report, "Essential legal needs are legal problems or situations that put into jeopardy a person or a person's family's liberty, personal safety and security, health, equality, employment, housing or ability to meet the basic necessities of life."

This is in our report, under benchmark two, scope of services.

The Chair: Thank you very much.

We will now go to Mr. Cooper.

Mr. Michael Cooper (St. Albert—Edmonton, CPC): Thank you to the witnesses.

Mr. Ferguson, perhaps you did elaborate earlier and I missed it, but I thought that you had said that Australia had adopted national benchmarks. Did I hear that correctly?

Mr. Doug Ferguson: That's correct. They have a national partnership agreement on legal assistance services and it's an agreement between the federal government and the states and territories of Australia.

•(1205)

Mr. Michael Cooper: When was that entered into?

Mr. Doug Ferguson: That came into being, just last year, in 2015.

Mr. Michael Cooper: I presume, given the fact that it was very recently implemented, that you wouldn't have any information about what the outcome of that has been, in terms of the provision of legal aid services in Australia.

Mr. Doug Ferguson: Not at this point, sir.

Mr. Michael Cooper: Thank you for that.

I pose this to Mr. Ferguson or Ms. Froc, and frankly, any of the other witnesses. One of the concerns highlighted in the CBA report

was about the patchwork of legal aid services across Canada, in terms of inconsistencies with respect to financial eligibility and the types of legal matters that are covered under legal aid. Of course, one of your key recommendations is these national benchmarks, which include, as one of the benchmarks, scope of services, which was defined. Is there anything else that you think the federal government can do to encourage greater uniformity to end this patchwork in all 13 jurisdictions across Canada.

Mr. Doug Ferguson: I think that there is a moral role to play here. The federal government is the protector of Canadians' rights. There are so many issues that come before the federal government that have been given priority and this one has not. I think this has to be given a top priority by the Department of Justice and also we have to make sure that the provinces feel the same. We need to get things lined up so that there's a common desire, a political will, to get this done.

I think also we need to get other stakeholders in the system on board. I think there would have to be a major discussion, and I talked about this earlier. There are so many silos. We have to get everybody working together with common goals.

Mr. Richard Fowler: You're studying access to justice, and of course we're speaking about legal aid. One of the impacts on access to justice is delays in appointing judges. It's a huge issue. The consequence of it will be felt a year from now, two years from now.

I know that in British Columbia the superior court judges are extremely overworked. I know in the Yukon they are overworked. I can't remember the figures in the Yukon, but the number of filings per week has tripled and they still only have two superior court judges up there. Delays in filling vacancies have a huge impact on access to justice.

Ms. Avvy Yao-Yao Go: I would just echo what Mr. Ferguson has said. It is important to have that conversation, whether it's in the context of funding or whether it's in the context of coming up with some kind of a national strategy to address this issue, which obviously affects all Canadians in different ways.

Mr. Doug Ferguson: If I can add one more thing, Mr. Fowler mentioned judges and the other thing the federal government could do is to work on more unified family courts in Canada. I think that would save a lot of confusion and create more efficiencies.

Mr. Michael Cooper: Mr. Nicholson raised the issue of pro bono legal services. One of the areas that was cited in the report on maximization of federal investment in criminal legal aid was the fact that in legal aid systems across Canada there is a reliance on lawyers to do a lot of different things in the providing of legal aid services.

One of the recommendations in that report was more utilization of paralegals and law students, whether it be in terms of handling applications or other aspects of the providing of legal aid services. I was wondering if you might be able to comment on that.

•(1210)

Mr. Doug Ferguson: You hit my sweet spot there, Mr. Cooper, especially when you mentioned law students, because that's what I do.

I think there is definitely more scope for the involvement of law students in the civil system, particularly in family law, which is where the need is the greatest. My students, for example, handle trials in the criminal courts for summary conviction matters. I would like to see them do super-summary matters, which would be like drinking and driving trials. That is not allowed right now by the Criminal Code. If that were changed it would allow us to do so.

As far as paralegals go, I think they can take also a more significant role to help keep costs down in a limited way. In Ontario, as you know, paralegals are governed by the law society. They handle small claims court, landlord and tenant, and some other tribunals. I think there is some leeway for expanding their role.

Mr. Richard Fowler: I differ from my friend a little bit. I think the answer to many of the problems in the criminal justice system with delays and inefficient trials is actually a proper allocation of funds, so that senior counsel can now train junior counsel, so that those junior counsel become the best possible lawyers, to make the best possible decisions about whether a case should go to trial, and when you're in trial, to make the best possible decisions about whether to argue this issue or not argue this issue. That's how you get efficiency. It's by making sure that criminal lawyers are as well trained as they can be.

I don't, with respect, think the answer to the problem is to bring more young people, more students, in to do cases without supervision. We need to train everybody to become as good a lawyer as they can be.

Ms. Avvy Yao-Yao Go: I'm somewhere between the two positions.

I see a difference between students, law students, articling students, and paralegals, because law students and articling students always work under the supervision of a lawyer. The lawyer is ultimately accountable for their work. I don't know about criminal law, but I think there are situations in other civil law areas where liberty is not at issue and where maybe students can play a bigger role.

I think I would use Mr. Ferguson's definition of what is essential. If you have liberty issues, where significant equality rights issues are at stake, then I think it's important to have proper legal counsel, and I agree with Mr. Fowler, as well. In Ontario, they have now started to fund a second chair for criminal law, so that senior counsels can work with junior counsels in order to train them on complex criminal cases.

The Chair: Thank you very much.

Mr. Fraser.

Mr. Colin Fraser (West Nova, Lib.): Thank you very much, Mr. Chair. Thank you all for being here today and for your thoughtful comments.

Ms. Go, you mentioned that one of the issues with legal aid services is the problem with middle-class people not being able to afford legal services. I believe you mentioned that. One of the suggestions that I've heard is to allow for contribution agreements for legal aid services. Last week, we heard from the department that only 7% of revenues come from contribution agreements or from the clients themselves making contributions to their legal aid services.

As you know, we have this problem where people who are very poor get legal representation, there's an automatic cut-off, and after that you're on your own. I'm wondering if you can comment on whether contribution agreements would be something that would work. Are they being attempted in provinces, and what does that look like?

Ms. Avvy Yao-Yao Go: In Ontario family law, for instance, there are cases where they will have contribution agreements. Usually if you have property, legal aid will make you pay at the end of the day. Those kinds of agreements do exist right now, but it still doesn't address the problem. I guess Professor Michael Trebilcock did a report, I think, in 2009, where he talked about how to expand legal aid to the middle class in order to get more buy-in for the legal aid program, because I think it speaks to some of the questions asked earlier. Why is it that we still have a problem today? Why is it that the government is not putting enough money into legal aid?

I think partly it's because the public does not see the value of legal aid, unless they're relying on it. How to expand legal aid to the middle class is maybe with contribution agreements and other kinds of programs, so that more Canadians understand the value of this kind of program, so there will be more buy-in, and so the government will put in more money at the end of the day.

•(1215)

Mr. Colin Fraser: Mr. Fowler.

Mr. Richard Fowler: I agree wholeheartedly with what my colleague just said. The Law Society of British Columbia has struck a committee to study legal aid. We had a colloquium about a month ago, and one of the participants said that part of the issue with the funding of legal aid is a marketing problem. The public doesn't understand that there are real financial payoffs to investing in legal aid. If we can establish that with the right studies—and many of them have already been done—then we can recognize that this is really a bipartisan issue. It's about the strength and the value of our democracy and the individuals who are struggling to deal with issues within society, and I have no doubt that people will support wholeheartedly the proper funding of legal aid programs.

As for contributions, in British Columbia, it's the cut-off. In a criminal case, if you're below a certain line, then you get it, but if you're above it, then you don't. There have to be ways to ensure that people can contribute, so that they can get help, as well. It can be for people with some means, but not adequate means.

Yes, I agree.

Mr. Colin Fraser: Thank you.

Mr. Ferguson, do you have a comment on that?

Mr. Doug Ferguson: Yes, I agree with Mr. Fowler's approach.

He's quite right that it's black and white. You qualify or you don't. In Ontario, there are some contribution agreements, which you referred to. These would be for people who qualify from an income point of view, but they have some assets and they may be required to pay.

I think there's definitely room for that, and it would lower the cost of funding legal aid, if there's some kind of contribution agreement. There could be some element of lower legal fees associated with it.

Mr. Colin Fraser: Very good.

Mr. Ferguson, I'm jumping to civil legal aid now. You answered a question, which I also had, from my friend Mr. Bittle a moment ago about the scope of civil legal aid. I'm wondering, though, about efficiencies in the system itself and whether legal aid could be part of those efficiencies. I'm thinking of efficiencies, within family services, most particularly for mediation, for people to have access to mediation to weed out the cases that can be resolved in the very first instance or after a short period of time without causing delay or clogging up the court system.

Obviously, it wouldn't be appropriate for cases of domestic violence and those sorts of cases, but do you see merit to it? Can legal aid play a part in those types of services?

Mr. Doug Ferguson: Yes, I see merit in it. I know that in some cases, when both clients are represented by legal aid, the legal aid service will act as a mediator to bring them together. That only makes sense.

I think, however, that we can go further than that. In the court system generally there is more scope for mediation. Some jurisdictions, I think, have some kind of mandatory mediation. They tried it as an experiment in Toronto. Ms. Go may know more than I do about that.

Mediation, then, is part of the answer, and this could be part of the triage we spoke of earlier. If the issues are resolvable, they should go to mediation sooner rather than later.

Mr. Colin Fraser: Okay.

Mr. Fowler, let me ask you a question. You gave the example of a case in which it would save money if we had, in the first instance, a properly experienced lawyer, rather than a wrongful conviction and somebody spending time in a federal penitentiary or whatever.

Do you see merit, and how does it work, with regard to paying experienced counsel for certain cases, say in cases in which the person would be facing penitentiary time? Do we see a case for higher rates for those types of legal aid matters? Can we recruit experienced counsel to deal with those—experienced counsel such as you?

Mr. Richard Fowler: In British Columbia we have that; we have enhanced fees. The hourly rate is \$120 an hour rather than the regular hourly rate for somebody with a 10-year call, which is about \$91 an hour. If you look at what the cost of running an office is, however...

A good way to do the calculation is to ask, what does it cost the government to fund a senior prosecutor? The government pays their pension, their salary, their health benefits, their other benefits, their

office expenses; \$120 an hour doesn't even get close to what it costs to support a senior prosecutor.

Yes, that's the way to do it. You have to have a tiered system. This is what was recommended by the Code-LeSage commission, and it is what led to increases to legal aid, because senior counsel weren't doing the murder cases and weren't doing the cases that were scheduled for six months.

I say that the practice of law is about judgment. You're not born with judgment; you learn good judgment. The decision whether to make a motion for the exclusion of evidence under the charter or not is based on good judgment. Younger, less experienced lawyers are probably likely to err on the side of making the motion rather than having the courage not to make the motion, recognizing that it has very little chance of success. The difference in the length of that trial could be a month or two.

That's why investing in senior counsel who will train junior counsel to make those good decisions is all going to pay off in the end.

•(1220)

The Chair: Thank you very much. We're at eight minutes on that turn.

Mr. Falk.

Mr. Ted Falk (Provencher, CPC): Good. Thank you, Chair, and thank you, witnesses, for coming.

Mr. Ferguson, I'd like to begin with you. You talked about essential services. Several of our committee members have asked questions about essential services. Can you tell me what services are currently covered that you perhaps think ought not to be covered?

Mr. Richard Fowler: That's an easy question.

Mr. Doug Ferguson: I'm just thinking here. I'm looking at Ontario, which is where my experience is. Coverage has dropped over the years, frankly, and I can't think at this point of a single instance of a service that ought not to be covered.

Mr. Ted Falk: Okay.

Mr. Fowler?

Mr. Richard Fowler: I'm afraid I'd have to agree with that. I honestly cannot...

Of course, you're always going to say that there was one individual who got legal aid who shouldn't have gotten it, because no system you put in place is going to be without its flaws. There's always going to be somebody who creeps in, who doesn't disclose their income as accurately as they should have done.

What, though, is the cost of policing it better? Probably that money would be better spent by putting it into legal aid rather than trying to prevent the very few people who get it but shouldn't get it.

I'm sorry, I cannot think of a single service that is currently funded that shouldn't be. If you want to ask the question in reverse, I'm happy to answer it.

Voices: Oh, oh!

Mr. Ted Falk: I think that was addressed already. Thank you very much.

I just wanted to ask the flip side of the question that was previously asked. Mr. Fowler, you wanted an easy question or you had hoped for one. You painted a very bleak picture of an individual that in order to fund an addiction started stealing from his employer, and it created marital problems and domestic abuse problems. It led to issues with child and family services. If we increase the availability to feed one's addictions, or facilities that would promote addictions, what do you think that will do for the need for legal aid?

Mr. Richard Fowler: Are you talking about safe injection sites?

Mr. Ted Falk: Safe injection sites, legalized marijuana—these are all things that promote addictive substances and the use of those substances. What do you think that will do? You painted a picture already of what you think happens. Can you extrapolate from that a little further?

Mr. Richard Fowler: At the end of the day, this is a philosophical question. It's a very difficult thing. I appreciate that different individuals have different beliefs on this issue. I happen to come at it from a different perspective; I happen to think that safe injection sites actually save lives.

In Vancouver right now we have an absolute crisis with fentanyl. The irony of it is that we have a crisis with fentanyl because we tried to deal with addiction by changing how we dealt with oxycodone addictions. The composition of oxycodone changed to make it impossible to snort. You couldn't grind it up. We have an opiate crisis. This shows the intersection between health and the criminal justice system. We have a health crisis because opiates have been far more overprescribed in Canada than in any other country in the world. We are heavily embedded in the opiate prescription business as a way of dealing with pain.

If you go to Vancouver right now, we've had 700 deaths. We have street people walking the streets, patrolling the streets with the antidote Narcan to save people's lives. There are going to be addicts. History has shown us this. We've had prohibition. There are going to be addicts. It's whether you think the way to deal with an addict is with the criminal justice system. I would say it is not. Is it with the health system, or is it with a combination of the two? In Vancouver, we try a combination of the two.

Until the fentanyl crisis we were doing better than we've done for years, in my submission. Many more addicts are being seen as a health problem rather than a criminal justice problem. In other words, the court system is no longer the first place they go. It's the place they go later on. We could talk about this for a long time. I don't generally agree with the proposition that funding safe injection sites or legalizing marijuana is going to create more of these problems.

Regulation of alcohol works better than prohibition. I think history has shown that. I think the regulation of marijuana, which is already widely available, is going to deal with the problem better. Having a source of marijuana that is regulated is far better than having it in the hands of organized crime.

●(1225)

Mr. Ted Falk: See? You wanted an easy question and I gave you one.

Voices: Oh, oh!

Mr. Ted Falk: I don't agree with the answer. I just gave him an easy question.

Mr. Richard Fowler: I'd be happy to talk to you. We have a different perspective. I appreciate that.

Mr. Ted Falk: Certainly, when we create addictions among people and when we promote addictions, it will increase the use of our legal system. It will increase the necessity to provide legal aid.

Mr. Richard Fowler: We provide alcohol. Does that promote addictions? Are we going to go back to prohibition? I don't know. The sad reality is that some individuals deal with the problems they face as a result of their intersection with a difficult world by going to chemicals. We know that. It happens in every country in the world. It's happened in every generation going back thousands of years. People chew this leaf, they do this, they do whatever, as a way to ease some kind of internal pain. I'm sorry, but it's true.

Mr. Ted Falk: There are better solutions, but thank you.

Mr. Richard Fowler: Maybe. I just don't know if we've found them yet.

The Chair: Thank you.

Mr. MacGregor.

Mr. Alistair MacGregor: Thank you.

I'm going to get a response from all three of you. I'll start with you, Ms. Go. This morning I was reading a paper entitled "Canadian Jurisprudence Regarding the Right to Legal Aid". It went over several Supreme Court cases, and it recognized that there is no overarching constitutional right to legal aid in Canada. However, when you read section 15 of the charter, which clearly states, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination".

You look at the CBA's report and the very stark regional disparities. Even though we've had a Supreme Court ruling on the fact that there's no constitutional right to legal aid, I'm wondering if the spirit of the charter is being met across Canada. Instead of having the government being reactive, is there an opportunity for the government to be proactive in honouring the spirit of section 15?

Ms. Avvy Yao-Yao Go: I think certainly I would highly question whether the spirit of section 15 is being met and whether the spirit of the rule of law, which is the foundational principle of our Constitution, is also being met. It's not just across Canada. Even within Ontario, where it's one of the best-funded legal aid programs, you see disparities. We talk about the gender issue in terms of the difference between access to family law versus criminal law. You will see a gender difference in that aspect.

Of course, if you look at the fact that racialized group members are two to six times more likely to live in poverty, then you see a racial aspect as well. The impact on racialized groups and their access to legal aid is also affected as well. All of those issues, I think, come under section 15, but also I think, as Ms. Froc had mentioned, section 7 is an issue as well, and that has been used in some of the cases with respect to a constitutional challenge to access to legal aid for child protection cases, for instance.

I would say that the same argument goes with many other areas of law. When you're being evicted from your home, you should get access to legal aid.

• (1230)

Ms. Kerri Froc: Could I just answer it?

Mr. Alistair MacGregor: We'll go along.

Mr. Richard Fowler: I see it as a rule of law issue. It's a fundamental principle of our democracy that we are all bound to obey the same laws, and we pass laws constantly that have complex offence provisions and penalty provisions. Yet we do not provide any resources realistically to the bulk of society, the middle class and many impoverished people, to assist them in dealing with any potential transgression of the law. You can't even get legal aid to explain the law to you. If I do X, am I going to be in breach of this new statute that the provincial government passed? It's silly in a way when you look at it that way.

Ms. Kerri Froc: I would argue in fact that the court hasn't completely adjudicated on the extent to which the government has an obligation to provide civil legal aid funding. In the G. (J.) case before the Supreme Court, the court dealt with an element of that in child protection proceedings. In Christie, what the court said was that under the rule of law there is no generalized right to legal services, but to the extent to which in other circumstances there's a constitutional right....

My specialty in my area of study as a post-doctoral fellow is women's constitutional rights. What I look at there is in terms of the right to equality. Is the right to equality being satisfied when there's such underfunding of civil legal aid, which is mostly used by women, for example.

Looking at section 7 and the right to security of the person for women, is that being satisfied when abused women can't get away from their abuser because they can't access legal aid to have their cases adjudicated? So I would push back from that a little bit in terms of, not talking about the spirit of the charter, talking about the actual provisions of the charter and what is required by the provincial and federal governments in that regard.

Mr. Alistair MacGregor: I have just a quick question.

Mr. Ferguson. I was wondering if you could provide the chair and the clerk the report that deals with Australia implementing its national benchmarks?

The Chair: Once it's translated, it will be distributed.

Mr. Alistair MacGregor: Okay, great.

Mr. Ferguson, if the government were to implement the national benchmarks for public legal assistance services, do you think that

would be the hallmark of a progressive government? A quick yes or no answer, please.

Mr. Doug Ferguson: Yes.

Mr. Alistair MacGregor: Thank you.

The Chair: If my colleagues agree, I just have brief question.

Previously you were asked what the amount is that the federal government should contribute, what you would recommend that this committee tell the government we should contribute. I think it's difficult to come up with a number and we can always find formulas, but I think the most likely formula is that this current formula penalizes the working poor. It seems very clear that people on social assistance can get legal aid and a working poor person is discriminated against because they have a job and they're trying to sustain their families at a very low income level.

I think the real question that we should be asking witnesses is what level of income is it or what type of person today is not qualifying for legal aid who should qualify and what should this committee recommend that these national benchmarks, if we had them, be set at, and then from that we can extrapolate how much funding is needed. Does anybody have any ideas on what that amount should be?

Mr. Doug Ferguson: Yes, Mr. Chair. The benchmarks call for people who live at or below 150% of the low-income measure to be considered to be financially disadvantaged. That is found at the StatsCan website. There's a reference there in our report.

The Chair: Thank you.

Ms. Go.

Ms. Avvy Yao-Yao Go: The other day I was at a round table with the minister responsible for the poverty reduction strategy. I think even the discussion around how to define "poverty" is ongoing—whether you look at the low-income cut-off or a low-income measure. Different people have different opinions, but I think it's a certain measure of low income.

Once that is defined, then I think anyone who falls under that should be able to get legal aid.

The Chair: Thank you.

Mr. Fowler.

Mr. Richard Fowler: I don't think we can have a single benchmark for every area of the law. If somebody is about to lose their liberty, or their house, or their child, that may require a different threshold than some other kinds of problems. I just look at it that way. I think it has to be issue driven and consequence driven, because that's where the net saving is going to be. If you get it right at the front end, you get the most savings.

If somebody doesn't lose their house, doesn't have their child taken away when they shouldn't have had their child taken away, when other services could assist their family, that's when you realize the most benefit. Maybe that would mean that the threshold is higher, for example.

• (1235)

The Chair: Thank you.

I very much appreciated your testimony. I think we all found it enormously helpful in our study. Thank you to all the witnesses for coming.

Mr. McKinnon.

Mr. Ron McKinnon: Could I have one quick question?

The Chair: If it's very quick, sure.

Mr. Ron McKinnon: This is a question for Mr. Fowler. Ms. Go has suggested that the Ontario model for legal aid is the best, second only perhaps to the U.K.'s.

Could you comment on that from a B.C. perspective?

Mr. Richard Fowler: I don't work in Ontario, so I don't know the formula, but I do know that as a response to the Code and LeSage report, they did bring in higher rates for senior counsel. I believe it was \$140 or \$150 an hour, something like that. I can't say whether

it's the gold standard. Unfortunately, I think many of the legal aid plans still remain sort of the rusty steel standard.

There are ways to go. What we have to do is encourage senior counsel to be able to take on the difficult cases, to mentor young counsel, and to look upon legal aid, from a criminal lawyer's point of view, as investing in the system in the same way as we invest in training police officers. It could be recognized that well-trained police officers investigate better and present better evidence in court. We invest in prosecutors. We invest in judges.

We have to look upon defence counsel and invest in them, and then the system will work better.

Ms. Avvy Yao-Yao Go: The Ontario system is considered one of the best for two reasons. One is the per capita investment in legal aid. The second is that it's a mixed model—it has duty counsel and it also has community legal clinics—and it covers a wide variety of areas of law. It's not just about criminal and family law, but it deals with a lot of the essential law that Mr. Ferguson referred to as well.

Mr. Ron McKinnon: Thank you.

The Chair: Thank you very much.

Have a great day, everyone.

This meeting is adjourned.

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