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Chair

Mr. Anthony Housefather

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• (1625)

[English]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): Ladies and gentlemen, we will resume our meeting of the Standing Committee on Justice and Human Rights. We are studying access to justice, focusing on legal aid.

We are delighted to be joined today by two witnesses. I am pleased to welcome Ryan Fritsch, who is a lawyer and a lecturer at the University of Windsor.

Welcome, Mr. Fritsch.

As a repeat witness, we have Josh Paterson, executive director of the British Columbia Civil Liberties Association.

Welcome back, Mr. Paterson.

We're going to start with Mr. Fritsch.

Mr. Ryan Fritsch (As an Individual): Thank you very much. I want to begin by giving you a bit of my background, since I appear before you today in my personal capacity.

I have been an advocate for mental health rights for over 10 years. I have served as legal counsel to the Psychiatric Patient Advocate Office, which supports psychiatric in-patients with rights, advice, and patient advocacy over 35,000 times every year. I also led developments of Legal Aid Ontario's province-wide mental health strategy, which just launched in March 2016.

Over the years, I have also participated in many advisory boards and committees, including the Toronto Police Service's mental health advisory committee. I was co-chair of the Police Records Check Coalition, which worked with the Ontario Association of Chiefs of Police and others to develop the first provincial policy in that area. For the last several years, as you mentioned, I have also taught as a sessional professor at the University of Windsor in the faculty of law.

Thank you very much for having me here today and giving me this opportunity, and for undertaking the important business of considering the huge role of legal aid plans across Canada.

Legal aid, simply stated, helps people live their rights. It's about getting the advocacy that makes citizenship a meaningful thing, and this is, in a very real way, what we are talking about when we say "access to justice".

Today, I want to focus on a very specific part of that question, and that is the criminalization of mental illness. There has obviously been a lot of work done on this topic, and over the last 15 years much of this work has been put into practice. We have been on a

very clear trajectory away from criminalizing those with mental illness. We recognize that a punitive law-and-order approach doesn't work. It doesn't work in the public interest, nor does it work to protect public safety. Concepts like denunciation, deterrence, and imprisonment are in fact counterproductive when we're talking about mental illness. They exacerbate underlying problems and trigger causes that bring persons with mental illness into conflict with the law. But what of this progress has been formalized and systematized as part of our courts today? That is much more narrow. This is also the opportunity I'm encouraging this committee to consider today.

If you pick up your copy of the Canadian Criminal Code, you will find the mental disorder provisions in part XX.1. That whole section, for the most part, speaks to just 2% to 3% of the population, who have serious and persistent mental illness. It is a very well-defined system, but it exists only for those who are seriously and persistently mentally ill, those who are either unfit to stand trial or not criminally responsible due to mental illness. This is a very high threshold to meet.

While the Criminal Code mandates a comprehensive set of services and systems, it won't be accessed by most accused. Indeed, those found not criminally responsible represent just 1.8 out of every 1,000 criminal cases. What about everyone else who appears as accused in a criminal court? What about those with less serious mental illness: those who some of my colleagues describe as "quietly unwell" or those who are acutely unwell and in short-term crisis? What about those with a mental illness and an intellectual disability or cognitive impairment?

I am pleased to say that, over this time period, they have enjoyed some progress as well. It was just in 1999 that the first Mental Health Court began operating at Old City Hall in Toronto. That court was set up because there was recognition that traditional prosecution wasn't working. Over the last 15 years, such alternative approaches have bloomed across Ontario. That one court in Toronto became a source of hope and inspiration to judges, crowns, defence counsel, and the accused alike. The idea and the approach grew.

Ontario's Ministry of the Attorney General recently undertook a checkup survey. In 2015, they found that 52 of 52 criminal courts in Ontario now provide some kind of targeted mental health programming. That includes everything from formal mental health courts to drug treatment courts, post-charge diversion, bail programs specializing in mental health, and so on. These kinds of efforts have been developed not for the 2% to 3% of accused with serious and persistent mental illness but for the majority of the accused: the one in two, or more, who has some kind of mental health and addiction issue when they appear in a criminal court. It is a huge proportion of the accused, likely the majority.

• (1630)

There are huge potential benefits for federal leadership to help formalize these kinds of programs to address these needs of the majority of the accused. You can see what these benefits are by simply looking at what happens in these courts. Much depends on the work of court support workers and on duty counsel and defence counsel. They long ago recognized that mental health is only part of the picture, that treatment alone is not a silver bullet, and that illness is only a part of what puts the accused in a precarious spot and only part of their story.

Instead, they're assessing the needs of their clients based on these other factors, which will help their clients stabilize in the community. They're advocating for housing. They're advocating for income and social entitlements. They're advocating for access to health services. They're advocating for access to education and for the decriminalization of police records so that people can get education, work, volunteer, and even access housing. Most of all, they confront assumptions, prejudice, and fear. All of these are barriers, and all of these are social determinants of health that hold the accused back and contribute to recidivism and criminalization. In other words, the investment in legal aid, which goes to assisting these accused, is paid back multiple times over. There is a tremendous social return on investment in legal aid. The 2014 Department of Justice report on maximizing the federal investment in legal aid confirmed that such investments in legal aid can save money in areas of government spending such as health and social assistance.

Diversion specialty courts are therefore an approach with considerable promise, but there are also troublesome aspects. First and foremost is that these special mental health programs tend to be ad hoc. Over the years, they have grown up here and there, often in isolation. They typically depend on cobbling together local resources.

Some of the specialty courts meet once a day and some meet once a month. They tend to be rather idiosyncratically defined. Some have clear eligibility and diversion criteria and some more or less do it on the fly. There is, in other words, lots of discretion, lots of variation, and very little consistency. Often, frankly, there is much confusion about procedure and options and about the intersection of criminal law and health care. There is often uncertainty about what practices and frameworks are best. Nonetheless, we see the considerable promise.

From my perspective, everyone is now pulling in this direction and wants to see these programs succeed through further investment

and normalization. Supporters of these kinds of initiatives include the following.

In 2013 the fifth national symposium on reinventing criminal justice recommended that consideration be given to whether Criminal Code amendments are required to allow for earlier assessments of the mental health needs of the accused, thus removing legislative barriers to these kinds of diversion and mental health programs growing.

In 2014 the Department of Justice advisory panel on criminal legal aid made the recommendation to address the lack of system coordination and to increase efficiencies, in part by targeting high users of the system and addressing the particular needs of particular groups, namely, those with mental health issues.

In 2014 the Mental Health Commission of Canada's national strategy made it priority 2.4 that we should increase the availability of programs to divert people living with mental health problems, including mental health courts.

In 2016 Ontario's Ministry of the Attorney General convened a round table on criminal mental health, and in part it endorsed a recommendation to the minister to investigate promising models of diversion and to consider standardizing the approaches being taken.

In 2016, I'm proud to say, Legal Aid Ontario released its province-wide mental health strategy. This included a comprehensive mental health training program and an ongoing learning tool developed by and for criminal lawyers. LAO's strategy also expanded financial and legal eligibility for mental health clients and established a multi-year commitment to innovate.

I'm here today to encourage the federal government to join this chorus and to do its part. It would go a long way to achieving that goal in the mandate letter of the Minister of Justice to address gaps in services to those with mental illness throughout the criminal justice system.

I would suggest that it would also greatly help maximize the federal investment in legal aid as well as help direct future and expanded investments with the greatest potential impact. It promotes earlier resolution. It streamlines processes. It reduces breaches and administration of justice offences, and most importantly, it supports the accused in defining their own pathway to recovery.

How do we get there? I would like to make six recommendations for you to consider today.

•(1635)

First, consider reviewing the Criminal Code definition of “mental disorder” to expand that definition, or to create a separate category of mental disorder short of “not criminally responsible” or “unfit to stand trial”. Frankly, this would better reflect the reality of what is happening on the ground in courthouses today. It would also better include those with dual and concurrent diagnoses, intellectual disabilities, cognitive impairments, acquired brain injuries, fetal alcohol syndrome, and so forth.

Second, you may consider reviewing the Criminal Code to formalize options like alternative measures or diversion procedures for those with a mental disorder short of NCR or unfit. Again, this would reflect what is happening on the ground, and it would provide a more comprehensive and evidence-based approach to conflicting efforts to reform bail, drug treatment courts, mental health diversion, and so-called community or accommodation courts.

Third, it would be very helpful to lead and promote the standardization of best practices. For example, I would suggest that federal investment in legal aid funds could be earmarked or expanded for courts that adopt models that are demonstrated to be effective. It would also be a means to encourage them to do so.

Fourth, invest in research. Frankly, there's a dearth of research in this area. The federal government could consider a range of possibilities, including making this a focus of the renewed mandate of the Mental Health Commission of Canada, or perhaps consider establishing a specialized Canada research chair, or even investing in groups that already have national scope, like the Association of Legal Aid Plans of Canada. This would ensure that approaches were evidence-based, and it could also ensure that a focus would be given to the special mental health needs of women and of aboriginal accused.

Fifth, as part of the research agenda, consider specific models of alternative or diversion courts. Today there are many approaches. There's a huge variety in what's going on in courthouses across the province of Ontario and across the country. Many of these have promising potential. At the same time though, some courts are looking to get beyond a purely therapeutic model to models like the risk-need-responsivity framework, which helps identify social factors that exacerbate mental illness.

Sixth, any such work in any of these areas I've just highlighted must be done in partnership with the mental health community and with those who have lived experience of the system. As this community often says, “Nothing about us without us”. They're experts in their disability and their experience, and they should be front and centre as part of any reform movement.

Thank you.

The Chair: Thank you very much.

Now we'll move to Mr. Paterson.

Mr. Joshua Paterson (Executive Director, British Columbia Civil Liberties Association): Thank you very much to the committee for its invitation.

The BC Civil Liberties Association is the country's oldest and largest civil liberties and human rights legal organization. We work

at the federal level and provincially to sustain, defend, extend, and uphold human rights and freedoms in Canada. We have a very long history on the topic of legal aid. In fact, the very first position paper that our board adopted in April 1963 was on the topic of criminal legal aid. In our report, among the recommendations, we argued something that was novel at the time, which was that legal aid is the responsibility of government. We called for a comprehensive legal aid plan, guaranteed in statute and not dependent on the charity of lawyers as legal aid had been up to that time in Canada. We've continued to advocate on the issue over the half-century since.

I'd like to return to a question that Ms. Khalid asked the Department of Justice witnesses here in December: why do we provide legal aid to start with?

We take the position at the BCCLA that there are certain fundamental precepts to making democracy effective for all persons, and that these fundamental precepts include equality before and under the law, and the equal protection of the law. This principle implies a second precept, which is that the same law shall apply equally for the rich and for the poor, for the weak and for the strong, and that is, more precisely, that the poor must not be denied equal access to the law because they are without economic means.

We think legal aid—and we're not alone—is fundamental to the rule of law. Sadly, we're very distant from these ideals, as you've heard from other witnesses. In the 50 years since our original submission, despite many developments in the creation of legal aid plans across the country, we're now in the midst of a crisis in access to justice, as has been pointed to by our colleagues at the Canadian Bar Association, a crisis marked by underfunding, a patchwork of disparities from province to province, a fragmentation of people's cases, in which marginalized or poor people have very complex legal problems but may get assistance in only one area and not in another. All of this has had a disproportionate impact on women, people with disabilities, members of racialized communities, indigenous people, and new immigrants, who are overrepresented in the low-income population.

As I testified last year to the Senate committee looking at delay in the justice system, in B.C., my home province, in real dollars, the amount spent on legal aid has dropped about 40% since 1995. That's 40%. In 2002, the Province of B.C. cut legal aid funding by 38% and shut down many of the branch offices and clinics across the province. To cope with the reduced amount of money that was being given to the Legal Services Society for legal aid in B.C., it had to reduce the eligibility, resulting in an increase in self-represented individuals. Right now in B.C. the qualifying cut-off is \$18,000 in income, or \$36,000 for a family of four. As you've heard from other witnesses, it's exceedingly difficult, if not.... It's impossible for someone making \$18,000 a year to afford a lawyer to properly defend them in a criminal trial, never mind civil issues. Poverty law services were cut at that time. Everything to do with rental housing, disability entitlements, and social benefits entitlements was cut, and the majority of family law services were cut at that time as well. In family law, for example, before those cuts were made, 15,000 cases were approved for family legal aid, whereas last year in the province of B.C., there were 3,800 cases approved.

You've heard about the network of community legal clinics in Ontario, and you've had witnesses testify from those, including Ms. Avvy Go. We don't even have those in B.C. any more. They were completely eliminated. We used to have 14 community legal aid offices and 14 first nations legal offices. Those were consolidated to seven offices at one point, and then cut down to just one office outside of Vancouver for the whole province of B.C.

Who has tried to take up the slack? Lawyers have, through the law foundation funding a small network of front-line community layperson advocates to give legal information but not advice.

● (1640)

All of this is admirable and important, but it is not the same as publicly funded legal aid for poverty law services, for family law services, and so forth. This network, as hard as it tries, and as skilled as those individuals are, is not adequate to the daunting task that has been left before it through the cutting back of these services.

All in all, each year, several millions of dollars' worth of services are provided through philanthropy and through the goodwill of lawyers in B.C., but it is simply not enough. The increase in the federal budget this year brought some help in this regard, but with great respect to the government, \$88 million over five years divided by 13 jurisdictions clearly doesn't go a very long way.

In terms of recommendations—because I want to get to that, and perhaps we can talk about other things more in questions—we think that this committee ought to be recommending that the federal government resume a leadership role in and set the tone for the provision of legal aid in Canada.

In 2011 the first recommendation of the Public Commission on Legal Aid in B.C. that we endorsed, from Leonard Doust, QC, was that legal aid needs to be recognized as an essential service. Legal aid, for people who are unable to meaningfully afford the legal services they critically need to meet their absolute needs, should not be viewed as a frill. It should not be viewed as an add-on or a luxury. Rather, it is an essential part of a just society. The Chief Justice of the Supreme Court of Canada has said the same thing, that providing

legal aid to low-income Canadians is an essential public service. It needs to be recognized as such.

In support of this, we repeat our support of the recommendations made in B.C. at the time, that eligibility thresholds should be modernized nationwide. You've heard a lot of evidence about the varying eligibility thresholds. We say that the eligibility measures should be connected to a statistically determined measure of poverty, such as the market basket measure. To deal with the people who are in the middle, in the gap that you've heard about, legal aid should be provided to a category that you could call the "working poor", at up to 200% of that income measure or cut-off on a sliding-scale contribution system. That could be worked out province to province.

We strongly urge the committee to recommend that the federal government come back to its original position to fund or cost-share 50% for criminal legal aid. Also, civil legal aid ought to be taken out of the Canada social transfer and treated separately, as with criminal legal aid, so we can make sure that is provided uniformly from province to province—obviously, working with provincial counterparts.

We think there needs to be a strong commitment to the funding of family law and poverty law. Ms. Govender from West Coast LEAF spoke eloquently about the cascading problems that can result when basic family law services, outside of abusive situations, are not covered, and how it's in the public interest and the best interests of children that those needs be better met than they are now.

We do support the CBA's recommendation for benchmarks as part of that funding discussion with other jurisdictions in Canada, but we share the caution that's been expressed. We want to make sure that we are generally benchmarking up and not benchmarking down. As much as those in Ontario—and I won't take any wind out of their sails—will complain about the inadequacy of legal aid in Ontario, it is by far better than, for example, that in B.C., where I live. We certainly don't want to be going down. We would like benchmarks to pull us up.

I'll quickly conclude with a few more recommendations.

I won't elaborate on this, but mandatory minimum sentencing is one thing that's causing a huge burden on the legal aid system. As you've heard, people are not able to plead out, or are not choosing to plead out and shorten trials or eliminate trials and so forth because of mandatory minimum sentences. We know the government is looking at that already, and Parliament will be too.

We support, as well, a continued commitment, and particularly in these times, an increased commitment, to the provision of legal aid in immigration, particularly in refugee areas, where there are very serious human rights interests at stake.

• (1645)

Finally, we think that any look at improving legal aid nationwide should consider the whole panoply of services that can be provided.

In Ontario, we see a network of community legal clinics providing one kind of service. We see duty counsel in the criminal courts, which is not something that is as widespread in other provinces. Of course, there is also the model of providing certificates, referrals, or contracts to private bar lawyers. All of these things work together to make sure that far more people will be able to access critical legal services in the future.

Thank you very much.

• (1650)

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

We will now move to questions. We'll go to Mr. Nicholson.

Hon. Rob Nicholson (Niagara Falls, CPC): Thank you very much.

Thank you, gentleman, for appearing here today. It's very interesting.

It's good to have the BC Civil Liberties Association here. I remember very clearly when, as a student back in the mid-1970s at the University of Windsor, I invited the BC Civil Liberties Association. There was an individual—it's on the tip of my tongue—who was a sort of spokesperson for them at that time. He was a real star. This was, quite frankly, before the charter. The discussion I remember was about the Canadian Bill of Rights.

Thank you very much for your comments.

I will start with you, Mr. Paterson. It's very distressing. You mentioned some of the testimony that we have heard with respect to area of family law. You gave statistics. Within the province, within a short period of time, I think you said it went from around 10,000 cases to around 3,600.

What is it about family law? Most lawyers will tell you—and it's been my own experience—that nothing is more traumatic for somebody to go through than some of the issues with respect to family law. I have met many people who I thought were more deeply affected, quite frankly, than were people going through the criminal justice system, as traumatic as that can be. Yet we hear consistently that somehow family law just doesn't seem to cut it.

What is the excuse? What are the issues? What are your thoughts on why that particular area seems to take a beating?

Mr. Joshua Paterson: Thank you, Mr. Nicholson. I'm glad that some predecessors from the BCCLA were able to play a role in your early legal education. We've been around a long time.

Speaking from the experience of B.C., I think what happened when there was less money for legal aid was that, as you've heard, the Legal Services Society had to prioritize those areas of the law that had constitutional entitlements, or at least areas in which constitutional entitlements had already been established. In order to better preserve certain areas of service, other areas had to be cut back.

The statistics that I gave you come from Legal Services Society annual reports. I would be surprised to hear that there are now one fifth as many family law problems in B.C. as there were in the 1990s. I suspect that there are probably as many.

Hon. Rob Nicholson: Is it your experience that family law takes the first hit?

Mr. Joshua Paterson: Family law tends to take the first hit.

Hon. Rob Nicholson: Do repairs of highways or other areas of provincial jurisdiction seem to take a hit, or is family law near the top of the list when provinces are straining for money?

Mr. Joshua Paterson: Well, certainly in British Columbia where we saw very significant cuts to legal aid starting in about 2002—I mean a real, significant gutting of the system—I think the government also made cuts in other areas at the time.

In recent months we've seen a Supreme Court case about cuts to education. We've had cuts to health care in B.C. during periods of austerity.

I don't think family law was alone, but within the context of this conversation, in terms of legal aid, it seems to be in first place.

Poverty law services were cut altogether. There used to be 40,000 people served in terms of poverty law in British Columbia. That went to zero in one year. Everyone who had issues, those who might lose their housing, those who might be having troubles with a bad decision made by the welfare office, those who had been kicked off of benefits unfairly, and those affected by a bad decision made by CPP about disability benefits are now without any legal help.

Hon. Rob Nicholson: Thank you very much for that.

Mr. Fritsch, thank you very much for your presentation. You talked about the study put out by Legal Aid Ontario. I think you were involved with that, were you not?

Mr. Ryan Fritsch: Yes, I have been leading development of LAO's mental health strategy over the last four years or so.

Hon. Rob Nicholson: I know it was a good report, but it's no surprise that you'd be supportive of it.

Mr. Ryan Fritsch: Oh, yes.

Hon. Rob Nicholson: Thank you for your testimony.

You said that anything the federal government does must be done with the mental health community, but I think you probably must also mean with the provinces, because jurisdiction over health care goes to the provinces.

Mr. Ryan Fritsch: In essence, what I'm suggesting is that there seems to be a groundswell of opinion and widespread recognition that all of these kinds of mental health programs, diversion programs, bail beds is good stuff. Everybody wants to get behind it. What I see, though, is a lack of coordination. I'm eager to make the point here today that as you're considering increasing the investment in legal aid, as I hope you are, this is an opportunity that can be grabbed. I think that a little bit of vision and a little bit of leadership on this issue can help all the parts add up to more than just the sum of the parts.

Everybody wants to do the right thing and everyone is trying to do the right thing and everybody is innovating and eager to do this. There's a lot of support for it. I think what we lack right now is coordination and coherency among the federal government, the provincial government, and the health care systems and other social support systems in the provinces.

I see the potential for a coherent program to come out of all of this, whereas right now it's kind of ad hoc. Each court and each locality is trying to cobble something together, but it's very localized and it often comes down to individuals. I would suggest that right now it's probably under-resourced. A little bit more investment in this and a little bit more of a framework or a structure for it would help it add up to what it wants to be right now.

• (1655)

Hon. Rob Nicholson: One of the things you said in your testimony was that it's very often left to the cobbling together of local resources. Later on in your testimony, you said that there should be more coordination of best practices across the country. I take it that's one of the areas of leadership you are suggesting the federal government could take.

Mr. Ryan Fritsch: Yes. If you look at the legislative framework provided by the Criminal Code, I think there's a great opportunity to have it better represent what's actually happening on the ground. Right now it's kind of a gum-and-string solution. Everyone is trying to figure out how we can divert people with a mental illness, short of serious and persistent mental illness, out of the system. We know that criminalizing and punishing them for their disability is not going to lead to good outcomes. They're trying.

What I'm suggested is that there is an opportunity for the legislation to correspond to the actual practices happening right now. If you do that, you'll get a lot more out of the system. You'll find a lot of efficiencies. You'll take a lot of the uncertainty out of it. You'll take a lot of the randomness out of it.

If you give it that kind of structure and that kind of certainty and that kind of vision, then you can plan around it and you can make longer-term plans as opposed to trying to cobble together a program from year to year. What often happens is that a particular judge, crown counsel, or defence counsel takes a local leadership role in all of this, and if they leave, the program might leave with them.

I think there's a tremendous opportunity here. From the federal perspective, you can tackle the Criminal Code provisions. You can expand what we mean by an accepted mental disorder for the purposes of diversion and support of bail. I think there should be funding for more research. I like the idea of benchmarking; it's a wonderful idea. In Ontario I see that there are 52 courthouses, and all 52 are doing something different. It would be great to find some standardization across them.

The Chair: Thank you very much.

Mr. Bittle.

Mr. Chris Bittle (St. Catharines, Lib.): Thank you, Mr. Fritsch for coming to testify today. It's very good to see you.

I believe you mentioned in your testimony that one in two individuals in the criminal justice system has a mental illness. Is that number higher for individuals who are using legal aid services?

Mr. Ryan Fritsch: It's difficult to measure. If you look into the literature and the studies that have been done, you'll find numbers all over the place. What they all add up to is that a very, very significant proportion of criminally accused people have some kind of mental health issue or an addiction issue or both. Within legal aid, and again it's difficult to measure, they found that easily one in three, if not one in two, clients receiving some kind of criminal advocacy service has a mental health or addiction issue, so it's a very, very high proportion.

I think when you're considering the investment in legal aid, if you're looking for one group of people to tackle, one priority group who are particularly vulnerable and for whom we can do a better job, this would be one of those groups. I think there's a tremendous return on investment in funding advocacy for these clients, because so much of that advocacy is now related to social determinants of health, housing, income, education, and so forth. A little bit of investment in legal aid and in these clients, I think, goes a long way.

• (1700)

Mr. Chris Bittle: Because it's such a large population, it would open up resources to tackle a lot of the issues—the civil side and the family law side—if we sought to treat it more as a health issue than as something that can be dealt with only by the criminal justice system.

We are dealing with the federal government and we have to come up with recommendations. Can you expand on your answers in regard to formalized amendments to the Criminal Code of Canada and how you would see that happening?

Mr. Ryan Fritsch: Sure. Right now, in practice, an accused person with a mental health or addiction issue comes into court, and there's a whole panoply of potential diversion options that might be made available to that person, through either bail or a mental health court or a drug treatment court or a diversion court. They call them accommodation or community courts in some circumstances, but there's a huge potential range of options.

Right now what's in the Criminal Code is quite narrow. It doesn't speak to that majority of clients with a mental health or addiction issue. It speaks to the 2% to 3% of the population who have a serious and persistent mental health issue. For them, the definition of mental disorder and the way it plays out in section 2 of the Criminal Code creates a very comprehensive system for those accused to enter into and to get health care and support and services and so forth.

The majority don't get those right now. Different mental health courts will have different definitions of who should be diverted. They may only admit for diversion clients who fall just short of meeting that not criminally responsible or unfit threshold. Other courts might take almost everybody. There's a tremendous range right now and very little standardization.

I see opportunities in the Criminal Code to have the legislation actually reflect what's going on on the ground; through the leadership of the federal government and working with the provinces and other groups, to define what the best approach to diversion might be; to help set some thresholds for eligibility; to work with academics and others to find out which models of diversion work best, because there are many different models of diversion; and to have the legislation reflect all of that.

Mr. Chris Bittle: Within an hour's drive of my own practice in Niagara and St. Catharines, where I'm from, is a fairly busy courthouse, but you can go out to Haldimand County, and there's a sleepy little courthouse that seldom has any sessions. I know you talk about the successes in downtown Toronto where the need is persistent. It seems that the need is persistent across the province, but how would you deal with these smaller centres if we were to roll out a program or come up with recommendations across the country?

Mr. Ryan Fritsch: I think systemic thinking would actually be encouraged. Right now if one court has a few more resources than another, they might share who goes where. This happens already in Toronto, where the mental health court at Old City Hall takes the high threshold clients, and the other courts might deal with some of the less serious cases.

Similarly, if you're a woman charged with an offence, you're going to College Park in Toronto as opposed to Old City Hall. It goes back and forth.

I think if you want to have a coherent legislative framework that guides this, it needs to take into account local conditions and local resources. By holding everyone to a similar standard, I think you would encourage the normalization of interjurisdictional sharing arrangements, whereas right now they tend to be quite ad hoc.

Mr. Chris Bittle: You mentioned that you had a significant part in the 2016 study.

Is it too early to see any of the results from that, recommendations that we could apply or that our committee could make?

● (1705)

Mr. Ryan Fritsch: I think a lot of the vision or the goals that Legal Aid's mental health strategy is driving towards would also be goals that you could achieve by following some of the recommendations I'm making here today. For example, that strategy identifies the value in having continuity of legal representation of a client. If the person representing you is constantly changing, you have to tell your story over and over again. That's traumatizing in and of itself. Also, someone who's able to follow you through the system is better able to help pick you up when you falter. They know your story already. They know what has or hasn't worked in the past. They know the barriers that you face.

By having a sort of coherent or better-defined system, you get those kinds of benefits that come along with it. Similarly, I think by investing in these kinds of programs, you would give them much more permanence. It becomes a lot easier to plan for this stuff and to help grow these programs, as opposed to just letting them live as these little vestigial efforts.

I think if you read that report, a lot of what's in there in terms of vision and goals would be the same sorts of things that these reforms could drive towards.

Mr. Chris Bittle: Thank you so much.

The Chair: Thank you very much.

Mr. MacGregor.

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

Mr. Fritsch, I'll start with you. I want to thank you for reminding this committee that these issues don't happen in a vacuum or a silo, and especially that something like mental health crosses so many different policy areas. You mentioned that it falls under health care. There are the social determinants of health and the reforms that are needed in our criminal justice system, and how that seems to be a big chunky object when it's meeting these very specific cases.

In your exchange with Mr. Bittle, he made mention of the fact that from this committee's point of view, we want to make some concrete recommendations to the federal government, and in your exchange with Mr. Nicholson, you were talking about the framework and the structure.

I would like to know specifically from you, when we make our recommendation to the federal government with specific attention to those people who have mental health issues, how the federal government can step up in a concrete way to make sure that legal aid is adequately addressing the needs of people with mental health issues.

Mr. Ryan Fritsch: I suppose if you took the approach of thinking about this in terms of vision or where we want to go with this, you could think about such things as perhaps earmarking funds.

Mr. Alistair MacGregor: Yes.

Mr. Ryan Fritsch: I think that a bit of investment in this particular group of accused could go a long way. If you tie those funds to models that are shown to be effective, you'll have set a standard that courts can attempt to achieve. Why not have performance benchmarking? Why not set targets? Why not develop ideal models, maybe several, that would work in different contexts, different jurisdictions, and different client groups? Women and aboriginal accused, for example, have very different mental health needs than do others.

I think by taking that leadership role, by setting those kinds of standards, whether in policy or tied to funding, you would help encourage everyone to take the next step. That is, to think about what they're doing a little more systemically, a little more coherently. I think that would make it easier for the provinces to then help support these programs as well. If they have some certainty, I think it becomes a lot easier to describe a system that attaches health care to the courthouses. It becomes a lot easier to envision having different kinds of workers providing services right at the courthouse where these clients go. Those kinds of things, I think, can happen.

I also think that with some leadership around best models and tying that to incentives and funding and so forth, you would find a lot of efficiencies, honestly, and you could ensure that the money would be spent as well as it could be.

Mr. Alistair MacGregor: Thank you very much.

Mr. Paterson, I'm a fellow British Columbian. Welcome to Ottawa. I appreciate the testimony you've given.

I was looking through the report by BC Civil Liberties called "Justice Denied". In that report and in some of the evidence we've heard through this committee, it has been noted that reports from Australia, the United Kingdom, and the United States "estimated that each dollar spent on legal aid funding can result in savings to the government of anywhere from \$1.60 up to \$30." Your testimony reflected that information about return on investment.

My question goes along a similar vein. In the major transfers we have to the provinces, there are equalization payments, the Canada health transfer, and the Canada social transfer. When we are looking to make recommendations to the government about earmarking specific funds, are you envisioning some kind of legislative framework for this type of funding to make it similar to the Canada health transfer, which has conditions that it meets? Can you just give us your idea of how that would look?

• (1710)

Mr. Joshua Paterson: That would be one way of doing it, setting up some legislation around that at the federal level. You may hear from provinces that they don't prefer that approach. I think there's a lot of scope for the federal government to exercise leadership in conversations, and in discussions and negotiations with the provinces, from one attorney general to another, and from one minister of justice to another, to try to come up with, for example, national standards and these kinds of things. We've seen that in other areas of shared jurisdiction in which routes other than legislation were used. Certainly we wouldn't object if a legislative route were to be used and if the money were to be specifically tied, but neither would we object to a well-functioning system in which the federal

government used its suasion and its spending power to show some leadership in this area of shared jurisdiction.

Obviously there are questions regarding the division of powers, but fundamentally, there's only one Canadian facing the courts. Governments need to work together to make sure that in the different parts of the country they get the services they need, in sensitive ways that may vary from one part of the country to another, and with particular attention paid to the special needs of particular groups such as those Mr. Fritsch has mentioned, as well as indigenous peoples and others.

The difficulty with any exercise of national benchmarking, whether it's done informally or whether it's done through legislation, is coming up with one-size-fits-all types of approaches. We fully recognize that can be a difficult exercise, but we think it's possible to do it in a way that achieves some national-level leadership. They've tried that in Australia, and we will see over time whether it's successful or not.

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

Mr. McKinnon.

Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.): Mr. Paterson, thank you for coming.

You mentioned in your recommendations that you'd like to see legal aid as an essential service. Could you expound on that? What would that look like? What would that encompass, and how would that be funded perhaps?

Mr. Joshua Paterson: Thanks very much for the question.

I can say what the Canadian Bar Association has had to say, which we subscribe to as well, and that is that essential legal needs are those needs or legal problems that put in jeopardy someone's liberty, personal safety, security, health, housing, or the ability to meet the basic necessities of life. That seems like a pretty broad range of things, but the legal aid systems that are already in place have mechanisms right now for serving the public. So the questions are what standards do they use, what are the eligibility criteria, and what things are covered? It's not as if the mechanisms don't exist now.

When we deal with other areas that we consider to be essential—education, health, emergency services, and so forth—we have structures in place for those too. My answer is that it's a little difficult to give...in that I think what it comes down to isn't necessarily a change to the structure that you would set up in any province but a prioritization in funding and a change in the understanding. As I said in my response to Mr. Nicholson, certainly in our province, legal aid has been one of the first places governments go to cut. Making something an essential service, or trying to get that recognition to be shared by governments, whether voluntarily or through some other means, would set out the proposition that it wouldn't be the first place you would go because of the cascading effects and the cascading costs to the public purse that result. I think it's a change in mindset perhaps more than it is the creation of structures.

● (1715)

Mr. Ron McKinnon: Thank you.

This all seems to boil down to a funding model: who is going to pay for it and how much money is available? Is that the biggest problem with the current legal aid system?

Mr. Joshua Paterson: It's a critical problem. I think a lot of the other problems flow from that. It's not just a question of saying let's throw more money at it. However, many of the problems that we could enumerate, such as the cut-off being too low or it being administered in one way or another that was problematic, could fundamentally be traced back particularly to the federal government in the 1990s. In 1996, it changed the way it was paying for things, essentially moving from sharing 50% of the cost of criminal legal aid to covering 20% of the cost. Money is a key piece of it, but that doesn't mean there aren't huge questions about how that money is channelled and how it can best be channelled.

Mr. Ron McKinnon: Regarding the various jurisdictions in Canada, are you aware of other jurisdictions, or is B.C. an example we can take as a model to follow?

Mr. Joshua Paterson: As I said in my testimony, sir, certainly here in B.C. we look wistfully at the situation in Ontario, but folks in Ontario have been before you and I completely support their submission that they have a great deal of difficulty as well. If I were to say where within Canada I hoped the other provinces would get closer to, it would be Ontario. The eligibility threshold is higher in Ontario. The tariff rates are higher in Ontario, which promotes more lawyers being able to do it. Lawyers often want to do the work but can't afford to. You get a 10-hour contract in B.C. and you're going to work 30 hours. So if you get paid \$80 per hour, you're going to get \$30. A lot of pro bono work is being put in. That happens in Ontario too, but certainly I'm hoping that our province will find its way forward to get closer to Ontario where there's a network of community legal clinics. Although LAO may be cutting them, there is a network there. So I think Ontario would be the high-water mark in the country.

Mr. Ron McKinnon: I believe you spoke about the prospect of expanding the nature of services, for, say, family law versus criminal law. Would it not exacerbate the funding problem if you added more services from other areas, or would you say more funding in family law would help the criminal law side of things?

Mr. Joshua Paterson: I'm not sure it would exacerbate the funding problem. I think the bigger cost problem, and there have

been studies to show this, is the cost that flows through the system to health care, to the criminal system, and to elsewhere in the system when a family law problem turns into a family law catastrophe, or when a poverty law problem with a landlord turns into a catastrophe: now you're homeless, perhaps you've lost your job, perhaps you're on welfare, and so on.

We think, and I think many of your other witnesses reflected this as well, that the investments to be made here, including in family law and including in poverty law, save various public purses, provincial and federal, many times more down the road.

Mr. Ron McKinnon: Thank you.

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

We don't have time to do a whole other round. I'm wondering if anyone has any short questions they want to ask one of the panellists before we wind up.

Monsieur Boissonnault.

● (1720)

Mr. Randy Boissonnault (Edmonton Centre, Lib.): Thank you.

I'd like to thank you both for your testimony today.

Mr. Fritsch, I'm interested in the intersectionality between people who are suffering from mental health and addictions and the justice system. Do you have any statistics? And who is represented in those stats? From other work we've done and from other data we have, we know that the indigenous population is overrepresented and that the LGBTQ2 community is overrepresented.

What do the statistics you have at your disposal tell you about who is represented in that intersectionality between mental health and addictions and where it intersects with the justice system?

Mr. Ryan Fritsch: Thank you very much.

Offhand, I can speak to a few of the groups you mentioned. I would refer you to a large study completed relatively recently by the National Trajectory Project, which looked specifically at those found not criminally responsible or unfit to stand trial. As far as I am aware, that's some of the best and most reliable and comprehensive data we have. I bracket that by saying that it's just looking at the NCR and unfit population. They found that of the entirety of that population—again, just those with serious and persistent mental illness—about 15% or 16% were women. As I recall, about 3% were aboriginal.

It raises some interesting questions. One question that the National Trajectory Project raised was what are the different mental health needs specific to women? I think there is a great opportunity to focus on that. I think very few courts, given that women are maybe one in seven or one in eight of these NCRs, are equipped to make sure they're getting the kinds of services and consideration they need.

On the other hand, you have aboriginal accused being found NCR. At 3%, that would seem to be drastically underrepresentative of aboriginal accused in the criminal justice system. Offhand, I think that covers somewhere around 15% or 20%. To me, I suppose, that raises some interesting questions about why that is. I'm not sure anyone has really done the research on this. Why are they not being

found NCR or unfit to the same degree? What diversion path are they taking? Are culturally competent services being offered to those accused? Are they finding alternative measures other than going into the psychiatric system?

Those are all excellent questions. I think part of what the federal government might consider for its review of legal aid would be investing in research that can help us answer those kinds of questions so that we can tailor and target services to those vulnerable populations.

Mr. Randy Boissonnault: If either of you is able to provide us with some indication of some of the most pressing research gaps that could be closed, we would take that into consideration in our deliberations regarding the report. Thank you to both of you.

The Chair: I think that will wind things up.

Let me thank both of our witnesses today.

It was a pleasure having you here. You provided us with some really interesting information that I think will help us frame the report. Thank you both very much.

The meeting is adjourned.

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