

April 16, 2018

Open Letter to The Honourable Kathleen Ganley

Minister of Justice and Solicitor General

Government of Alberta

“Many of the delays that we see in our justice system come, clearly, from our profound inability to deal with our failure to provide access to legal assistance and legal resources.”

Rachel Notley, Alberta Legislature, May 9, 2011, speaking to proposed

Private Member's Bill 204, *Justice System Monitoring Act*.

Minister Ganley, I write to you publicly and to all Albertans with a sense of complete desperation.

As you know, I am the President of the Calgary-based Criminal Defence Lawyers Association (CDLA). I have held this position for almost seven years now. I've had the opportunity together with other defence bar representatives and those from years gone by to try to persuade previous governments and now you and your government to do the right thing about Legal Aid funding and access to justice in the criminal justice system in this province. We have failed. Others before you, and now your government too, have not done the right thing, and it's shameful.

Legal Aid in Alberta is the provincial government's dirty little secret. Like a shackled and starving foster child locked in a filthy closet for years, the Legal Aid program is a neglected and degraded shadow of its true potential and is robbing poor and disadvantaged Albertans of their futures. Your government knows exactly what is going on with its starving hidden child, but prefers to feed and care for its more attractive and socially appealing bigger brothers and sisters: the police, the prosecution service, and the jails.

We have one thing to say about this: shame on you and shame on your so-called social democratic government.

Legal Aid is the core of the criminal justice system and as such represents the fourth pillar of our socially conscious democracy, together with the publicly funded health care, education and welfare systems. Your party more than any other stands for socio-economic justice and Legal Aid epitomizes your principles. Or so we had hoped.

Everyone working inside our criminal justice system knows, ethically and practically, that a properly funded Legal Aid program is absolutely essential to the fair and efficient functioning of the entire system. Without the rule of law and equal access to justice, our legal system begins to look like a police state.

What is the point of a constitutional right to counsel upon arrest in this country if after charges are laid, the government consciously decides to robustly fund police, prosecutors and jails year after year, but equally consciously decides to severely underfund the opposite side in our adversarial system, Legal Aid, year after year, such that competent and effective legal representation disintegrates and the Legal Aid plan prematurely runs out of money every year. Premier Notley's words seven years ago ring more loudly now than ever.

Our representatives have sat with you and your senior officials formally and informally many times now over these last three years. We have welcomed the change in approach, the openness to consult. You know we have already presented you with many ideas how to use the existing funding more effectively. You know we have also provided you with all the necessary information to fully support our analysis and recommendation for proper funding. The long-term evidence from studies worldwide is incontrovertible. Every dollar spent on Legal Aid actually has a societal economic benefit or return of \$5 to \$9. And that's no surprise, of course. Every time a poor or disadvantaged person is properly helped through the criminal justice system, the benefits to our health, education, child care, mental health, work force, welfare and other systems all ripple and amplify. Spending money on Legal Aid saves money! A fully funded Legal Aid plan improve the lives of everyone in Alberta.

After much pleading, your Ministry launched an ambitious plan last year to review and revamp the long-term foundation and future of Legal Aid in Alberta in consultation with various stakeholders including our association. We had some hope for that process. In fact, you promised us a seat at the negotiating table, as happens in Ontario. But that promise was broken. Now the process is delayed, and genuine adequate financing is obviously not under consideration. "No more money" is the essence of your government's message. So we refuse to play this game anymore. Unless you want to immediately lop off the family law and immigration law services that make up 20% of Legal Aid's mandate and divert that money, proper funding is needed now. Not six months from now, or a year from now, or never, as seems to be the intention. Now.

Therefore, we call upon your government to make up for the years of neglect in relatively short order by adding 65% to the Legal Aid budget over the next four years starting with an immediate 40% increase this year. Government abandoned its responsibilities to the most vulnerable in society for decades because it could rely on Legal Aid lawyers and other pro bono poverty law programs to fill the void. It is now time to take back your responsibility and fund that void. When Alberta cruelly abandoned its severely handicapped citizens a few years ago by declaring their AISH benefit too rich to qualify for Legal Aid, defence lawyers acted for them for free to have the government ordered by the courts to pay for representation. We thought that shameful low point in Alberta's history would prompt true change, but instead Legal Aid remains perpetually near collapse and consequently the criminal justice system in Alberta is in disarray. This time, the CDLA and other Defence lawyers will not fix your problem. Today we will begin withdrawing our unpaid services and expect the government to pay the true cost of the justice system.

We invite you to sit in the back row of a busy courtroom in Calgary for at least a few days in the coming weeks and observe. Spend some of that time following us around as we juggle appearances in 3, or 4, or 5 different courtrooms for 6 or 8 or 10 different clients. See how we facilitate the advancement or resolution of each file by spending much of our time making things easier for the prosecutors and judges and court staff. Realize that we are taking on much of what is actually their responsibility. Count the minutes and hours of that unpaid time and labour and imagine how many more prosecutors, judges and court staff you would need to hire to perform that extra work if Defence lawyers stopped doing it for free. That is the only way Legal Aid has survived at all these last several years – by downloading work and costs in an ever increasing volume onto the backs of those that the government believes won't or can't object: accused criminals and their lawyers. Well, the free ride for government is over.

We, as Defence lawyers, are tired of enabling your administration, like previous administrations over the years and now decades, to continue to fiscally abuse the core of the criminal justice system in this province to the point of collapse. As of right now, we are throwing open the closet door and showing everyone what years of neglect have wrought. As we told you two years ago, the government gives Legal Aid \$80 (now \$89) million to deal with a \$150 million problem. We will no longer prop up a system that only operates at all because Defence lawyers on behalf of those the system prosecutes take on a multitude of unpaid and time-consuming tasks necessary to facilitate those self-same prosecutions. Perverse, isn't it? We think so too.

We know you say that your government increased Legal Aid funding by over 20% in the first two years of your term, and then quietly by almost another 10% last fall. So, let's talk numbers. Legal Aid's budget allocation was \$81.4 million in 2017-2018. The program's administrators knew from the beginning it wouldn't be nearly enough, especially with the recession still in effect. It pinched pennies so tightly and irrationally that it wouldn't pay lawyers for gas money, amongst other measures. All the other participants in the system – judges, prosecutors, clerks, police – get paid gas money. It tried to introduce user fees for people already in jail. We raised an immediate stink about that one and fortunately you shut that idea down. Predictably, it was completely broke (again) by sometime last fall. The unpublicized infusion of \$7.9 million at that time staved off bankruptcy until the fiscal year end last month. Then your recent new budget announced an increase for Legal Aid this year of exactly . . . Zero. Other parts of the Justice Ministry received a \$26.7 million increase, including an additional \$16.5 million for policing and corrections. Where is the fairness in these numbers?

Here are some other numbers to consider. Alberta has exactly one-third the population of Ontario, so one might expect Legal Aid here to receive about one-third of what Legal Aid Ontario receives. But no, it only receives one-fifth of that amount. And the Ontario plan even ran a deficit the last two years too, because of increased demand (read: recession). Are you curious what that pro-rated dollar differential between Ontario and Alberta is? Yes that's right— Legal Aid is short here by about \$60 million. Which brings us back to the number I indicated would be required to properly fund Legal Aid Alberta: \$150 million. To repeat, after decades of neglect, it simply and plainly still is a \$150 million "problem". So despite the recent blood transfusions, Legal Aid is still a starving child whimpering in the closet that cannot achieve the thriving future it deserves without serious nourishment.

We know that governments across Canada are under enormous pressure to reduce court delays due to the Jordan decision from the Supreme Court. And your government has additionally been required by court ruling last year to replace police with prosecutors for first-instance bail hearings. So an entirely new layer of court has been created at millions of dollars in unanticipated costs. Together these two developments have taken the public spotlight and the lion's share of any new money in the Justice Ministry's budget. We get that. After all, what would be worse than not spending the money to enforce the law, catch alleged criminals, and prosecute and jail them? Well, how about delaying their trial by lack of resources to the point the charges are dropped or stayed? Legal Aid is a resource that can, if properly funded, reduce delays and increase court efficiencies. Just plant the seed now. Because it doesn't take a genius to realize the more people we charge and attempt to prosecute but don't provide a competent and experienced lawyer, the more unrepresented or poorly represented people will end up clogging the system. And we know what happens then. Many more legal errors, improperly conducted trials and wrongful convictions, followed by more appeals and then the huge costs to government in both dollars and delays for retrials - that's what happens then. Or some are eventually let go without ever undergoing the fair trial that every accused person, complainant and average citizen/taxpayer expects and deserves from the system. The human costs to both sides of the equation in all these scenarios are not really even quantifiable - especially if you cause even one wrongful conviction, which history tells us will happen with certainty.

This short-sighted and knee-jerk approach to justice system funding has already created the exact opposite of the government's stated goal: "access to justice" has increasingly become inaccessible justice. By diverting already inadequate court resources to criminal law to band-aid over those problems, family law and civil law services have deteriorated to unsustainable levels. Family law hearings and trials, where the future and well-being of children and struggling families are at stake, are unconscionably delayed for months and years. In essence, family and civil law court resources are being robbed to keep criminal proceedings from falling into a Jordan/delay abyss.

Some civil law courts are now applying the Jordan delay analysis to their timelines. Anyone that knows the inner workings of our justice system in Canada knows that Jordan was a direct call by the Supreme Court of Canada for all governments to face some hard truths: decide what crimes and which perpetrators to prosecute, and then pay enough money to allow the participants to do a proper job of it. The Supreme Court in 2010 gave fair warning: "In general, access to justice should not fall solely on the shoulders of the criminal defence bar and, in particular, legal aid lawyers." Without a properly funded Legal Aid program, the citizens of Alberta will watch access to justice disappear before their eyes.

We realize there is no glory for you in what some critics will portray as simply wasting money to help accused criminals and their lawyers. The danger is that some people may believe that fake news and you could lose votes. Accordingly, we also realize our role in this Legal Aid funding crisis is to be the canary in the coal mine, because no other stakeholder can do so publicly. We know the judiciary, the prosecutors, court administration and court-related staff privately share our deep concerns over Legal Aid underfunding, because they know without the Defence lawyers playing ball and doing a good job of it, the whole system quickly becomes impossible to

operate. Just ask them – we beg you. Now is the time to be brave, make up for decades of neglect by others but exacerbated more recently by you, and do the right thing. And be proud to do so. Because you can fully justify the money, as explained above, as a guaranteed way to save money overall for taxpayers both short-term and long-term. Truly be a Minister of Justice.

Yours respectfully,

M. Ian Savage

President, CDLA