



# Submission to the BC Chamber of Commerce

**Prepared by: The CANADIAN BAR ASSOCIATION  
BRITISH COLUMBIA BRANCH**

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## **CANADIAN BAR ASSOCIATION BC BRANCH**

### **PUBLIC ENGAGEMENT ON LEGAL AID**

#### **CHAMBER OF COMMERCE BACKGROUNDER**

##### **The Problem**

It is good for business when there is access to the courts to resolve disputes for all who need them. In British Columbia the justice system is critically plagued by delays and backlogs. That is bad for business.

Legal aid funding is so limited that in BC Provincial Court a startling 90-95% of family law cases in BC Provincial Court involve a person who is unrepresented, 40% of persons accused of a crime who appear in Provincial Court represented, and 90% of civil litigants in Provincial Court are unrepresented.<sup>1</sup> In BC Supreme Court, the numbers are not tracked but they are growing and unrepresented litigants are now a daily occurrence in Supreme Court courtrooms across British Columbia.

The impact is that, through no fault of their own, people who are unrepresented take up more court time and more taxpayer funded resources to go through the legal system.<sup>2</sup> For businesses this means significant delays when they need to access the courts.

Trials in our court system, for which businesses and others pay their lawyers to prepare to conduct, are regularly “bumped”, due in part, to overcrowding and delays caused by unrepresented litigants. Are you willing to pay your lawyer to prepare for trial only to have to pay for them to re-prepare for a re-set trial in 6 months? And then again in another 6 months? That’s the real scenario affecting businesses today. And things will only get worse the longer we ignore the problem.

A poorly functioning and slow court system erodes respect for the law as the structure which regulates good behaviour in society. People who are not represented experience poor outcomes compared to those who are represented and the outcomes seem arbitrary and inconsistent. A system where outcomes of court cases appear to be related to socio-economic status and the ability to afford a lawyer builds contempt for the law which undermines the stability of society. A stable society is critical to a good business environment.

Accordingly, the CBABC BC is reaching out to the public to gain support for a simple notion that need not involve the expenditure of excessive amounts of public resources. This statement of principle, if backed with the investment of modest sums over time, can make a

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<sup>1</sup> Final Report Of The 2010 British Columbia Judges Compensation Commission, at page 19, available online at: <http://www.ag.gov.bc.ca/judicial-compensation/info/2010-JCC-FinalReport.pdf>

<sup>2</sup> Leonard T. Doust, Q.C., *Foundation For Change: Report Of The Public Commission On Legal Aid In British Columbia* online: [http://www.publiccommission.org/media/PDF/pcla\\_report\\_03\\_08\\_11.pdf](http://www.publiccommission.org/media/PDF/pcla_report_03_08_11.pdf) (March 2011), at page 21, 22 (“Doust Report”)

real difference, especially when combined with the other efforts to tackle problems of delay in the justice system which are currently underway (and to which the CBABC is also applying significant efforts and resources<sup>3</sup>). However, if the other problems are tackled but legal aid is not, it is unlikely that improvements will be realized given the magnitude of the issue of unrepresented litigants in the courts.

### **The Resolution**

The CBABC seeks to engage the local Chambers of Commerce and the BC Chamber of Commerce in its ongoing efforts to raise the public and political profile of the issue of access to justice, and in particular, legal aid, by passing the following policy resolution:

*The Government of British Columbia should:*

- 1. commit to increased, long term, stable funding for the Legal Services Society; and*
- 2. recognize legal aid as an essential service fundamental to a just society.*

This form of resolution has been passed by the Kamloops Chamber of Commerce as well as Lantzville Council. It was moved from the floor at the BC Chamber of Commerce AGM last year and garnered significant support but not the necessary 2/3 to pass.

Lack of legal aid affects all walks of life, especially when it contributes to the malfunctioning of the justice system and delays to other users of the justice system, and the costs of running the justice system. While the problems are neither caused by nor the sole responsibility of lawyers, lawyers make concrete and impressive efforts to address the problem, but those efforts cannot bridge the gap nor solve the problem unless voters put pressure on politicians to deal with the issues in a multi-faceted way.

### **Is Legal Aid An Issue For The Chamber Of Commerce?**

Canadian and British Columbia research and statistics indicate that the most prevalent types of legal problems experienced by Canadians are consumer, employment, debt and housing problems. <sup>4</sup> These issues often involve businesses which need to have the issues resolved in a timely and cost-effective fashion. A significant number of family cases involve family businesses which are caught up in the process of distributing family assets or whose cash flows will depend on the outcome of a family law case.

Businesses who are parties to disputes where persons are unrepresented are in a situation where the issue can become unnecessarily entrenched because the unrepresented person does not understand the legal issues and the reasonable range of situations. It can be extremely challenging to avoid the escalation of a dispute or negotiate a reasonable resolution where an unrepresented person is in crisis mode and is not getting advice from a

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<sup>3</sup> These efforts are detailed below in this background information.

<sup>4</sup> Carol E McEown, *Civil Legal Needs Research Report*, (2009, 2nd ed.) online: <http://www.lawfoundationbc.org/wp-content/uploads/Civil-Legal-Needs-Research-FINAL.pdf>

trusted advisor who understands the legal framework. Businesses in that position are committing their own resources in the form of personnel and legal fees to resolve the dispute but come up against the reality that the unrepresented person slows down the proceedings and may be impervious to a rational resolution.

In addition, lawsuits in which businesses are involved are in the same line up for scarce judicial resources as all other cases including those where persons are unrepresented. They experience the same set of delays which are in part caused by unrepresented persons dealing with issues that are complex and overwhelming without training to resolve them.

Finally and perhaps most importantly, stable societal infrastructure with the rule of law as its foundation is necessary for businesses to thrive. We need the stability of the system not only to resolve our disputes when and if they arise, but as an ever-present consistent backdrop which supports a culture where entrepreneurship and work ethic operate to secure success because the justice system guarantees fairness and equal opportunity. Where that system is overwhelmed, and stops operating as it should, it affects all of society<sup>5</sup>.

### **Concrete Recommendations To Improve Legal Aid And Their Costs**

#### **Incremental Spending Recommendations and Priorities**

The Attorney General requested the Legal Services Society to provide an independent review of the current status of legal aid and to make recommendations. The CBABC supports the recommendation made by the Legal Services Society<sup>6</sup> that incremental increases in funding be made to allow for:

- expanded duty counsel (lawyers who provide “on the spot” advice at the courthouse but do not act for the person throughout the whole case) who can provide much needed direction allowing for better outcomes and saving court time;
- enhanced family law advice, especially at the outset;
- new community partnerships including legal information outreach workers (some non-lawyers); and
- improved access to Aboriginal Services.

These are near term recommendations for which the Legal Services Society estimates the costs will be \$4.9 million per year over three years.

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<sup>5</sup> Chief Justice Robert Bauman, *Challenges To The Budget For The Court Services Branch* – Remarks of Chief Justice Bauman At The Canadian Bar Association BC Branch Meeting 19 November 2011 – Las Vegas, Nevada, online: [http://www.courts.gov.bc.ca/supreme\\_court/about\\_the\\_supreme\\_court/speeches/Challenges%20to%20the%20Budget%20for%20Court%20Services%20Branch-%20CBA-BC%20Las%20Vegas%20meeting.pdf](http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/speeches/Challenges%20to%20the%20Budget%20for%20Court%20Services%20Branch-%20CBA-BC%20Las%20Vegas%20meeting.pdf)

<sup>6</sup> See *Making Justice Work – Improving Access and Outcomes For British Columbians* online: <http://www.lss.bc.ca/assets/aboutUs/reports/submissions/makingJusticeWork.pdf>

The CBABC also supports the re-establishment of *LawLine* and supports the recommendations that it be expanded to provide services on weekends and evenings – which would cost \$387,000 per year. That should also be done without delay.

In the medium term, the CBABC recommends adding \$18 million to the annual budget of the Legal Services Society over the next election cycle, which would bring BC in line with the national average per capita spending on legal aid. Currently, BC stands at 10 out of 13 in per capita spending among the provinces and territories. The CBABC would recommend to the Legal Services Society that additional resources be prioritized as follows:

- expanded coverage of family law matters not currently covered, especially in early intervention which can be crucial to solve problems before they escalate and prevent damage to the family and run away dispute resolution costs;
- focus on regional service delivery including the re-establishment of regional legal aid centres;
- integration of legal aid services with social services and health law services;
- funding of pilot projects in partnership with community funding organizations;
- support and training for legal aid lawyers and service providers; and
- tariff reform.

The details of these proposals are outlined in the CBABC's submission<sup>7</sup> to the Legal Services Society and are consistent with the recommendations made by the Legal Services Society in *Making Justice Work* and with the recommendations contained in the *Doust Report*.

In the long term the CBABC recommends that poverty law<sup>8</sup> services be restored (some of which can be commenced through the outreach recommendations above), the eligibility levels be restored and the compensation for legal aid lawyers be raised so as to ensure that it is economically viable for lawyers to provide the services (tariff levels have not been increased since 1994). Taking the pre-2002 funding (when legal aid was a functioning system but was cut by over 40%) as a benchmark, this will be up to \$50 million per year additional funding (inclusive of the amounts above). However it is likely that efficiencies and improvements in technology will mean that not all of this is required to bring the coverage and service levels to where they need to be for the system to function effectively and efficiently.

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<sup>7</sup> [http://www.cba.org/BC/Initiatives/pdf/LSS\\_Review\\_Submission\\_Mar\\_31\\_2012.pdf](http://www.cba.org/BC/Initiatives/pdf/LSS_Review_Submission_Mar_31_2012.pdf)

<sup>8</sup> poverty law services relate to legal problems which affect the impoverished particularly including housing issues, issues affecting senior citizens, disputes with government agencies over disability and income assistance payments, and mental health issues

## Legal Aid Funding in Fiscal Context

In 2013/14, the total budget for the Legal Services Society is \$77.2 million, consisting of \$72.5 million of provincial funding and \$4.7 million of funding from other sources (primarily the Law Foundation, which is funded by interest earned on lawyers' trust accounts, and the Notary Foundation, funded by interest earned on notaries' trust accounts).<sup>9</sup>.....

Although the justice system is often touted as receiving funding of over a billion dollars a year, the numbers do not break down that way. In 2012, the two ministries of the Attorney General and the Solicitor General and Public Safety were combined and had a combined budget of \$1.110 billion (out of a total Provincial Budget of \$43.489 billion).<sup>10</sup> The portion of that attributable to the justice system in the sense of funding prosecution, the courts, legal aid and law reform is about 42%. In the year previously, the two ministries had separate budgets of \$458 million (Attorney General) and \$637 million (Solicitor General). For the current 2012/2013 budget, the combined funding is \$1.140 billion against a provincial budget of \$43.990 billion. Justice system spending is about \$478 million of that which is about 1 per cent of the total provincial budget. That is, one cent out of every dollar of public spending is spent on the justice system.

Expenditures on the justice system are offset by cost recovery within the justice system. Unfortunately, the government does not publish current statistics, but in the last years for which these statistics are known, the government collected \$59.9 million in civil filing fees which include user fees and probate fees which are required to be paid to use the courts.<sup>11</sup> Reviewing the available data over the 4 year time frame for which we have it, and extrapolating to the present, the revenue would be about \$70.1 million in 2012-2013. With the re-introduction of the PST, the government will again be collecting 7% on all bills for legal services – the only province in Canada to collect sales tax on legal services. When introduced, the stated purpose of the tax was to fund legal aid. It has never been used for that purpose. However the users of the justice system will once again contribute over \$115 million in PST revenue<sup>12</sup>. Seen this way, the net cost of the justice system is about \$292.9 million, or 66 cents of each dollar of public spending.

The CBABC recommendations outlined above would imperceptibly increase the 1 cent gross spending and .66 cents net spending to the following:

- short term – 1.1 cent / .68 of a cent
- medium term – 1.1 cent / .71 of a cent
- long term – 1.2 cent / .79 of a cent

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<sup>9</sup> Legal Services Society 2013/2014 Service Plan, p 14, online at:  
<http://www.lss.bc.ca/assets/aboutUs/reports/servicePlans/servicePlan2013.pdf>

<sup>10</sup> BC Budget 2012 at p.17, online: [http://www.bcbudget.gov.bc.ca/2012/bfp/2012\\_Budget\\_Fiscal\\_Plan.pdf](http://www.bcbudget.gov.bc.ca/2012/bfp/2012_Budget_Fiscal_Plan.pdf)

<sup>11</sup> Ministry of Attorney General, Court Services Branch, Report of the 2002/2003 Fiscal Year. Civil Filing Fees Revenue, Fiscal 1999/2000-2003/2004,

<sup>12</sup> *Christie v. British Columbia* [2007] 1 SCR 873, 2007 SCC 21 at paras 1, and 2006 BCCA 120 at para. 13

Another way of looking at it is that these incremental changes are within the rounding errors of the budget numbers; much, much less than the estimated surplus; and an even smaller fraction of the contingency reserve in the budget. There is so much opportunity which could be gained with such a small investment.

### **Economic Benefits of Legal Aid**

The provision of timely and adequate legal aid will result in substantial economic benefits. This position is evidenced by submissions presented to the Public Commission and dealt with by Commissioner Doust in his report:

*A number of submissions also commented on the economic cost of inadequate legal aid. It was pointed out that short-changing legal aid is a false economy since the costs of unresolved problems are shifted to other government departments in terms of more spending on social and health services, the cost of caring for children in state custody, and so on. Others pointed me to studies showing how the court system is less efficient and more expensive because of the rise of unrepresented litigants and accused and how spending on legal aid can actually contribute to the provincial economy.<sup>13</sup>*

These observations are born out by international studies which all show that expenditures on legal aid result in downstream savings both within the justice system and in other areas of government spending.<sup>14</sup>

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<sup>13</sup> Doust Report, p. 28.

<sup>14</sup> See:

- Citizens Advice, *Towards A Business Case For Legal Aid: Paper To The Legal Services Research Centre's Eighth International Research Conference* (July 2010), online: The National Association of Citizens Advice Bureaux [www.citizensadvice.org.uk/towards\\_a\\_business\\_case\\_for\\_legal\\_aid.pdf](http://www.citizensadvice.org.uk/towards_a_business_case_for_legal_aid.pdf);
- James A. Richardson, *Legal Services Programs in Louisiana: Their Economic Impact on The State of Louisiana* (January 2011), online: <http://www.lsba.org/2007Documents/NewsDocuments/NewsDocument-647.pdf>
- Price Waterhouse Coopers, *Economic Value of Legal Aid: Analysis In Relation to Commonwealth Funded Matters With A Focus On Family Law* (2009), online: [www.legalaidact.org.au/pdf/economic\\_value\\_of\\_legalaid.pdf](http://www.legalaidact.org.au/pdf/economic_value_of_legalaid.pdf)>
- Rod Feelhaver and Jerome A. Deichert, *The Economic Impact of Legal Aid In Nebraska (2008)* online: [www.nlada.org/DMS/Documents/1236007550.3/NE\\_impact\\_2007.doc](http://www.nlada.org/DMS/Documents/1236007550.3/NE_impact_2007.doc)>
- Florida Tax Watch, *The Economic Impact Of Legal Aid Services In The State Of Florida* (February 2010), online: [www.nlada.org/DMS/Documents/1309704171.89/florida%20legal%20aid%20economic%20impact%20study%202010.pdf](http://www.nlada.org/DMS/Documents/1309704171.89/florida%20legal%20aid%20economic%20impact%20study%202010.pdf)>
- Task Force to Expand Access to Civil Legal Services in New York, *The Task Force To Expand Access To Civil Legal Services In New York: Report To The Chief Judge Of The State Of New York* (November 2010), online: [www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaksForceREPORT.pdf](http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaksForceREPORT.pdf)>
- The Perryman Group, *The Impact of Legal Aid Services On Economic Activity In Texas: An Analysis Of Current Efforts And Expansion Potential* (February 2009), online: The Perryman Group [www.texasatj.org/files/file/Perryman%20Report.pdf](http://www.texasatj.org/files/file/Perryman%20Report.pdf)>
- Phillip Granberry and Randy Albelda, *Assessing The Benefits Of Provision Of Legal Services Through The Disability Benefits Project* (August 2006), online: via [www.nlada.org/DMS/Index/000000/000050/document\\_browse](http://www.nlada.org/DMS/Index/000000/000050/document_browse)>

It is readily understandable that timely and appropriate legal aid results in significant cost savings to the system. For example, the *Doust Report* noted that more than 80 percent of all criminal trials in the province are resolved before trial. However, when a litigant in a criminal trial is unrepresented it is extremely difficult, if not impossible, to either resolve the matter without a trial or to even expedite the trial process.<sup>15</sup> The inability to resolve or expedite in criminal cases without representation can be linked to a number of cost pressures, including: more court appearances before the case is ready for trial; fewer agreements on admissions and the admissibility of evidence, and therefore more time at trial and more witnesses; more adjournments of trials due to the accused not being in a position to put on a defence when the Crown is ready to proceed; fewer plea bargains and therefore more trials; and longer trials due to the accused not understanding the system during the course of the trial. Furthermore, timely legal aid may prevent additional healthcare costs, the commission of criminal offences as a response to the failure to properly access legal benefits, and further burden on the social welfare system.<sup>16</sup>

The same dynamics are at play in civil cases. Based on a conservative estimate of the inefficiencies caused by unrepresented persons, the CBABC estimates that savings could be realized, or efficiencies created, in Provincial Court in family and criminal cases of at least \$50 million per annum. Savings by providing legal aid in poverty law cases are estimated at another \$50 million<sup>17</sup>.

In his independent report on criminal justice reform *A Criminal Justice System For the 21st Century*, Geoff Cowper, Q.C. made the observation that legal aid is a necessary component of reform and in order for it to play that role, incremental increases to legal aid funding would be “money well spent”.<sup>18</sup>

### **Legal Aid In The Context Of Overall Law Reform**

As the Chamber members will be aware, much discussion, debate and ink has been spilled on justice system reform. The CBABC has instigated the debate, supported the debate, and supported the reform proposals to make the justice system more efficient and more effective while maintaining its core of fairness which is so important to the role that the justice system must play in society as described above. Most recently, the CBABC has issued *An Agenda For Justice*,<sup>19</sup> a comprehensive guide to justice reform and law reform to ensure that this debate continues and is carried into the upcoming election and beyond.

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<sup>15</sup> *Doust Report* at page 8

<sup>16</sup> *Doust Report* at page 8

<sup>17</sup> Sharon D. Matthews, *Making The Case For The Economic Value Of Legal Aid Briefing Note* (January 2012) online: [http://cba.org/bc/practice\\_resources/pdf/Economic\\_Value\\_of\\_Legal\\_Aid-Briefing\\_Note.pdf](http://cba.org/bc/practice_resources/pdf/Economic_Value_of_Legal_Aid-Briefing_Note.pdf) and *Making The Case For The Economic Value Of Legal Aid Supplemental Briefing Note* (February 2012) [http://cba.org/bc/practice\\_resources/pdf/Economic\\_Value\\_of\\_Legal\\_Aid.pdf](http://cba.org/bc/practice_resources/pdf/Economic_Value_of_Legal_Aid.pdf)

<sup>18</sup> <http://www.ag.gov.bc.ca/public/justice-reform/CowperFinalReport.pdf> at page 10

<sup>19</sup> online: [http://www.cba.org/BC/Initiatives/pdf/cbabc\\_an\\_agenda\\_for\\_justice.pdf](http://www.cba.org/BC/Initiatives/pdf/cbabc_an_agenda_for_justice.pdf)

The profession as a whole has stepped up its efforts in many ways, most notably in the provision of pro bono legal services. In 2011, 6,727 British Columbia lawyers<sup>20</sup> volunteered an average of 48.1 hours of pro bono each. That is over one week of free legal services provided by each of those lawyers.

The CBABC's efforts have not been focussed on legal aid or access to justice alone. Our reform proposals are broad ranging and have been well received by government, other justice system stakeholders and the public. Access to justice and legal aid are elements of the reforms we propose. We believe that all avenues must be explored and all problems tackled to get the justice system functioning as it was designed to function and as it can function. We applaud the government, especially the efforts of the current Attorney General, to tackle difficult issues and we are in agreement with many of the proposed reforms. We part company on the speed and extent of the reforms necessary. We believe that they can and should be implemented on a shorter timeline, and we believe that the investment in legal aid can be made more broadly and sooner than proposed without having a negative impact on the finances of the province (and probably creating financial efficiencies) as discussed above.

The activity of the CBABC in this regard includes:

- February 2013 - development and release of *An Agenda For Justice – Platform Considerations Presented By The Canadian Bar Association British Columbia Branch* – this comprehensive document summarizes justice system reform proposals and law reform proposals from big to little and from soup to nuts – it is intended to put both the justice system and law reform into the debate once the election is underway and to provide a roadmap to whomever forms government in May;
- December 2012 – the CBABC made a submission to the BC Attorney General responding to the White Paper on Justice Reform, Part 1 in which we commented that the visions in the White Paper are a good starting point for discussion and then made several concrete recommendations on how to make them a reality and as effective as possible;<sup>21</sup>
- October 2012 – the CBABC presented to the Standing Committee on Finance and Government Services (and does so every year);<sup>22</sup>
- June 2012 – in response to the February 2012, appointment of Geoffrey Cowper, Q.C. to engage in a thorough review of the operation of the criminal justice system, both inside the Ministry and out; the CBABC made a thorough submission, *Justice In Time*, with 25 recommendations on criminal justice reform, including such things as

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<sup>20</sup> well over half the full time bar. Significant portions of the bar, those who are employed by government, for example, are constrained in the amount of pro bono they can do but the numbers continue to go up as ways around those barriers are developed

<sup>21</sup> [http://www.cba.org/BC/Initiatives/pdf/CBABC\\_Response\\_to\\_White\\_Paper\\_final\\_December\\_12\\_2012.pdf](http://www.cba.org/BC/Initiatives/pdf/CBABC_Response_to_White_Paper_final_December_12_2012.pdf)

<sup>22</sup> [http://www.cba.org/BC/Initiatives/pdf/CBABC\\_Submission\\_Standing\\_Committee\\_on\\_Finance\\_Government\\_Services\\_Oct\\_1\\_2012.pdf](http://www.cba.org/BC/Initiatives/pdf/CBABC_Submission_Standing_Committee_on_Finance_Government_Services_Oct_1_2012.pdf)

streamlining disclosure, getting cases to trial earlier, ensuring sufficient judicial resources to complete the cases in a timely manner, streamlining *Charter* challenges and legal aid;<sup>23</sup>

- March 2012 – in response to the Attorney General’s request of a review of legal aid by the Legal Services Society, the CBABC made a submission to the Legal Services Society entitled *Shaping The Future Of Legal Aid And The Justice System In BC* which is described in more detail and linked above;
- October 2011 – May 2012 the CBABC launched a public engagement campaign entitled *We Need Legal Aid*<sup>24</sup> which involved extensive polling and focus groups on what British Columbians perceive and want in relation to legal aid, social media, engagement with people who need legal aid, community groups, MLAs, chambers of commerce, Rotary groups and poverty organizations. During the course of the campaign, the CBABC published material on legal aid and the issues addressed in this submission including:
  - The Economic Value of Legal Aid Briefing Note and Supplemental Briefing Note (referred to and linked above)
  - Justice System Reform Briefing Note<sup>25</sup>
- 2010 – 2011 – the CBABC was the founding partner and operational partner on the Public Commission on Legal Aid which was an extensive British Columbia-wide set of hearings and findings about the experience of British Columbians with legal aid. The result was the *Doust Report* as referred to above, which is a sweeping and powerful reflection on the state of legal aid with comprehensive and practical recommendations. That independent report and recommendations form the basis of the CBABC’s work on legal aid.

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<sup>23</sup> [http://www.cba.org/BC/Initiatives/pdf/CBABC\\_Submission-Justice\\_In\\_Time-Jun\\_6\\_2012.pdf](http://www.cba.org/BC/Initiatives/pdf/CBABC_Submission-Justice_In_Time-Jun_6_2012.pdf)

<sup>24</sup> see: [www.weneedlegalaid.com](http://www.weneedlegalaid.com)

<sup>25</sup> online: [http://cba.org/bc/practice\\_resources/pdf/Justice\\_Reform\\_Briefing\\_Note\\_\(00249518\).pdf](http://cba.org/bc/practice_resources/pdf/Justice_Reform_Briefing_Note_(00249518).pdf)