

If there were legal aid in New Brunswick . . .

A Review of Legal Aid Services in New Brunswick

By Dr. J. Hughes & E.L. MacKinnon

September 2007

"The sense of being treated fairly, of being given a fair chance, does much to determine the degree of attachment to the institutions, the communities, and the society in which people live their lives. Fair treatment nourishes loyalty to the society and makes people more willing to contribute to its functioning. In contrast, unfairness is socially destructive." Breton et al., *A fragile social fabric? Fairness, trust and commitment in Canada.* (Kingston: McGill-Queen's University Press, 2004)

***If there were legal aid in New Brunswick...
A Review of Legal Aid Services in New Brunswick***

Published by :

Province of New Brunswick
P.O. Box 6000
Fredericton NB E3B 5H1

CANADA

Printed in New Brunswick

CNB 5071



Table of Contents

Executive Summary	1
1) Introduction	7
a) Review Panel.....	7
b) Terms of Reference.....	7
c) Time Frame	8
d) Methodology.....	8
e) Research	8
f) Consultations	8
2) Why Legal Aid? Policy and Legal Considerations.....	11
a) Policy Considerations	11
b) Legal Obligations.....	13
i) Statutory Obligations	13
ii) Constitutional Obligations	14
iii) International Legal Obligations.....	15
c) Trends and Challenges	15
3) Legal Aid in New Brunswick Today.....	16
a) The <i>Legal Aid Act</i>	16
b) Organization of the Delivery of Legal Aid Services	16
c) Legal Aid Program Services.....	16
i) Criminal Law Services	17
ii) Domestic Law Services	17
d) The Legal Aid Budget.....	17
e) Management Information	18
4) Criminal Legal Aid	18
a) Duty Counsel	18
b) Serving First Nations Accused	19
c) Current Practices and Use of Resources	20
5) Domestic Legal Aid.....	25
a) Eligibility Criteria	25
b) Financial Limits on Service.....	26
c) Increasing Efficiency and Improving Service.....	26
6) Legal Aid Clinics	27
a) Student Legal Aid Clinics	27
b) Benefits of Legal Aid Clinics.....	28
7) Governance of the Legal Aid Program.....	29
a) Institutional Independence.....	29
b) Internal Governance Structure and Practices	32

i) Board Governance Practices	32
ii) Creating an Effective Board for the NBLASC.....	32
(1) Mission Statement and Three-Year Strategic Plan and Budget	34
(2) Annual Business Plan and Budget.....	34
(3) Code of Ethics and Conflict of Interest Policy	34
(4) The Audit Committee and Audit Program.....	34
(5) Hiring, Promotion, and Compensation Policy.....	35
(6) Due Diligence Policy.....	35
(7) Communication Policy and the Right to Information.....	35
(8) Information and Document Retention Policy.....	36
(9) Conclusion.....	36
8) Legal Aid Funding	36
a) Regional Practices.....	36
b) Policy Considerations.....	37
c) Four Options for Legal Aid Funding.....	37
9) Atlantic Legal Aid: Opportunities for Savings and Efficiencies.....	39
a) Atlantic Legal Aid.....	39
b) NBLASC Overhead Expenses.....	39
Appendix A: Melinda Buckley, “The Legal Aid Crisis: Time For Action”	41



Executive Summary

The Minister of Justice and Consumer Affairs appointed the Review Panel in July of 2007 to review the governance, service delivery and funding of legal aid in New Brunswick. The Review Panel consulted with stakeholders representing legal aid clients, public advocacy groups, government and non-governmental organizations, the judiciary and representatives of the present management, Board and staff of the New Brunswick Legal Aid Services Commission ("NBLASC").

Legal aid is crucial for access to justice for low income people in New Brunswick. The province, along with the federal government, has a legal and moral obligation to ensure that access to justice is not contingent on wealth. The current legal aid service offerings show legal aid to be a low government priority and cover barely the minimum of what is legally required. The fall far short of what is needed to ensure access to justice for all.

The *Legal Aid Act* does not serve its purpose well and needs to be completely overhauled. The management of legal aid is impeded, not assisted by the *Act* and the regulations. Management is also impeded by a lack of proper and timely management information. NBLASC does not inform the public adequately about its services.

There are significant gaps in criminal legal aid. Coverage for first appearances is much improved since the introduction of staff duty counsel, but duty counsel often has a very large file load and has unmet training needs for special and high needs clients. Representation at trial is subject to a number of unjustifiable exceptions and limitations. First Nations accused are not served in their own language. There are no post-conviction services available in jails. Eligibility for criminal legal aid is subject to much discretion leading to uneven and slow decision-making. Compensation for certificate criminal legal aid work is inadequate and not timely.

Eligibility criteria in domestic legal aid are incomprehensibly complex. Domestic legal aid is subject to an abuse criterion which fails New Brunswick women and men in need of legal representation. Legal assistance is not available for complex matters or matters involving matrimonial property over \$20,000. Eligibility decisions are made with undue delay. Access to representation is frequently very slow. Compensation for certificate domestic legal aid work is less than for criminal law certificate and indefensible both from a pay equity and from a fair compensation standpoint.

There are no poverty law services. A first step in addressing this urgent need is to establish student legal aid clinics at the two faculties of law in the province. There is desperate entirely unmet need to bridge the gap between public legal information services and full representation in criminal matters. Ultimately, a network of community clinics serving all areas and linguistic groups of the province is highly desirable.

governance of NBLASC as an arms-length organization has been languishing due to the Board's loss of members and a lack of reappointments. Once new Board appointments have been made, there is much work to do. The Board will need to take the reins and develop a longer term business plan, a mission statement and code of ethics for the organization. It will have to establish committees to deal with financial and planning matters. Risk management and communications policies are also high on the agenda.

Finally, the Review Panel was asked to assume stable and increased funding scenarios and to look for opportunities for savings and efficiencies. Legal aid in New Brunswick is a very low budget operation. There are no superfluous programs, nor is there fat to be cut from the organization. There may be opportunities for efficiencies if a region-wide legal aid plan was established in cooperation with the other Atlantic or Maritime provinces. Stabilizing at current funding levels will shrink the program and create great social and financial costs in other areas of government and private sector spending. As a first priority, base funding must be increased to adequately fund the existing programs. Beyond this, a serious reinvestment in legal aid to address poverty law issues is warranted.

Summary of Recommendations

Recommendation #1

The NBLASC should make the development and use of proper management information an early priority.

Recommendation #2

Duty counsel should have managed and limited file loads.

Recommendation #3

Duty counsel should receive additional training to deal with special and high needs defendants.

Recommendation #4

Establish a court worker program in consultation with First Nations groups.

Recommendation #5

NBLASC should consider the use of video conferencing technology where appropriate.

Recommendation #6

The Board should consider adopting ceilings for certificates and staff lawyers in terms of hours or block funding to better manage expenditures.

Recommendation #7

NBLASC should provide extended duty counsel services to provincial courts of specialized jurisdiction.

Recommendation #8

The Minister should revoke the 60/40 rule by amending the regulation. (84-112 subs. 79(23))

Recommendation #9

The Board should consider establishing criteria and an eligibility grid for financial eligibility for criminal legal aid and make recommendations to the Minister. The Board should consider sliding scales with staged client contributions, inclusion of family size as a factor, and consideration of discretion for disabled accused with exceptional expenses related to their disability.

Recommendation #10

The Board should clearly delineate areas of discretion and review the exercise of discretion periodically to ensure just and consistent application of criteria.

Recommendation #11

The Board should consider whether to accept the Review Panel's recommendation not to engage in asset testing.

Recommendation #12

The Board should drop the \$50 client contribution.

Recommendation #13

Intake officers should be actively involved in developing a more streamlined process.

Recommendation #14

NBLASC should undertake an operational review of the application process.

Recommendation #15

The Board should urgently consider revoking the multiple certificate rule.

Recommendation #16

The Board should urgently consider extending legal aid to summary conviction offences where imprisonment or other restraints on liberty are a likely outcome.

Recommendation #17

The Board should reconsider legal aid practices with regard to provincial offences with particular attention to fishing and hunting charges and the differential impact on First Nations individuals and communities.

Recommendation #18

The Board should extend legal aid services to cover prison law

Recommendation #19

The Department of Justice should enter into a Memorandum of Understanding with the NBLASC to provide court ordered *Rowbotham*, *Fisher*, YCJA s. 25, and CC s. 685 counsel. Funding for these extra services should be transferred from the current budget of court services.

Recommendation #20

The Board should replace the spousal abuse criteria for domestic legal aid with a simple income test.

Recommendation #21

Legal aid assistance should be made available in complex domestic cases.

Recommendation #22

The amount of resources dedicated to a domestic case should be established through a pre-evaluation of the case needs.

Recommendation #23

The application and approval process should be streamlined to speed assignment of counsel in domestic cases.

Recommendation #24

There should be a means whereby clients of legal aid can obtain information on the status of their application or, if approved, of their case.

Recommendation #25

We recommend that NBLASC, the Department of Justice, the Law Society, the Law Foundation, and the law faculties of UNB and U de M enter into negotiations for the purpose of establishing student clinics.

Recommendation #26

To preserve institutional independence, the NBLASC should discontinue representation of children who are the subject of guardianship applications by the Minister of Family and Community Services. The NBLASC should also discontinue the provision of legal services for Family Support Orders service cases.

Recommendation #27

Budgetary flexibility should be granted to the Commission to be exercised by the Board where the proper defense of a complex case would cause budgetary over-run.

Recommendation #28

A legislative change should be enacted making the Executive Director of the NBLASC an employee of the Board, appointed by the Board, and serving at the pleasure of the Board.

Recommendation #29

The NBLASC should be viewed as experts on legal aid policy. Legal aid policy recommendations should flow from the Board to the Government through the Minister.

Recommendation #30

There should be a three-year Memorandum of Understanding between the NBLASC Board and the Minister of Justice and Consumer Affairs setting out multi-year policy direction and budgets, as well as formalizing relationship matters such as the flow of information between the Minister and the NBLASC.

Recommendation #31

The NBLASC should take steps over time to establish in the public mind its independence from the Executive Branch. The NBLASC should make clear that it operates only in the interests of clients.

Recommendation #32

The legislation should be amended to provide for expansion of the NBLASC Board from five to seven persons to seven to nine persons.

Recommendation #33

Board members should have a range of skills, including legal training, clinical law experience, financial expertise, advocacy experience, and general business experience.

Recommendation #34

The Board and the Minister should agree on the skills profile required of a director. It is skills, knowledge, and experience that are most important in selecting directors and not the particular group they represent.

Recommendation #35

NBLASC should make its governance structure and practices a top priority in its work.

Recommendation #36

The Review Panel believes there is a strong case for increased legal aid funding.

Recommendation #37

The Review Panel recommends that the first step in improved legal aid funding be the addition of sufficient resources to adequately fund the current system. This means an increase of \$2-3 million in base funding in year one.

Recommendation #38

The Review Panel further recommends that a commitment be made for Legal Aid program expansion to chosen priorities from among the options outlined. The level of this commitment would be \$4-6 million and reasonably be spread over a two-to three-year period.

Recommendation #39

A staged increase in Legal Aid tariffs for payment of private lawyers should be implemented within the scope of additional funding granted for the program.

Recommendation #40

The provincial government should consider approaching the other Atlantic or Maritime Provinces on a joint delivery model for legal aid services.

1. Introduction

In July 2007, the Government of New Brunswick, through the Minister of Justice and Consumer Affairs, commissioned a review of legal aid in New Brunswick.

a) Review Panel

The Minister of Justice and Consumer Affairs mandated Mr. Ernest MacKinnon, a former Deputy Minister in the New Brunswick government, and Dr. Jula Hughes, Professor at the UNB Faculty of Law, to co-chair the Review. Research and administrative support was provided by Mr. Hassan Arif and the staff of the Policy and Planning Branch of the Department of Justice and Consumer Affairs.

The chairs of the Review Panel would like to extend their thanks to Ms. Debbie Hackett, Director of Policy and Planning, Mr. Hassan Arif, researcher for the review, and the staff of Policy and Planning for their invaluable help.

b) Terms of Reference

The Review Panel was given the following terms of reference:

- 1) Review and make recommendations regarding the appropriate governance model to be employed for the delivery of legal aid services in New Brunswick.
- 2) Examine alternative service delivery models and recommend the most appropriate model to meet New Brunswick's needs.
- 3) Examine and make recommendations on the most appropriate model for legal aid in New Brunswick, based on the assumption that provincial and federal funding levels will not be increased over the next five years.
- 4) Identify potential administrative efficiencies such as sourcing certain common service needs with the Province (e.g. systems, insurance, facilities, personnel, and financial services).
- 5) Examine the potential for University Law School sponsored legal aid clinics patterned on the Nova Scotia model. Examination should include potential benefits, costs, and challenges.
- 6) Identify the pressures for growth of demand for legal aid service, including possible impact of Federal Criminal Law changes. Provide cost projections for growth estimates.
- 7) Identify the policy and other considerations in opportunities to increase client contributions.
- 8) Confirm the basis for the provision of criminal, young offender, aboriginal, and domestic legal aid and other forms of civil legal aid in New Brunswick.
- 9) Examine the scope and adequacy of the present system.
- 10) Examine gaps in the present system.
- 11) Examine the interface between traditional legal aid models, mediation, and other alternative criminal justice concepts (e.g. mental health court, family violence court, etc.).

c) Time Frame

The Review Panel was mandated in late July 2007 to complete the review and provide a report to the Minister and Vice Chair of the New Brunswick Legal Aid Services Commission ("NBLASC") by September 14, 2007.

d) Methodology

The Review Panel organized its work as follows:

Late July to mid-August:	Work Planning Background research/data gathering Development of consultation plan Development of consultation questions
Mid-August to early September:	Consultations with stakeholders Preliminary drafting of non-consultation sections of the report
Mid-September:	Deliberations and preparation of report and recommendations

e) Research

The Review Panel examined a number of documents to obtain background information, including the *Legal Aid Act* and Regulations, NBLASC Annual Reports, information on Legal Aid available on the government website, and the most recent NBLASC Business Plan along with other documents provided by the NBLASC. A recent review of legal aid in Manitoba, the 1996 Review of Legal Aid Services in Nova Scotia, and the Canadian Bar Association's submissions on Legal Aid were also examined.

f) Consultations

A preliminary list of groups and individuals to be consulted was circulated to a cross section of individuals within the NBLASC, the Department of Justice and Consumer Affairs, and other provincial government representatives. A final consultation plan was developed based on comments received, keeping in mind the need to consult with stakeholders representing women's groups, linguistic and cultural communities, aboriginal peoples, disabled persons, seniors, prisoners' advocacy groups, and other organizations representing various segments of the community who come into contact with the legal aid system. As well, academics and representatives of other legal aid plans were consulted.

The Review Panel met with the members of the Board of Directors and senior staff of the NBLASC on more than one occasion, and sought the expertise of representatives from the Dalhousie Legal Services Clinic and Legal Aid Ontario with respect to examining the potential for University Law School sponsored legal aid clinics.

Stakeholder consultations were conducted with organizations both internal and external to government. Most consultations were in-person meetings, but some were done by teleconference or video conferencing technology. The Review Panel also solicited written comments from some organizations.

Prior to the commencement of its consultations, the Review Panel developed a series of questions that it wished to discuss with the groups and individuals participating in the consultations.

The Review Panel met with the following individuals/organizations:

New Brunswick Legal Aid Services Commission

Dr. Deborah Doherty, Vice Chair
Ronald LeBlanc, Board member
David Potter, Executive Director
Gabriel Paulin, Director of Financial Services
Peter Corey, Director of Criminal Operations
Louise Surette, Director of Family Operations

Aboriginal Affairs Secretariat

Patrick Francis, Deputy Minister

Department of Justice and Consumer Affairs – Administrative Service

Neil Foreman, Executive Director
Gayle Howard, Senior Policy Analyst, Financial Services Branch

Department of Justice and Consumer Affairs – Court Services

Mike Comeau, Assistant Deputy Minister
Mike Guravich, Consultant, Program Support
Joanne Higgins, Director of Family Support Enforcement
Debbie Locke, Officer, Program Support

Office of the Attorney General – Public Prosecution Services

Glen Abbott, Assistant Deputy Attorney General
Anthony Allman, Regional Crown Prosecutor - Moncton
Bill Corby, Regional Crown Prosecutor - Fredericton
PJ Veniot, Regional Crown Prosecutor - Bathurst

Department of Family and Community Services

Gary Love, Provincial Child Protection Consultants
Danielle Chiasson, Provincial Child Protection Consultants

Judiciary

Chief Justice Drapeau, Court of Appeal
Chief Justice Smith, Court of Queen's Bench
Chief Judge Jackson, Provincial Court

Premier's Council on Status of Disabled

Randy Dickinson, Executive Director

Canadian Bar Association – New Brunswick Branch

Jade Spalding, President
Cameron Gunn
Lia Daborn, Executive Director

Canadian Mental Health Association – NB Division

Tracy Ryan, Executive Director, NB Division

Jean McBrine, Executive Director, Fredericton/Oromocto Branch

Del Brodie, Fredericton/Oromocto Branch

Dalhousie Legal Aid Service

Donna Franey, Executive Director

Elizabeth Fry Society of Saint John

Marianna Stack, President

Erin McLaughlin, volunteer

Denise Durette, volunteer

Justice Canada

Ab Currie, Researcher

Law Society of New Brunswick

Maria Henheffer, President

Geri Mahoney

Rod MacDonald

Bruce Noble

Marc Richard

Legal Aid Ontario

John McCamus, Chair

MAWIW

Ruth Levi, President

Ron Gaffney, Legal Counsel

Muriel McQueen Ferguson Foundation

Rina Arseneault, Associate Director

New Brunswick Advisory Council on Status of Women

Ginette Petitpas-Taylor, Chairperson

Rosella Melanson, Executive Director

New Brunswick Anti-Poverty Association

Eric Teed

New Brunswick Child and Youth Advocate/Ombudsman

Bernard Richard, Ombudsman

New Brunswick Law Foundation

Paul Smith, President

New Brunswick Multicultural Council Inc.

George Maicher, President

Ontario Legal Aid Review

Michael Trebilcock, Chair

Population Growth Secretariat

Humphrey Sheehan, Chief Executive Officer

Université de Moncton
Marie-France Albert, Dean – Law Faculty

University of New Brunswick
Philip Bryden, Dean – Law Faculty

Women's Issues Branch of Executive Council Office
Norma Dubé
Suzanne Blaney-Tremblay

The Review Panel received written submissions from:

Association acadienne et francophone des aîné(e)s du Nouveau-Brunswick
Jean-Luc Bélanger, President

Comité des 12 pour la justice sociale
Claude Snow, President

New Brunswick Senior Citizens' Federation, Inc.
Rhéal Bélanger, President

Still awaiting written submissions:

Association des juristes d'expression françaises du Nouveau-Brunswick
Me Sacha D. Morisset, President

Elizabeth Fry Society of Moncton
Claudette Rogers, President

The Review Panel would like to thank all the stakeholders for taking the time to provide their input and their help in this process.

2. Why Legal Aid? Policy and Legal Considerations

a) Policy Considerations

A functioning justice system is one of the important hallmarks of a democratic society. The ability to resolve disputes fairly, consistently, and without delay enables people to participate in civil society without the constant distraction of unsettled strife. It allows us to contribute to society and our economy and to put our time and effort into our work, family, and community life.

Our justice system is built on the assumption that people participating in it are represented by legal professionals. Given a choice, most of us would not enter a courtroom to argue for our rights or defend against the imposition of an obligation, let alone a punishment, without the assistance of our lawyer. There are good reasons for this. Laws in modern democracies are complex and it takes skill and experience to advance a case. This is true for civil disputes as well as criminal cases.

As in all other democratic ventures, the system is only as good as the ability of the least privileged to participate in it. Just as we do not require a big pay cheque before someone can vote in an election, we should not require wealth to permit a person to participate effectively in the justice system. The Review Panel heard from many groups and individuals. Everyone we spoke with agreed that access to justice was crucially important and that legal aid is an essential component for achieving this goal.

At the same time, we are all aware that access to justice is in a state of crisis everywhere. All across Canada, low-income Canadians are routinely denied access to representation in courts. New Brunswick is no exception. Essential government programming does not reach intended beneficiaries because legal aid does not reach administrative tribunals and other administrative decision-makers. Newcomers to our provinces frequently lack assistance in getting acquainted with the legal norms and expectations of Canadian society. Women are disproportionately affected by the failure to invest in civil legal aid. Aboriginal people find the justice system unresponsive to the needs of their communities. The shortcomings of other parts of the social safety net, such as mental health care and addiction treatment shortages, are felt acutely in the criminal justice system.

Increasingly, legal representation is out of reach for most middle-income Canadians as well. Courts identify self-represented litigants as the single biggest obstacle in the effective, just, and efficient administration of justice. The judges we consulted were unanimous in their conclusion that an unrepresented litigant is much less likely to achieve a favourable outcome than a represented litigant, particularly when self-representation was not a choice. The scales of justice are put out of balance by forced self-representation.

Legal aid is part of the answer to all of these concerns. It would be unrealistic, however, to expect legal aid to solve all the woes of the justice system. Other funding opportunities will need to be explored to ensure access to justice for people above the poverty line, but below income levels that allow retaining private counsel, particularly in complex matters. As Canada's Chief Justice has remarked: "much more needs to be done if access to justice is to become a reality for ordinary Canadians."¹

At the moment, legal aid program offerings are much too restricted to enable access to justice for low-income people in New Brunswick. All stakeholders we consulted supported the notion of legal aid, but there was also widespread support for an expanded range of services to be provided by legal aid. The need for legal assistance for low-income New Brunswickers is obviously a generally held concern and is evident to all observers. There is also near universal consensus that the current service offerings of legal aid fall far short of a desirable service level.

There is, however, some disagreement over the precise scope of services that should be available. In the view of the Review Panel, the debate might be assisted by some clarification as to what the Province must provide as a matter of law, what services are desirable on social justice and other policy grounds, and what services, if not provided, end up costing the citizens and tax payers of New Brunswick more. In other words, there are essentially three reasons to provide legal representation to people who cannot afford to retain counsel privately:

¹ http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/Challenges_e.asp

- 1) It is the right thing to do;
- 2) It is legally or constitutionally required; and
- 3) The cost of self-represented individuals to the system outweighs cost savings for not representing the person.

It is the right thing to do because the vision Canadians set out in their constitution for their country was that of a just and democratic society. A society can only be just and democratic where there is support for democratic institutions and for justice for all. Since the enactment of the *Charter* in 1982, the courts have developed some minimum standards for access to justice arising from the right to counsel guaranteed in s. 10 of the *Charter*. They have only just begun to develop some broader standards arising from the right to life, liberty, and security of the person guaranteed by s. 7 of the *Charter*. There is much scope for political leadership in providing access to justice. Courts realize that important funding decisions are at stake and that elected representatives, rather than judicial officers, should make these decisions. However, this political leadership has frequently not been forthcoming. This has pushed the courts further into constitutionalizing the right to legal aid. Much could be gained from political leadership. We could choose areas of priority. We could decide on justice priorities not based on a particular set of circumstances that arise in litigation, but based on what we as a society think are the circumstances in which individuals should have the right to be represented. To understand what must currently be provided and where political choice can be exercised, the following outlines the existing legal and constitutional obligations.

b) Legal Obligations

i) Statutory Obligations

There are three scenarios under which a person is statutorily entitled to court ordered counsel:

- 1) In Youth Criminal Justice proceedings, the right to counsel arises from s. 25 of the *Youth Criminal Justice Act*. It requires that the Attorney General provide counsel to a youth who does not qualify for legal aid. At present, this means that the youth must apply for legal aid, be turned down, appeal the decision, be finally turned down, and then apply to the court for the appointment of counsel. If these conditions are met, the court must appoint counsel.
- 2) In proceedings involving vulnerable witnesses, the court has a power under s. 486.3 of the *Criminal Code* to appoint counsel. The Attorney General must provide funding or face a possible stay of proceedings.
- 3) In criminal appeals, the Court of Appeal has the power to appoint counsel under s. 684 of the *Criminal Code*. In that case, the *Code* expressly requires the Attorney General to fund the appointment.

It is important to remember that these are not entitlements to legal aid; they are entitlements to counsel paid for by the Attorney General.

ii) Constitutional Obligations

The right to counsel arises most directly from s. 10 of the *Charter*. It guarantees the right to retain private counsel and is at present much broader than the right to state-funded counsel. The scope of constitutional obligations to provide state-funded counsel continues to evolve. It is well established in the context of court ordered counsel for criminal cases in so-called Rowbotham and Fisher applications. These are cases where the accused cannot afford to retain counsel, the consequences of conviction are serious, and the issues to be decided are so complex that a layperson of the accused's educational background cannot be expected to defend himself adequately. At a time when the federal government is pursuing an aggressive law and order agenda, additional costs arise for provincial legal aid plans or Attorneys General to provide counsel in criminal cases. The renewed focus on incarceration as the punishment of choice creates particular pressures on provincial coffers. More on this issue can be found in the chapter on criminal legal aid. Suffice it to say in the present context that the threat of imprisonment has long been a threshold for criminal legal aid. Expanding imprisonment means expanding criminal legal aid. It is within the sole purview of the federal government to change criminal law policy. With that power comes a corresponding obligation to fund criminal legal aid adequately. The current 50/50 funding model already understates federal responsibility. Disingenuous declarations on the part of the federal government that their criminal law agenda is fiscally neutral should be refuted by provincial governments.

Beyond these, there is an evolving requirement to provide state-funded counsel in situations involving security of the person interests protected by s. 7 of the *Charter*. It is clear that many issues generally falling within the area of poverty law engage the security of the person interest ranging from income support to utility board reviews and rental disputes. The leading case in this area involved a New Brunswick mother only identified by her initials J.G. for whose child the province sought guardianship. The Supreme Court of Canada recognized that the ability of a parent to defend against having their children removed from their care without the assistance of counsel was limited and that the removal of a child affected the parent's security of the person interest. For this reason, the Court recognized a right to state-funded counsel in guardianship applications.

To date, for budgetary reasons, New Brunswick Legal Aid has had to take an extremely narrow view of the implication of this right recognized by the Supreme Court of Canada in the J.G. case. The right is being limited essentially to the facts of the particular case of guardianship applications. This narrow view is not supported by the language the Supreme Court of Canada used in the decision and indicates an approach of extending rights only where there is direct and imminent constitutional pressure. In the absence of political leadership in developing poverty law programs for legal issues which engage s. 7 interests, it can be expected that courts will impose constitutional obligations in additional situations.

It is also evident that legal aid is currently being provided in an extremely gendered fashion. The majority of poor people in New Brunswick (as elsewhere) are female,

but most legal aid dollars are expended on men. This is because most legal aid is provided in the criminal law area, and vastly more men than women are involved in the criminal justice system. It is very well understood that the legal needs of women are different from the legal needs of men, and catering to the one and not the other is difficult to reconcile with the equality guarantee contained in s. 15 of the *Charter*. The Supreme Court in *J.G.* gave governments warning through a concurring minority opinion that the s. 15 issue was on its radar. Governments will ignore this warning at their peril. Again, it is likely that the continued deprivation of legal assistance to women facing poverty will lead to an expansion of constitutionally required areas of state-funded counsel unless there is evidence of a political will to deal with the problem.

iii) International Legal Obligations

A final source of state obligations for the provision of legal aid is Canada's international obligations. A useful summary of these legal aid obligations can be found in the CBA paper on legal aid that the Review Panel considered as part of the review. (The relevant section is located in Appendix A.) It is clear that binding international law requires a broader range of services offered by legal aid than is currently being provided in New Brunswick. This is true even in one of the areas where legal aid is being provided (i.e. criminal law). An expansion of services in this traditional core area of legal aid is legally required. Beyond this area, international legal norms are emerging in a somewhat similar fashion to the constitutional developments in domestic Canadian law described above.

c) Trends and Challenges

Legal aid faces significant challenges. The provincial government has made attracting immigrants to New Brunswick a high priority. Legal services to newcomers are an important part of making people feel welcome and comfortable in their new environment. Ever increasing complexity in laws and regulations will require ever more sophisticated legal interventions. First Nations people as a group are an exception to the general demographic trend toward an aging population. This is good news in terms of economic development. However, high demand for legal aid services to First Nations people is likely to continue for longer than in the rest of society.

At the same time, an aging population for the rest of society will reduce demand on criminal side. We can also expect the focus on reducing spousal abuse to have impact. Prevention measures should reduce demand down the road. It is difficult to predict at what point in time these effects will become observable. Furthermore, a strong labour market is predicted for the foreseeable future. This means fewer people unemployed, fewer families facing poverty, and fewer people requiring poverty law services. This may be the best chance we will ever have to develop services at a low level.

3. Legal Aid in New Brunswick Today

a) The Legal Aid Act

The *Legal Aid Act* governs the provision of legal aid services in the province of New Brunswick. The *Act*, together with the Regulations, contains provisions ranging from high-level matters of governance, to extremely detailed eligibility, to minor administrative matters.

The *Act* and the Regulations are a patchwork of amendments that all parties (including the NBLASC, the Review Panel, and the Department of Justice) agree must be replaced by new legislation.

NBLASC is seriously impeded in its work by the fact that financial issues, normally considered the policy of the Board of Directors or to be in the discretion of management, are contained in the *Act* and the Regulations.

One example is a provision in the regulations that non-residents of New Brunswick (even if they are Canadian citizens) are not eligible for legal aid in the province. This provision runs contrary to an existing federal-provincial agreement. Another example is the requirement for a 40% holdback to year-end of private criminal lawyer's fees. This provision exacerbates the problem of the low private bar legal tariff and thus discourages private lawyers from providing legal aid services.

b) Organization of the Delivery of Legal Aid Services

NBLASC is an arm's-length organization with a governing Board of Directors. The Legislative intention is that it be very independent of government and is therefore not an agency of the Crown. Except for a number of anomalies in the *Act* (such as the provision that the Executive Director be appointed by the provincial Cabinet) the intended organizational independence has been largely achieved.

In addition to the governing Board of Directors, there are Area Legal Aid Committees in each of the eight service regions of the province. These Area Committees are made up of six volunteers (three lawyers and three laypersons) who act as a first level of appeal.

The Head Office is in Fredericton (which doubles as the regional office for the Fredericton area) and there are 7 other regional offices in the following areas:

Bathurst
Saint John
Moncton
Miramichi

Edmundston
Woodstock
Campbellton

c) Legal Aid Program Services

i) Criminal Law Services

There are several services offered in the criminal law area:

- 1) There is a phone service (*Brydges Counsel*) – available 24/7 – which provides initial advice for persons taken into custody by a law enforcement agency.

- 2) Everyone, regardless of income, is entitled to duty counsel on first appearance. Duty counsel provides brief legal representation at the pleadings stage of trial.
- 3) There are income-tested services of criminal legal counsel for persons charged with offences where there is a likelihood of incarceration. A \$50 up-front fee is required (as is also the case in domestic proceedings), although it may be waived on the discretion of the intake officer if she/he determines that it is impossible for the client to pay this amount.

NBLASC provides legal services for applications under the *Criminal Code* initiations in the Mental Health Court in Saint John. Summary conviction charges or Provincial offences are not eligible for legal aid even though the penalties for some charges can be quite severe.

ii) Domestic Law Services

This area of legal aid services is restricted to very specific circumstances. Assistance is granted for domestic law services where there is an allegation of spousal abuse and a court social worker agrees. Issues covered by this service include custody of children, support payments, property division, and no-contact orders.

Where no abuse is alleged, the client is referred to mediation. If this fails, the client is referred to a legal aid lawyer for matters of support and variations in support, provided the client meets a financial eligibility test.

As well, clients are requested to pay the \$50 up-front fee in domestic cases. As in the case of criminal clients, this fee may be waived at the discretion of the intake officer if she/he determines that it is impossible for the client to pay this amount.

There is an additional provision that domestic legal aid clients alleging abuse (who have more than \$20,000 worth of jointly held real property) may not get services covering property division matters.

d) The Legal Aid Budget

The following are the 2007-08 budget for legal aid totals:

Expenditures by NBLASC:

Criminal	\$4,220,000
Domestic	\$1,710,000
Services/Overhead:	\$1,301,000
TOTAL:	\$7,231,000

Revenues (Sources of Legal Aid Funding):

Provincial:	\$4,583,000
Federal:	\$2,465,000
Client Contributions:	\$ 81,000
Interest and Other:	\$ 102,000
TOTAL:	\$7,231,000*

*Note: there is no provision for a Law Foundation contribution in these numbers. This contribution has been in the order of \$150,000 annually and is likely to be forthcoming in the 2007-08 year. If so, both revenues and expenditures should be increased by \$150,000.

All federal contributions are for criminal Legal Aid services. The federal contribution was capped in 2005 at \$2,465,000. The Federal Government proposes to extend their funding agreement to 2012 at the 2005 level. Negotiations are ongoing at this time. The Domestic Legal Aid Program is funded entirely by the Province.

e) Management Information

The Review Panel examined a number of documents provided by the Department and the NBLASC, including policy and budgetary submissions and general program information. The Annual Report to the Legislative Assembly for 2005-06, the latest year available, was also examined. The Review Panel was unable to find in any of these documents the management information the NBLASC needs to run their business. Although there is data contained in the Annual Report, it does not represent management information. We therefore have to conclude that outside of periodic spending reports that there is none.

If management do not receive pertinent and timely information on what is going on in the Legal Aid program on a weekly or monthly basis, if this information does not have a qualitative as well as a quantitative basis, how do they make decisions? How is the Minister, Board of Management, and Cabinet supposed to make policy and budgetary decisions if all they have put in front of them is management's opinion unsupported by facts?

This issue is important and should represent an early priority for the new Board.

Recommendation #1

The NBLASC should make the development and use of proper management information an early priority.

4. Criminal Legal Aid

Criminal legal aid is the traditional focus of legal aid services. As discussed, there are constitutional and legal requirements for state-funded counsel for some criminal cases. There is also a federal-provincial funding agreement in NBLASC for criminal legal aid. Despite this well-institutionalized status, criminal legal aid was in grave danger before the coming into being of the current NBLASC. Reasons for the malaise were a severely under-funded judicare model and a bar no longer willing to bear the impact of miserly and inappropriate legal aid tariffs. The move to a predominant staff model and some increase in provincial funding has brought considerable improvements to some aspects of criminal legal aid in the province. In particular, the provision of duty counsel services by NBLASC staff lawyers has led to better and more consistent service.

a) Duty Counsel

While the move to staff duty counsel was generally thought to be a big improvement in terms of service, many stakeholders noted that services were often provided in an

assembly line and rushed fashion. Given the high importance of the plea stage in criminal proceedings, all reasonable efforts must of course be made to ensure that guilty pleas are sound. This requires more preparation time than appears to be available to many duty counsel. A limited file load would ensure that individual duty counsel are not made to single-handedly bear the burden of under-funding.

Recommendation #2

Duty counsel should have managed and limited file loads.

Satisfaction with duty counsel services was generally high, but was lowest for special and high needs defendants. These included defendants with significant mental health issues, women, particularly those with substance abuse issues, First Nations individuals, and linguistic minorities. There is a potential for community partnerships with service organizations representing these groups, and it was generally felt that a threshold awareness of issues on the part of duty counsel was essential to ensure that available services were being accessed and service organizations called in to provide assistance. We heard from mental health, multicultural, and Elizabeth Fry Society representatives that they are able to provide considerable assistance where they are aware that a person is in the system, but that referral is rare and discovery of need haphazard.

Recommendation #3

Duty counsel should receive additional training to deal with special and high needs defendants.

b) Serving First Nations Accused

First Nations groups and individuals suffer from a lack of legal services not comparable to any other group. Native men and women are vastly disproportionately involved in the criminal justice system, more likely to be denied bail, more likely to be punished by a sentence of imprisonment, and more likely to be victims of crime. Their legal needs tend to be complex, complicated in part by the historical burden of discrimination and in part by the convoluted legal responses to discrimination, past and present. To this is added a lack of availability of legal services in Native languages and a lack of training for lawyers on all sides about Native culture and particular challenges facing First Nations people in the justice system. The Review Panel is not in a position to make recommendations to address these issues. We do wish to relate to the Minister and the NBLASC the advice given to us by representatives of the Aboriginal communities of New Brunswick which have been financially modest, sensible, and undemanding in program terms. There is strong support for a court worker program to facilitate Native access to justice and a better understanding of the justice system for those involved in it. There is a need for provision of legal services in Native languages. And there is a need to build justice capacity on reserves across the province to strengthen community resources for addressing criminal and family law challenges.

Recommendation #4

Establish a court worker program in consultation with First Nations groups.

c) Current Practices and Use of Resources

In some locations, there are some possible efficiencies that are currently not realized. Remand prisoners are shuttled a great distance for minor appearances and there are delays for show cause hearings because duty counsel is only available on plea days and alternate arrangements are difficult. Some courthouses have technological support for video conferencing, but duty counsel are currently not using this technology. Clearly, video conferencing is not appropriate in all circumstances. However, the technology should be used in appropriate circumstances (e.g. where this would avoid delays in show cause hearings).

Recommendation #5

NBLASC should consider the use of video conferencing technology where appropriate.

Beyond duty counsel services, a mixed model currently exists for the provision of representation services in criminal law. Some clients are represented on a certificate basis, while other clients are represented by staff lawyers, frequently the same lawyer who appeared as duty counsel at earlier stages. In the opinion of the Review Panel, the efficiency or otherwise of this part of the service is difficult to measure. The NBLASC does not impose hour or block funding limits on files at the time of issuing a certificate or assigning cases to staff lawyers. This practice appears to be unique to New Brunswick and is difficult to rationalize. It makes it difficult to budget certificate expenditures and requires very active file management, including taxation after the fact.

Recommendation #6

The Board should consider adopting ceilings for certificates and staff lawyers in terms of hours or block funding to better manage expenditures.

New Brunswick has been experimenting with a number of courts of specialized jurisdiction, notably the mental health court in Saint John and the domestic violence court in Moncton. These courts are generally thought to make an extremely valuable contribution to addressing complex social matters. Legal aid can make a significant contribution to the proper working of these courts. Continuity of representation is crucial and has to extend over lengthy periods of time while an individual remains under the supervisory jurisdiction of the court. Extended duty counsel services appear to be the most efficient and consistent delivery model for supporting individuals in the special jurisdiction courts.

Recommendation #7

NBLASC should provide extended duty counsel services to provincial courts of specialized jurisdiction.

The NBLASC continues to have recruitment problems for certificates, in part because the tariff continues to be unconscionably low, but also in part because only 60% of a lawyer's bill is paid in a timely fashion. The remaining 40% is paid at year end and is subject to budgetary room. Cash flow is a major concern in all business endeavours, and law offices are no exception. The rule thus creates a major disincentive for the private bar to take on certificate work. The rule is not of NBLASC making. Rather, it emanates from regulation. It is thus the Minister who needs to address this issue.

Recommendation #8

The Minister should revoke the 60/40 rule by amending the regulation.
(84-112 subs. 79(23))

While the eligibility criteria in the criminal field are moderately less confusing than they are on the domestic legal aid side, there is still opportunity for more explicit and streamlined criteria and processes. Currently, the NBLASC does not use an eligibility grid. The representatives of NBLASC considered this an advantage since it permitted greater discretion. With respect, the Review Panel disagrees. Discretion is useful for dealing with marginal cases, but it should not be the sole or even primary mode of decision-making. Clearly articulated eligibility criteria lead to faster, more consistent service, more streamlined processes, lower appeal rates, and, perhaps most importantly, an ability of potential clients to self-screen. Stakeholders indicated a great deal of dissatisfaction with eligibility decisions in terms of delay, lack of clarity, and uniformity.

Recommendation #9

The Board should consider establishing criteria and an eligibility grid for financial eligibility for criminal legal aid and make recommendations to the Minister. The Board should consider sliding scales with staged client contributions, inclusion of family size as a factor, and consideration of discretion for disabled accused with exceptional expenses related to their disability.

Recommendation #10

The Board should clearly delineate areas of discretion and review the exercise of discretion periodically to ensure just and consistent application of criteria.

One of the issues raised by the terms of reference with respect to eligibility was the question of whether assets (personal, or, in the case of youth, parental) should be included for determining eligibility. This is an issue that the Board should address in its general review of eligibility criteria. The Review Panel would recommend not including assets for purposes of financial eligibility, since the administrative effort required is likely to far outstrip any savings.

Recommendation #11

The Board should consider whether to accept the Review Panel's recommendation not to engage in asset testing.

Similarly, the NBLASC currently requires a \$50 client contribution before it will take on representation. Intake officers have the power to waive the client contribution. A blanket requirement makes little sense. It is like having a \$50 application fee for welfare. It is likely unconstitutional, causes delay in the system, and contributes only minimally to the overall NBLASC budget.

Recommendation #12

The Board should drop the \$50 client contribution.

In part due to the excessively complex eligibility criteria and part due to a lack of articulation of criteria, eligibility decisions are frequently slow. There are unacceptable delays. Self-screening is impossible because criteria are unclear. The review panel identified intake officers as a likely source of great expertise for any effort to streamline the intake process.

Recommendation #13

Intake officers should be actively involved in developing a more streamlined process.

Recommendation #14

NBLASC should undertake an operational review of the application process.

Service in criminal legal aid is currently less than comprehensive and has a number of gaps that are difficult to justify either from an access to justice or from a compliance with the federal-provincial agreement perspective. NBLASC is well aware of the gaps and of the fact that they are undesirable, but for budgetary and governance reasons has been unable to address the problems. There are several specific instances:

1) The Rule Against Multiple Certificates

The current limit on representation for similar offences in the same 24-month period to a single instance leads to gaps in service where incarceration is a near certainty in case of conviction. Since many repeat offenders now face mandatory minimum sentences, and since recidivism has long been considered a primary ground for imposing incarceration, the limit leads to deprivation of service for those most at risk. The reality of recidivism is that most offenders do not reoffend, but those who do tend to be multiple recidivists and tend to reoffend in the same area (e.g. multiple drunk driving charges or multiple B&E charges). Trying and sentencing these individuals is necessarily more complex, making legal assistance necessary and in some cases constitutionally required.

Recommendation #15

The Board should urgently consider revoking the multiple certificate rule.

2) Summary Conviction Offences

It used to be true that summary conviction offences were considered less serious and were, in many cases, unlikely to lead to incarceration or other restrictions on the liberty of an individual. These days are long past. The vast majority of criminal offences are “hybrid” and the Crown frequently selects the summary route. In particular, the sentencing increase from 6 to 18 months for summary conviction sexual assault is a clear indication that fairly serious matters are now being addressed summarily. Despite these developments, the NBLASC has a policy of denying legal aid to individuals charged with summary conviction offences. This blanket exclusion is untenable. Representation should not depend on the procedural niceties of the Code, but rather on a substantive assessment of need.

Recommendation #16

The Board should urgently consider extending legal aid to summary conviction offences where imprisonment or other restraints on liberty are a likely outcome.

3) Provincial Offences

In a similar vein, there is now a very limited amount of legal aid assistance available for provincial offences. In most instances, it would appear that this is a need that may well be addressed through student and community legal aid, if such a delivery form was to be implemented. In the meantime, the Review Panel notes that there exists a disproportionate impact of provincial offences on First Nations people, particularly in licensed activities such as hunting, fishing, and other resource harvesting.

Recommendation #17

The Board should reconsider legal aid practices with regard to provincial offences with particular attention to fishing and hunting charges and the differential impact on First Nations individuals and communities.

There is a pressing need to provide ongoing legal support to incarcerated persons. These individuals are most vulnerable and in need of services dealing with issues ranging from conditions of incarceration to parole and programming access. The service should be delivered in partnership with John Howard and Elizabeth Fry Societies as a monthly outreach service.

Recommendation #18

The Board should extend legal aid services to cover prison law.

The Department currently pays for court ordered counsel out of the court services budget without separate budget line. This creates unpredictability in the court services funding and creates an institutional incentive for NBLASC not to provide counsel where court ordered counsel is likely or certain. It is clear that there is no room in the current NBLASC budget to provide these services, so extra funding is required. This recommendation is fiscally neutral in terms of departmental funding, since the monies to be spent by NBLASC under the recommendation currently come out of departmental funding as well.

Recommendation #19

The Department of Justice should enter into a Memorandum of Understanding with the NBLASC to provide court ordered Rowbotham, Fisher, YCJA s. 25, and CC s. 685 counsel. Funding for these extra services should be transferred from the current budget of court services.

In the future, demand for criminal law services will certainly increase in the short term. In its pursuit of its law and order agenda, the federal government has been very active in the area of criminal law, undertaking a number of initiatives to amend the Criminal Code ranging from the creation of new offences to changes in area of sentencing. The amendments before Parliament regarding sentencing show four related trends:

- 1) Increased use of mandatory minimum sentences;
- 2) Harsher sentencing ranges for both existing and new offences;
- 3) New limits on conditional sentences; and
- 4) Facilitation of dangerous or long-term offender designations.

The changes restrict the availability of conditional sentences generally. This is likely to increase overall incarceration rates at a time when the sentencing reforms of the 1990s are beginning to show some improvement in this area. It remains to be seen whether sentencing judges will use the precedents developed under the previous law that shifted offenders from probation to the conditional sentencing regime (usually referred to as the "net-widening" effect of conditional sentences) to now shift even more offenders into the custodial regime, or whether the trend will reverse so that probation orders increase. Under current federal government proposals, federal funding for criminal legal aid would be frozen for ten years; any new initiatives will require provincial funding.

In the longer term, some demographic developments will counteract this increase in demand. As noted, as the New Brunswick population ages, crime will decrease.

5. Domestic Legal Aid

Domestic legal aid (also sometimes referred to as civil or family law legal aid) provides limited family law services on family breakdown, particularly where a history of abuse contraindicates the use of family mediation. The issue of domestic legal aid has been studied in New Brunswick by Status of Women and by researchers of the Muriel McQueen Centre at the University of New Brunswick. Both these sources discuss the program in more detail than is possible in the present context. Regard should be had to these sources of expertise in any review of the legal aid program.

a) Eligibility Criteria

A central eligibility criterion for Domestic Legal Aid Services is that the applicant must show evidence of spousal abuse. The initial point of contact with the program is the court social worker who screens clients under this abuse criterion.

The Review Panel believes this criterion is problematic on a number of fronts:

- 1) There will be clients in dire circumstances who need legal help and can only get it if they make a claim of abuse, whether they have been abused or not;
- 2) Clients may simply be unwilling, at that juncture, to openly talk about their abuse experience, placing them in an uncomfortable position or even discouraging them from applying for legal aid in the first place;
- 3) An appearance in court with a legal aid lawyer makes public the fact that the client has been abused, which can unfortunately have a stigmatizing effect;
- 4) Criteria such as abuse are difficult to administer and can be a significant factor in front-end service delays. Concerns about such delays were raised repeatedly by stakeholders in presentations to the Review Panel.

In place of spousal abuse criteria, the Review Panel favours a simple income test. We have heard differing opinions about the impact this may have on demand. While the Review Panel has concluded that this change would tend to increase demand, some middle- and higher-income clients would not qualify under an income test, reducing demand. This approach will also allow for a single point of entry to the legal aid program through the intake workers, greatly simplifying the application process for both the clients and for NBLASC.

Recommendation #20

The Board should replace the spousal abuse criteria for domestic legal aid with a simple income test.

The Review Panel did not consider recommending a particular threshold for income-tested eligibility. One option would be to use the criteria employed for criminal legal aid eligibility. It need not be so. There may be different criteria to consider in choosing an income threshold for domestic legal aid clients. For example, a higher threshold could be considered along with a sliding scale of client contribution, offering some prospect of shared help in hiring legal assistance.

The Review Panel also concluded that the limit of \$20,000 marital property for domestic legal aid services dealing with division of marital property should be dropped. In its place, the legal aid program should pursue a contribution from the proceeds of the ultimate property settlement. In the panel's view, the present policy simply encourages people to forego the pursuit of property over \$20,000. The program is further limited to marital property division in routine cases. This means that assistance is not available for more complex cases when it is most needed.

Recommendation #21

Legal aid assistance should be made available in complex domestic cases.

b) Financial Limits on Service

The Review Panel also noted that NBLASC places a \$1000 limit on the value of Domestic Legal Aid services. The legal aid lawyer, when reaching this limit, would have to withdraw from the case leaving the client with matters unresolved. This is unacceptable and should be changed. In place of the financial limit, a pre-evaluation should be done of the needs of the case. The \$1000 limit is too much for some cases and not enough for the more complex cases.

Recommendation #22

The amount of resources dedicated to a domestic case should be established through a pre-evaluation of the case needs.

c) Increasing Efficiency and Improving Service

The Review Panel found that screening for eligibility and assigning a lawyer for domestic legal aid clients can be unduly slow (one factor among several is the abuse criteria discussed above). These clients are in highly stressful situations and delays add to this stress. An additional and very concrete problem is that their situations are very fluid. There are issues surrounding child custody, access to liquid assets, and a critical need for support, all of which will most likely deteriorate with long delays in service.

Court delays can also be endemic, adding to this problem. Delays in getting to court for an issue like child custody can be very prejudicial to the subsequent outcome. If, for example, the children have stayed at home with one spouse for weeks or even months while the other spouse has left the home, courts may well opt for the stability of the current situation to the detriment of the parent who left.

Recommendation #23

The application and approval process should be streamlined to speed assignment of counsel in domestic cases.

The Review Panel believes that sensitivity to the needs of legal aid clients, most particularly clients of domestic legal aid, means being willing and able to tell people where they stand on their application or the stage where their case currently rests. Clients should be able to call the NBLASC to get this information. We realize this may be difficult or even impossible with a paper-based case management system. However, with the current development of an IT-based case management system, this service could be instituted.

Recommendation #24

There should be a means whereby clients of legal aid can obtain information on the status of their application or, if approved, of their case.

Finally, in serving Aboriginal clients, the review panel wants to alert the NBLASC to a possible change to the *Indian Act* dealing with matrimonial real estate property on reserve lands. These changes could result in a novel need for representation.

6. Legal Aid Clinics

One of the major gaps in service that the Review Panel identified in the course of consultations, repeated by all community stakeholders, was the shortage of legal information, advice, and general poverty law services. These issues range from income assistance and CPP and EI appeals to utility cut-off reviews and information about and advocacy for tenants' rights. Many of these issues could be dealt with appropriately through community legal aid clinics and community outreach programs.

a) Student Legal Aid Clinics

In its terms of reference, the review was directed to investigate the possibility and usefulness of establishing student legal aid clinics associated with the two law faculties in the province at UNB in Fredericton and at U de M in Moncton. The Review Panel met with the deans of the two faculties as well as with Donna Franey, Executive Director for the Dalhousie student legal aid clinic in Halifax, Nova Scotia.

The Dalhousie model is impressive. Six review counsel and 1.5 community legal workers supervise 48 students in a year. The clinic budget is in the order of \$850,000, drawn from a number of sources. The clinic provides services to clients of Nova Scotia Legal Aid where there is a conflict, typically in criminal and family law. It also provides broad poverty law services; priorities are set by the Board of Trustees each year. The clinic also runs a number of outreach legal information programs staffed by a community support worker and law students. They manage a website and a helpline operated by students. Dalhousie Legal Aid also engages in test case litigation. Current priorities in community legal aid services include tenants' rights, social assistance, food security, and utility board reviews. The clinic course is very popular among students and the clinic tends to have a waiting list of students seeking enrolment. Students work at the clinic in a 13-credit course and are at the clinic essentially full-time for the term.

b) Benefits of Legal Aid Clinics

Legal aid clinics, whether community or law faculty based, bring great potential benefits:

- 1) providing services in currently severely under-serviced areas;
- 2) expanding poverty law and family law services;
- 3) providing advice to clients outside the current service offerings;
- 4) handling the more minor matters;
- 5) providing support to counsel and pre-screening for legal aid staff lawyers.

Student legal aid clinics are more limited than community legal aid clinics in their geographic (and linguistic) scope. However, there are additional benefits student legal aid clinics can bring to a legal aid program:

- 1) student legal education will be enhanced by a strong clinical component;
- 2) participating students will graduate law school with well-developed community service skills and ethics;
- 3) NBLASC will find a fertile recruitment ground in the student clinics;
- 4) graduates will have better awareness about legal aid programs;
- 5) the clinic will build support for the program in the legal community;
- 6) and clinics foster a *pro bono* culture among students.

To realize on this potential, it would be important to look upon the student clinics as an integral part of legal aid services, rather than an extraneous add-on.

The Dalhousie clinic is the product of almost four decades of growth. It became clear in our discussions with both Ms. Franey and the Deans that any student legal aid program in New Brunswick would have to begin on a more modest scale. The Deans received the idea of student clinics with interest, and indicated that a three-, six- or nine-credit course might be appropriate for students in a start-up program. The NBLASC indicated to us that space sharing with a student clinic was possible. The Law Foundation indicated a willingness to consider a funding proposal. The Women's Issues Branch in particular should be invited to consider a funding proposal.

Two important issues that would have to be resolved are the provision of adequate supervision of students (including funding of supervisory counsel) and the Law Society's restrictions on what students are permitted to do in a supervised setting. It may also be necessary for the Law Society to negotiate special insurance rates for supervisory counsel, particularly in light of the fact that the practice would not include real estate transactions.

The overall conclusion of the Review Panel is that establishing student legal aid clinics would be an appropriate first step towards establishing a community legal aid clinic program in New Brunswick.

Recommendation #25

We recommend that NBLASC, the Department of Justice, the Law Society, the Law Foundation, and the law faculties of UNB and U de M enter into negotiations for the purpose of establishing student clinics.

7. Governance of the Legal Aid Program

In the Review Panel's view, there are two important aspects to governance of the legal aid program. First and foremost is the requirement that the organization charged with delivery of the program be independent of the Executive Branch of Government. Second, it is essential that the internal governance structure and practices of NBLASC be clearly established, thoroughly implemented, and periodically reviewed by the Board of Directors.

a) Institutional Independence

It is a reality of all provincial legal aid programs that their funding comes chiefly from government, both federal and, increasingly, provincial. It is also true that in order to run a cost-effective and efficient legal aid program, some use of government's common services is desirable.

At the same time, there is a need for institutional independence of legal aid programs to ensure that the Attorney General, who is ultimately in charge of prosecutions, cannot interfere or have the appearance of being able to interfere in the defense of persons criminally accused. Similarly, the Attorney General is usually adverse in interest to parents where the state is seeking guardianship over their children. Again, institutional independence of the legal aid program is important to preserve both the reality and appearance of justice.

A similar issue regarding institutional independence arises out of the arrangement whereby NBLASC solicitors act for the Family Support Orders Service to establish and enforce maintenance orders for separated or divorced social welfare recipients. The chief beneficiary of this work is the Minister of Family and Community Social Services, who recovers the support payments in the form of reduced social welfare payments.

Recommendation #26

To preserve institutional independence, the NBLASC should discontinue representation of children who are the subject of guardianship applications by the Minister of Family and Community Services. The NBLASC should also discontinue the provision of legal services for Family Support Orders service cases.

It is clear that the provinces are afforded a large margin of appreciation in the design of the funding and governance structure of their legal aid programs (*R. v. Prosper* (1994), 92 C.C.C. (3d) 353 and *British Columbia (Attorney General) v. Christie*, 2007 SCC 21). Institutional bias created by enabling legislation is considered statutorily authorized (2747-3174 *Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 and *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781). While an argument might be made that the rule of law requires certain minimum independence protections, it must also be recognized that the adjudicative function of the NBLASC is limited to eligibility decisions that can be judicially reviewed or circumvented through court ordered counsel. The NBLASC is thus not exercising judicial powers, but

rather administrative decision-making powers, and its institutional independence is thus delineated by statutory design, subject of course to requirements of the duty of fairness.

The independence of counsel in the carriage of a particular file is another matter. A high degree of independence is important to the credibility as well as the efficacy of the scheme. Difficult issues arise when representation is affected by limited legal aid budgets, particularly in large and complex cases such as alleged gang criminality. Therefore, limits on the retainer of expert witnesses, for example, may directly affect the ability of legal aid counsel to represent the client to the degree required by the right to full answer and defense. For this reason, it is important that the responsibility for the NBLASC budget rest with its Board and that the Board be given additional funding for unusual cases. One way this could be done is to give the Board the ability to draw up to 5% of additional budget in a particular year, as is done in some jurisdictions.

Recommendation #27

Budgetary flexibility should be granted to the Commission to be exercised by the Board where the proper defense of a complex case would cause budgetary over-run.

The Review Panel believes the current legislated arrangement of an independent arm's-length Commission to administer legal aid services is appropriate. The current legislation further establishes the independent status of the NBLASC through a governing Board that, though appointed by government, enjoys security of tenure. This appears to be sufficient from a constitutional perspective to guarantee institutional independence.

The current scheme goes further, and in the opinion of the Review Panel, too far, in giving security of tenure to the Executive Director. While this might be viewed as an additional protection, there is a danger that the appointment power of the Minister, together with essential immunity from Board review, create less, rather than more institutional independence. As a governing Board, the Board of the NBLASC must have both the responsibility to appoint the Executive Director and to monitor and evaluate his/her performance. Current legislative provisions essentially prevent or impede both.

Recommendation #28

A legislative change should be enacted making the Executive Director of the NBLASC an employee of the Board, appointed by the Board, and serving at the pleasure of the Board.

The other area where concern for the institutional independence of the NBLASC might arise is in the determination of legal aid program policy and the annual budget. In the opinion of the Review Panel, the NBLASC should be looked upon as a body of experts in legal aid policy, and it should be the responsibility of its Board to recommend legal aid policy and priorities as well as budget. It is the Minister's responsibility to carry them forward to government and ultimately the Legislature. Once determined, legal aid program priorities

and the supporting budget should be communicated to the NBLASC, at which point it should have independence of action in implementation.

Recommendation #29

The NBLASC should be viewed as experts on legal aid policy. Legal aid policy recommendations should flow from the Board to the Government through the Minister.

The Review Panel suggests that a formal Memorandum of Understanding between the NBLASC Board and the Minister of Justice and Consumer Affairs be struck which covers general program priorities and budgets for a three-year period. Although year two and three budget commitments cannot be firm, a MoU nonetheless gives the NBLASC a basis on which to plan. If need arises, amendments to the MoU can be made within the three-year period. The MoU should also set out how the Board and the Minister will work together on a day-to-day basis.

Recommendation #30

There should be a three-year Memorandum of Understanding between the NBLASC Board and the Minister of Justice and Consumer Affairs setting out multi-year policy direction and budgets, as well as formalizing relationship matters such as the flow of information between the Minister and the NBLASC.

The Review Panel frequently heard in consultations that both clients and advocacy groups working with clients saw the NBLASC as part of government. This perception, although at odds with the Legislature's intent in establishing the NBLASC at arm's length, represents a challenge for the NBLASC Board which needs to be addressed.

Recommendation #31

The NBLASC should take steps over time to establish in the public mind its independence from the Executive Branch. The NBLASC should make clear that it operates only in the interests of clients.

The final relationship issue for the NBLASC is its relationship with the Legislature. The Legislature established the NBLASC as an arm's-length organization essentially under the Legislative umbrella, much like the Ombudsman, the Auditor General, and similar organizations. It must make a formal annual report to the Legislature through the Minister and is normally called upon to report to a Legislative Committee in person. This Annual Report should cover matters ranging from governance to expenditure and program results.

b) Internal Governance Structure and Practices

i) Board Governance Practices

The 2003 Report of the Auditor General states:

“6.3 Governance can be defined as the process and structure used to direct the business and affairs of a corporation with the objective of achieving its mission. The process and structure define the division of power between the board and management. They also establish mechanisms for achieving accountability between management, the board of directors, and corporate stakeholders.”

Sound governance structure and practices are the foundation of high performing organizations. Organizations under-perform when Boards fail to pay attention to sound governance principles which clearly delineate how they will operate as a Board, the principles and policies under which employees will operate, and the program results and their expectations for management performance. Taking these steps may not guarantee the success of the organization but will, in combination with a skillful and determined Board, go a long way toward doing so. If the Board does not take these steps, under-performance and systemic failures are virtually guaranteed.

ii) Creating an Effective Board for the NBLASC

The NBLASC’s governing legislation calls for a board of five to seven persons to be appointed by the Lieutenant Governor in Council. It is the Minister’s responsibility to bring recommendations to Cabinet for appointments and reappointments to the Board.

Recommendation #32

The legislation should be amended to provide for expansion of the NBLASC Board from five to seven persons to seven to nine persons.

Although there is no right size for a board, the NBLASC Board would benefit from an enlarged membership of seven to nine people to permit a broader range of skills and interests to be represented. A larger Board of seven to nine directors would also allow for staggering of appointments and better continuity of knowledge.

Recommendation #33

Board members should have a range of skills, including legal training, clinical law experience, financial expertise, advocacy experience, and general business experience.

In establishing the desirable skills for a director of the NBLASC, membership in the legal profession is important. However, it is not necessary for all directors, or indeed even a majority of directors, to have legal training. It would be beneficial to attract directors who have had first-hand experience working with constituencies from which legal aid clients are drawn, either today or in the recent past. At least one director with financial training and experience is highly desirable, as well as directors with clinical law experience and general business experience.

Recommendation #34

The Board and the Minister should agree on the skills profile required of a director. It is skills, knowledge, and experience that are most important in selecting directors and not the particular group they represent.

In technical terms, directors have a duty of care to:

- 1) Act in good faith;
- 2) Act as an ordinary prudent person in similar circumstances would act; and
- 3) Act in a fashion they believe to be in the best interests of the organization.

Steps the NBLASC Board should take include:

- 1) Becoming very familiar with the NBLASC's activities to ensure these activities promote the mission and goals of the organization;
- 2) Becoming fully familiar with the organization's financial status;
- 3) Insist on full and accurate information so they can make informed decisions; and
- 4) Insist on full and unfettered access to any staff of the NBLASC and to any information held by the NBLASC.

The NBLASC Board should tackle governance as an early priority as it is such an important determinant of the efficient and effective workings of an organization. More importantly, clear governance standards will establish for the first time that the Board is in charge and plans to take a strong role in guiding the NBLASC.

Important first steps in establishing sound governance practices include:

- 1) Creating a Mission Statement and a Three-Year Strategic Plan and Budget;
- 2) Implementing a detailed Annual Business Planning and Budget Process;
- 3) Establishing financial policies covering signing authority, spending delegation, reporting requirements, etc.;
- 4) Adopting a Code of Ethics and Conflict of Interest Policy covering directors and employees;
- 5) Establishing an Audit Committee to conduct financial and operational audits as well as to monitor finances;
- 6) Implementing a Hiring, Promotion, and Compensation Policy;
- 7) Establishing a Due Diligence Policy;
- 8) Establishing a Policy on Communication;
- 9) Establishing a Policy on Information Availability; and
- 10) Establishing an Information and Document Management Policy.

(1) Mission Statement and Three-Year Strategic Plan and Budget

The Mission Statement will explain the organization's purpose, its "raison d'être", for employees, clients, and other constituencies.

The Strategic Plan will set out the specific direction of the organization and the key goals it will seek to accomplish over the three-year period. The strategic plan brings consensus to the organization's priorities and sets out for employees the longer-term direction that will guide the delivery of services and the preparation of annual plans and budgets. Finally, a three-year budget with projections of both service levels and expenditure should be included.

(2) Annual Business Plan and Budget

The Annual Business Plan is developed by Management and approved by the Board. An Annual Budget supports the plan. The Business Plan sets out the detailed plan of accomplishments for the organization and is the basis for Board monitoring of NBLASC activity and the key accountability document between the Executive Director and the Board. It should form the basis for Board evaluation of the Executive Director's performance.

(3) Code of Ethics and Conflict of Interest Policy

A highly ethical organization will be a successful organization. The public expects their government organizations to observe high ethical standards and to operate free of conflicts of interest. Boards must establish ethical standards and hold themselves and the Executive Director to account for them. Everyone in the organization should abide by the same set of standards, regardless of rank.

Provision should be made by the Board for employees to report ethical lapses such as misuse of the organization's resources.

The Conflict of Interest Policy should make clear that it is the responsibility of directors to act in the best interests of the NBLASC and not the interests of any other person or organization.

The policy should:

- 1) Require directors and staff to act solely in the interests of the organization without regard for personal interests;
- 2) Include written procedures for determining when a conflict of interest exists; and
- 3) Prescribe a course of action if a conflict of interest exists.

All directors and staff should be required to file an annual disclosure, including family members, of any financial interest in any entity which transacts business with the NBLASC.

(4) The Audit Committee and Audit Program

The Board must establish an Audit Committee comprised of at least three members. Board members with financial or other Audit Committee experience should be included. The Audit Committee should meet at least quarterly, in advance of Board meetings, or more frequently as needed. The Chief Financial Officer of the NBLASC should act as Secretary of the Audit Committee.

A key responsibility of the Audit Committee is to appoint an Auditor to audit the finances

of the Commission annually. The Auditor General is currently appointed by legislation to perform financial and other audits for the Commission. In undertaking non-financial audit activity, the Audit Committee may not be able to rely on the Auditor General due to competing priorities. In this case the Audit Committee should look to private audit firms to do the work.

The Audit Committee is responsible for establishing the terms of engagement with the Auditor, to review the audit report, and to take whatever steps are appropriate based on the Auditors' recommendations.

The Audit Committee should have an operational audit of the NBLASC performed at an early stage as one of the first non-financial areas for review and evaluation.

(5) Hiring, Promotion, and Compensation Policy

The Board should recognize that success in achieving its mission will be largely determined by the employees of the organization. Therefore, it is in the organization's best interests that the very best employees available be hired and retained. Succession planning to meet the organization's future staffing needs should be a key responsibility of the Executive Director.

A policy should be in place that specifies that hiring be based on the demonstrated skills and experience of candidates relative to the needs of the position. Management should also be encouraged to consider the future potential of the people they hire to fulfill leadership needs of the NBLASC. It should be very clear that favoritism or nepotism will not be tolerated.

The policy should require that the performance of every employee is to be evaluated at least annually and discussed between the employee and his/her supervisor. Feedback should be provided on an ongoing, real-time basis, but should also be formalized annually in writing. The Executive Director of the NBLASC should read and sign off on every employee evaluation.

The culture of the organization should reflect an emphasis on performance and through actual practice demonstrate that job performance, not who you know, is the basis for promotion.

(6) Due Diligence Policy

It is the Board's responsibility to become conversant with all aspects of the NBLASC's business. The Board must undertake whatever steps are necessary to gain the requisite knowledge and to ensure that they have all the information needed for decision making.

(7) Communication Policy and the Right to Information

The Board must decide who will speak for the NBLASC. In the long term, the Board should consider establishing a Communications Strategy. The Review Panel heard people speak with a loud voice that Legal Aid Program information was inadequate and the terms of eligibility were unduly complex and poorly communicated.

In addition, the Board must consider that the NBLASC holds a great deal of sensitive information and must establish policy on the public right to information. The NBLASC must deal with two sets of standards in considering access to information. The first includes the

rules for disclosure of client information and the second the standard set by the *Right to Information Act* for access to general information not of solicitor/client nature. (Note: The NBLASC is currently not subject to the *Right to Information Act*, but should nonetheless use the same standards for general information).

The Ontario *Freedom of Information and Privacy Act* provides an exception for Legal Aid Ontario which states that the CEO may refuse to disclose a record that is subject to solicitor/client privilege or that is prepared by or for legal aid counsel for use in giving legal aid advice or for use in litigation. This is a model which might be considered in amended New Brunswick legislation.

The NBLASC should be made subject to the *Right to Information Act* and the Board should hold the Executive Director accountable for timely and accurate responses to requests for information.

(8) Information and Document Retention Policy

Today much of the information of the organization exists in digital form as well as in the traditional paper form. The Commission should adopt a formal policy for information integrity, retention, and destruction of both types of information. In particular, backup procedures for electronic files should be specified and periodic checks should be done to ensure that procedures are being followed.

(9) Conclusion

The success of the NBLASC will be determined by a strong and active Board of Directors. Clear governance structure and practices are essential to the achievement of the organization's mission and goals.

Recommendation #35

NBLASC should make its governance structure and practices a top priority in its work.

8. Legal Aid Funding

The Review Panel was asked to provide an opinion on future legal aid funding.

a) Regional Practices

The Review Panel's firm view, based on New Brunswick's fiscal effort relative to other Atlantic Provinces (65% of the Atlantic Provinces average and 50% of Nova Scotia), is that this province views legal aid, and this means primarily domestic legal aid, as a low priority and spends very little on the service. We heard criticisms of this situation from virtually everyone, from advocates for women who see such low spending as discriminatory towards women and insensitive to one of the gravest issues women face in our society, to people who run our justice system who point to the folly of low funding of legal aid as a huge waste of time and money by making the system very inefficient due to endless delays and due to self-represented persons.

As the experience in other provinces has shown, the amount that can be spent on legal aid can be very large and demand will still go unmet. The potential in this province for legal aid spending is a level that is simply not realistic to contemplate given the fiscal situation of the Province.

b) Policy Considerations

The Review Panel believes, however, that a strong case has been made for a measured increase in legal aid funding. Government must pay attention to this constituency's needs because it is large and diverse.

Recommendation #36

The Review Panel believes there is a strong case for increased legal aid funding.

Those in need of legal aid are not just criminals or accused criminals. They are women facing a fracturing of their family who must resolve issues of custody, support, and property division and in some cases, personal protection from abuse. They are children and parents of children involved in protection or other matters where a just and sensible outcome may determine the shape of their future lives.

They are average folks who are trying to make sense of a government and business environment so complex that even the people who work in those institutions often don't get it right. People need help of a legal or quasi-legal nature on matters as diverse as social welfare benefits, EI benefits, CPP benefits, NB Power decisions, decisions taken by their bank or credit card company and many others. There are cost effective ways to provide this help.

At the same time, governments cannot solve everyone's problems, nor should they try to. However, the Review Panel believes that additional Legal Aid funding is warranted.

c) Four Options for Legal Aid Funding

The Review Panel sees the issue of additional legal aid funding in terms of the following range of options:

1) Maintain The Current Level Of Funding

The implications of this option are a shrinking domestic legal aid service and at least some increase in court ordered council for criminal matters that must be paid for by the Attorney General. The Review Panel does not believe the current funding level is a viable option in view of the critical service gaps identified by the Review Panel and urged by the stakeholders.

2) Add Enough To The Current Level Of Funding To Maintain The Status Quo

This increase would be in the order of 4-5% annually to cover cost increases and a modest increase in service to meet needs created by legislative change. This option will perpetuate all of the weaknesses outlined in this report.

3) Adequately Fund The Current Intended Scope Of The Program

This option would require a \$2-3 million base level increase in budget. This funding would fill the current service gaps where the NBLASC is suppressing service through discretionary decisions in order to meet budgets. Domestic legal aid, in particular, would be enhanced by allowing more clients into the system and allowing an increase in the current limit of \$1000 of service on more difficult cases. However, this would not bring New Brunswick Legal Aid into line with the level of service offered in other provinces.

Recommendation #37

The Review Panel recommends that the first step in improved legal aid funding be the addition of sufficient resources to adequately fund the current system. This means an increase of \$2-3 million in base funding in year one.

4) Substantive Expansion In The Level Of Funding And Service

The funds required for this degree of expansion depends on the areas chosen for service enhancement, but is certainly in the \$4-6 million range.

Recommendation #38

The Review Panel further recommends that a commitment be made for Legal Aid program expansion to chosen priorities from among the options outlined. The level of this commitment would be \$4-6 million and reasonably be spread over a two-to three-year period.

In the Review Panel's view, the options in order of priority include:

- 1) A base family law program;
- 2) A base poverty law program;
- 3) University Law School Legal Aid Clinics; and
- 4) Province-wide Legal Aid Clinics. (It should be noted that a general clinical system or a University Legal Aid Clinic and a poverty law program are not entirely separate issues as the clinics are an excellent means of delivering poverty law services.)

Another issue which we address elsewhere in the report and which has a budgetary impact is the issue of tariffs for private practice legal aid cases. We do believe the current low rates are problematic. The system needs private practice criminal aid lawyers to work effectively. If the rates are so low that the NBLASC cannot attract the better practitioners, then the service will suffer. In addition, we need a robust private practice criminal bar in this Province. If we do not have one, where will the future staff criminal lawyers come from?

Recommendation #39

A staged increase in Legal Aid tariffs for payment of private lawyers should be implemented within the scope of additional funding granted for the program.

The tariff for private practice lawyers who work in the domestic law area are even lower than the criminal side tariff. The Review Panel believes the first step in adjusting the tariff upward should be to raise the domestic tariff to the level of the criminal tariff. This will address the pay equity issue which exists with a much lower compensation for female dominated family law practitioners. The second step should be an increase of 20% in the tariff of fees across the board. This suggestion will cost in the order of \$300,000 at current budgetary levels.

Although we have not positioned the tariffs issue in relation to the other program priorities, we believe it must be addressed very soon.

9. Atlantic Legal Aid: Opportunities for Savings and Efficiencies

The Terms of Reference given to the Review Panel included an examination of NBLASC Administrative Expenses. In particular, the question was raised as to whether the NBLASC has been economical in the acquisition of services and whether it has generally spent public money in its trust in a prudent manner.

a) Atlantic Legal Aid

The Review Panel believes that a program like legal aid services is a viable candidate to be an Atlantic or Maritime area of cooperation. The program, policy, and service parameters are similar in all of the provinces with the only substantive difference being the level of funding commitment. The long-term direction for legal aid as seen by the Review Panel is generally consistent with the position taken by other provinces at the moment. In terms of potential efficiencies in the delivery of services, the Review Panel believes Atlantic or Maritime cooperation offers potential savings.

Recommendation #40

The provincial government should consider approaching the other Atlantic or Maritime Provinces on a joint delivery model for legal aid services.

b) NBLASC Overhead Expenses

The Review Panel looked at staffing levels in the administrative area and general overhead expenses contained in the NBLASC's latest budget. In the Review Panel's opinion, it does not appear that either staffing or expenses in this area are excessive.

The NBLASC must establish a base level of common services in support of the legal aid delivery system. This base level of common administrative services should be sufficient to support a much larger legal aid program with minimal staffing increases. The Board should seek to ensure that any budgetary increases it receives go to direct service rather than additional overhead.

The Review Panel considers the NBLASC to be a small organization with a modestly complex, though not a broad mandate. The management challenges associated with the recent conversion from a 100% certificate model to a mixed model with both staff lawyers and certificates for private lawyers is an additional complexity. Nonetheless, the Review Panel

does not believe the program size and complexity warrants a full-time Executive Director. An organization of this type with a second tier of senior management does not in our view require a full-time CEO if responsibilities are properly delegated.

We, therefore, recommend that additional duties be assigned to the Executive Director. This is a highly paid position with responsibilities well below those of other CEOs in the New Brunswick Government.

The NBLASC purchases a number of administrative services from the Department of Justice. These include Human Resources Services, facility management, and Information Technology Services, including system development. For these services, the NBLASC is billed \$45 per hour by the Department of Justice. The NBLASC also acquires facility management services for office needs in Fredericton and around the Province from the Department of Supply and Services for no cost.

The NBLASC has three staff members, including a Chief Financial Officer, who provide their financial administrative service. Payroll services are provided by an external service provider under contract.

It is our conclusion that these services are being acquired in an economical fashion and if possible the NBLASC should continue these arrangements.

NBLASC facilities at the Fredericton Head Office were examined. It is our view that they are extremely modest. In fact, they are relatively poor facilities from an ergonomic and efficiency point of view. They fall well below the standard of other New Brunswick Government head office facilities.

Since the NBLASC is bound by the records retention policy of the Law Society of New Brunswick, which requires long-term retention of case records, the NBLASC will soon face the requirement and costs of a secure, fireproof records facility. Current use of a basement storage facility in their Head Office puts records at risk of water and fire damage and is unacceptable.

In conclusion, the NBLASC has been sufficiently prudent to this point in their acquisition of common services and in the overhead expenses they have incurred.

Appendix A

Melinda Buckley, "The Legal Aid Crisis: Time For Action"
(Canadian Bar Association, 2000).*

C. Legal Aid and International Obligations

A third source of principled support for legal aid is derived from Canada's international human rights obligations concerning the rights to a fair hearing, to equal treatment of all persons before courts and tribunals and the entitlement of all persons to equal protection of the law. Canada is a party to a number of international conventions or treaties that address the right to publicly-funded counsel for accused persons. These treaties are only binding at international law and are not incorporated in Canada's domestic law. However, Canadian courts can and do look to international law when interpreting Canadian legislation or *Charter* rights. In this way, international law has an important influence in Canadian jurisprudence.

In international law, the right to legal counsel and legal aid is one aspect of the right to a fair trial in criminal matters. Article 14.3(d) of the *International Covenant on Civil and Political Rights* provides:

14(3) In the determination of any criminal charge against him everyone shall be entitled to the following minimum guarantees, in full equality:

(d) To be tried in his own presence, and to defend himself or through legal assistance of his own choosing; to be informed if he does not have legal assistance, of this right; and to have legal assistance assigned to him in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

The rationale for these rights is that the complexity of legal systems demands that for a trial to be fair, every defendant ought to have the services of counsel who is knowledgeable about the law and the workings of the justice system.

Related to this is the right of the accused to defend oneself in person or through a competent legal practitioner of one's own choosing. The right to counsel can safely be said to be one of the most crucial elements of a fair trial. The United Nations Human Rights Committee has also held that the obligation to provide legal assistance occurs not only at the trial stage, but in preliminary stages and on appeal and for any proceedings concerning the constitutionality of procedures taken in the case. Further, it implies that the counsel shall adequately represent the accused.

This element of the right to counsel is so fundamental to the fairness of criminal trials that even where an accused person has been summoned and fails to appear at the trial, the deprivation of his or her right to legal counsel is not justified.

* Footnotes omitted.

The issue of whether a State is required to provide free legal advice in all circumstances was considered in a complaint before the UN Human Rights Committee. The Committee concluded that in decisions regarding legal aid counsel, a tribunal is expected to take into account the competence of counsel and the complexity of the matter. The Committee has also commented that counsel should receive adequate remuneration for providing legal assistance under a legal aid plan.

Canada has been subject to a complaint under Article 14(3)(d) of the *International Covenant on Civil and Political Rights*. In *J.S. v. Canada*, J.S. applied for a legal aid certificate in Ontario but was denied assistance because she was considered not to be ordinarily resident in the province. While the legal aid authority in British Columbia had offered to pay her counsel, the lawyer believed he must refuse that payment because he was not authorized to practice law in British Columbia. The Committee found that there were no grounds for establishing a violation since she was in fact represented before the court and since the legal aid authority of British Columbia had offered to pay her legal costs.

Canadian courts have considered this international jurisprudence in establishing the right to counsel in domestic law. For example, the Alberta Court of Appeal reviewed international law in finding that the right to counsel was a fundamental human right, though the contours of that right remain somewhat ill-defined:

The mid-20th century saw the concept of the right to counsel demanded as a social or human right. Expressed as a human right it incorporated an obligation on the state not only to allow counsel but also to pay his cost. As a human right the right to counsel finds tempered expression in the International Covenant of Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Canada is a signatory to each [sic].

In both treaties the obligation of the state to provide paid counsel is, in terms, less than absolute. Neither treaty purports to entrench an entitlement to paid counsel on appeal while both treaties extend a positive right to legal assistance at trial only where the interests of justice so require, implying a case-by-case consideration.

Canada is party to the Organization of American States and is thereby bound to accept the Organization's *American Declaration of Rights and Duties of Man*. Article XVIII of that document addresses the right to a fair trial as follows:

Article XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental rights.

Canada is also bound by the *Charter of the Organization of American States* (as amended). The OAS *Charter* contains a much broader provision on legal aid:

44 The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of all principles and mechanisms: ...

i) Adequate provisions for all persons to have due legal aid to secure their rights.

Unlike the other international obligations discussed in this section, the *OAS Charter* requirements to provide legal aid appear to be unrestricted in the sense that they are not limited to persons without sufficient means nor to situations in which the interests of justice require legal representation.

Canada is a signatory, but has not yet ratified the *American Convention on Human Rights*, which also addresses the right to a fair trial in Article 8. Section 2 stipulates that:

8.2 Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ...

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate privately with his counsel;

e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law.

The *European Convention on Human Rights* has been influential in Canadian jurisprudence despite the fact that Canada cannot be a party to this regional instrument. Jurisprudence under this regional treaty is often cited by the United Nations Human Rights Committee. The *European Convention* addresses the question of the right to state-funded counsel in Article 6.3(c), which guarantees a criminal accused the right “to legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”

The European Court has identified a number of criteria to be considered when determining whether the interests of justice require granting legal aid to an accused.^{4.3} These factors are similar to ones developed in Canadian jurisprudence and include: (i) the complexity of the case; (ii) the capacity of the particular accused to present the case himself or herself; and (iii) the seriousness of the offence and the possible penalty that could be imposed. An accused who is granted legal aid is not entitled to choice of counsel and the European Commission has recognized that a state may limit the number of consultations with the appointed lawyer to limit costs.

Like the *European Convention*, the United Nation’s General Assembly’s *Basic Principles on the Role of Lawyers* is not binding on Canada but provides a further indication of how the international community views the obligation to provide legal aid. These principles stipulate the following under the heading “access to lawyers and legal services”:

1 All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

3 Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor, and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

International law also contains strong equality rights provisions that have a bearing on the right to counsel. To date, there has been no finding of a right to legal aid in civil cases under international human rights treaties in international law, despite the recognition of the importance of these rights and the inequity in confining a right to legal aid to criminal cases. Nevertheless, international bodies such as the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights have noted the practical importance of providing legal assistance to give effect to international obligations to provide equal protection of the law. For example, both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have noted that Canada should enhance equal access to legal proceedings in order to effectively carry out its international obligations. In addition, under the European *Convention*, an argument for legal aid in civil cases may be founded under Article 6(1), right to a fair and public hearing, which has also been held to establish right of access to a court.

International law on the right to counsel in civil cases is underdeveloped, as it is within Canadian law. How these international provisions on the right to equality and the right to access to legal representation in civil proceedings shall apply to civil legal aid is prime for future exploration.