

ACCESS TO JUSTICE

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The Manitoba Law Reform Commission

The Manitoba Law Reform Commission is an independent statutory body created by the *Law Reform Commission Act* in 1970. The Commission is funded by grants from the Government of Manitoba and the Manitoba Law Foundation.

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The Commission currently consists of four Commissioners: Cameron Harvey, Q.C. (President); The Hon. Gerald Jewers; The Hon. Mr. Justice Perry Schulman; and John C. Irvine.

The Commission's staff consists of Catherine Skinner, legal counsel, and Debra Floyd, administrator.

The Commission's mandate is to make recommendations for the modernization, improvement and reform of the law. Its work involves in-depth legal research and analysis, consultation with interested parties, and the publication of Reports, Consultation Papers and Issue Papers.

The Commission's Reports consist of extensive legal research, analysis and recommendations on a variety of law reform issues, and are available both in print and electronically on the Commission's website. The Commission often circulates Consultation Papers before completing a full Report on any given subject.

In addition, the Commission publishes Issue Papers which are typically shorter than a full Report and are intended to offer a brief analysis of a current discrete legal issue. While the Commission formerly submitted these types of informal reports directly to the Minister of Justice and Attorney General, it has concluded that a broader audience may be interested in its work on discrete legal issues and has therefore begun to circulate its Issue Papers more widely. One of the purposes of an Issue Paper is to gauge the level of public interest in a particular law reform topic, and the questions discussed in an Issue Paper will sometimes, but not always, lead to a full Report. Both Consultation Papers and Issue Papers are only available electronically on the Commission's website at <http://www.gov.mb.ca/justice/mlrc>.

The Commission welcomes comments on all of its publications.

1. INTRODUCTION

The Manitoba Law Reform Commission is publishing this issue paper to contribute to the ongoing discussion about a significant problem in our legal system: access to justice. The Commission would welcome readers' comments on the issues raised in this paper, or other matters pertaining to access to justice. Please email the Commission at lawreform@gov.mb.ca with your feedback.

Access to the legal system is seen to be unaffordable for too many people. A number of legal bodies have task forces devoted to the problem: The Canadian Bar Association, The Federation of Law Societies, The Canadian Superior Courts Judges' Association, The Canadian Judicial Council, and others. In 2011, the Manitoba Bar Association conducted Town Hall Meetings across the province on the subject, and issued a report on its findings.¹ Similar public meetings have been held in other provinces. The Law Society of Manitoba has recently established an Access to Justice Stakeholders Committee including members of the bench and bar and representatives of the University of Manitoba's Faculty of Law. The University of Winnipeg and the University of Manitoba have jointly established a Legal Help Centre, supported by the bar, to provide legal assistance to those not eligible for legal aid but not able to afford a lawyer. The Law Society of Manitoba is the sponsor of the Family Law Access Centre, which serves as a brokerage in family law matters for middle income residents of Manitoba.²

We begin with the premise that all have a right to access justice in our society, which can be exercised either by self-representation or through a lawyer. While some prefer self-representation, others represent themselves only because they cannot afford a lawyer.

In this paper, the Commission focuses on the costs of litigation, as opposed to other legal services such as property transactions and wills and estates, which are generally affordable for most having need of them. By contrast, court proceedings are very costly.

The Manitoba Law Reform Commission's *Class Proceedings* report³ referred to the 1996 Manitoba Civil Justice Review Task Force report:

One of the recurring themes...was that it takes too long and costs too much to litigate disputes in court.⁴

By all accounts the same is true today.

Legal Aid Manitoba gives reasonable and free legal assistance to the most needy in our society, but its coverage is limited and the income eligibility levels are outdated, and very low.

¹ The Manitoba Bar Association, *Town Hall Meetings on Access to Justice Report and Summary* (2011), online: <http://www.cba.org/Manitoba/main/PDF>.

² The Law Society of Manitoba, online: <http://www.lawsociety.mb.ca/for-the-public/family-law-access-centre>.

³ Manitoba Law Reform Commission, *Class Proceedings* (Report No. 100, 1999).

⁴ *Manitoba Civil Justice Review Task Force Report*, (September 1996) at 7.

People in the middle-income group, not eligible for legal aid but not able to afford a lawyer, are also significantly affected by limitations on access to justice.⁵

Fortunately the average person will never become involved in a court case, unlike health care where one can count on many visits to the doctor and dentist.

But for those who do encounter the court system, the cost can be most burdensome and even ruinous.

2. THE DIMENSIONS OF THE PROBLEM

What are the dimensions of the problem? One indication would be the number of self-represented parties in the system. It is difficult to know the number of people who are not in the system because they cannot afford to be, but the Legal Help Centre is serving such people and may be a source of information in this regard once it is more established. Another would be an analysis of the costs of a typical lawsuit as compared to the average middle class income and assets.

Recent reports such as the Manitoba Bar Association's *Town Hall Meeting on Access to Justice Report and Summary*⁶ and the 2011 *Report of the Public Commission on Legal Aid in British Columbia*⁷ have proceeded on the premise that there are far too many self-represented parties in the courts, based on the submissions they have received. There is some statistical support for this position. The Chief Justice of Canada, a strong voice for reform in this area, has made several speeches citing the statistic that 44% of litigants in some courts are not represented,⁸ data compiled by the Ontario Attorney General shows that 43.2% of applicants in family court are self-represented,⁹ Supreme Court of Canada statistics indicate that in the past 10 years self represented litigants have filed 1308 applications for leave to appeal, with only three granted, accounting for 25% of all such applications.¹⁰ The Commission is not aware of any recent comprehensive Manitoba statistics. Justice Canada conducted a study in Brandon in 2003, following 522 criminal cases over a three month period.¹¹ It showed that overall approximately 1 to 2 accused out of 10 were not represented, but that virtually all those charged with serious

⁵ This middle-income group is the focus of the Middle Income Access to Civil Justice Initiative sponsored by the University of Toronto, Faculty of Law. The Middle Income Access to Civil Justice Steering Committee published a thorough literature review in its January 2011 *Background Paper*, online: http://www.law.utoronto.ca/documents/conferences2/AccessToJustice_LiteratureReview.pdf.

⁶ *Supra* note 1.

⁷ Leonard T. Doust QC, *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia* (2011), online: <http://www.publiccommission.org/media/PDF/pacla_report_03_08_11.pdf>.

⁸ See for example Rt. Hon. Beverley McLachlin, P.C., *The Challenges We Face*, presented at the Empire Club of Canada, Toronto, March 8, 2007, online: <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp>.

⁹ Ontario Ministry of the Attorney General, *Representation at Time of Filing for FLA/CLRA and Divorce Matters filed with the Ontario Court of Justice Family Court and the Family Court Branch of the Superior Court of Justice* (2004), cited in A. Langan, "Threatening the Balance of the Scale of Justice: Self-represented Litigants in the Family Courts of Ontario" (2005), 30 *Queen's Law Journal* 825 at 826-7.

¹⁰ Statistics cited in Emily White, "By Your Leave", *The National Magazine* (Oct-Nov, 2011) at 20.

¹¹ Justice Canada, *The National Court Site Study of Self-represented Accused-Court Site Study of Adult Self-represented Accused in the Provincial Criminal Courts* (2003), online: <http://justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la3-rr03_aj3/p4.html> .

crimes were represented. A complete empirical study of the problem of access to justice in Manitoba would assist in tailoring appropriate solutions.

As to costs, the 2010 Legal Fees Survey, conducted by Canadian Lawyer's Magazine indicates an average national hourly rate for senior counsel of \$317, and an average hourly rate for senior counsel in western Canada of \$327.¹² The same survey indicates an average national cost of a 2-day civil action trial of \$26,444. These costs are likely beyond the reach of most.

There are devices to manage costs including legal insurance, contingency agreements, 3rd party financing, and class actions. But even so there would be a significant residue of cases where the parties would have to foot the bill themselves.

3. POSSIBLE SOLUTIONS

The problem of access to justice has been studied by many legal and policy organizations, and a number of provincial governments, in recent years. These various bodies have examined a variety of possible approaches to the problem. For example, in its 2011 *Town Hall Meetings on Access to Justice Report and Summary*, the Manitoba Bar Association recommended, among other things, increased access to legal information and interpretation services, better access to community based advocacy and legal support services, and methods to provide lower cost legal services to those ineligible for legal aid including legal service brokerages and public legal insurance schemes. Others have explored the possibility of unbundling legal services, or limited scope retainers, as a possible means of improving access to justice.¹³ Efforts to modernize and streamline rules of procedure may also make litigation more accessible to the self-represented, and reduce costs overall. The Court of Queen's Bench of Manitoba is taking new initiatives to address access to justice issues.¹⁴

In this paper, the Commission will focus on four issues: legal aid; legal insurance; pro bono activities; and, court fee waiver policies.

A. Legal Aid

Legal Aid Manitoba provides free legal assistance and representation to those who qualify in matters related to family law, criminal charges, social assistance, workers compensation, disability benefits, test cases in consumer, poverty, environmental, aboriginal and Charter of Rights challenges. It does not handle real estate, wills and estates, adoptions,

¹² R. Todd "The Going Rate" *Canadian Lawyers Magazine* (June 2010), online: <<http://www.canadianlawyermag.com>. In this report, "senior counsel" refers to lawyers called to the bar in 2000 or earlier.

¹³ See for example, Saskatchewan Ministry of Justice and Attorney General Self-represented Litigants Access to Justice Committee, *Final Report* (November 2007) at 16-17.

¹⁴ The Honourable Chief Justice Glenn Joyal of the Court of Queen's Bench of Manitoba recently addressed the Manitoba Bar Association Council on the subject of the Court's initiatives in respect of access to justice. See Manitoba Bar Association "MBA Council Highlights" *Headnotes and Footnotes* (volume XLIV, No. 3, March 2012) at 9.

corporate and commercial matters, or civil litigation, and its coverage of most non-criminal matters is limited.¹⁵

The guidelines for eligibility are from \$14,000.00 annual income for one person to \$37,000.00 for a family of 6 or more, there is a further range of \$16,000.00 to \$39,000.00 for those who exceed the guidelines but can afford to repay the legal aid fees monthly in a reasonable period of time.¹⁶

Most agree that there is a crisis in legal aid provision, not just in Manitoba but throughout Canada. The limited range of matters covered and the low income eligibility thresholds limit the role of the legal aid system in ensuring access to justice.

The Manitoba Bar Association's Town Hall Meetings Report and Summary, and similar reports in other jurisdictions, call for substantially increased financial support from government. That would go a long way towards a solution and is a natural and logical recommendation. But in the present economic climate is it affordable? In 2010 Legal Aid Manitoba served over 76,000 persons¹⁷ and will certainly experience increased pressure with the enactment of the federal omnibus crime legislation, Bill C-10. Some figures indicate that the government provided approximately \$25 million in funding to Legal Aid Manitoba last year, with about 20% of that coming from the federal government.¹⁸ Nevertheless self-represented persons are an increased cost due to delays and long trials, and this is an element to be factored in.

The Commission agrees that legal aid is an essential public service, a sentiment recently expressed in the *Report of the Public Commission on Legal Aid in British Columbia*.¹⁹ Both the B.C. report, and the *Report of the Legal Aid Review 2008* in Ontario²⁰ make a number of suggestions for improvement of legal aid coverage and services, including: expanded service in many family law and poverty law matters; modernization and expansion of financial eligibility criteria; establishment of innovative service delivery and regional legal aid centres; increase in long-term, stable funding; a regular tariff review mechanism; the establishment of information and summary advice services; and, the establishment of more multi-disciplinary clinics.

While it is clear that there is no one single solution to the crisis in legal aid, the Commission believes it is worthwhile to examine any and all possibilities and to adopt an integrative and innovative approach wherever possible.

¹⁵ In its *2010-2011 Annual Report*, Legal Aid Manitoba reported 19,504 criminal legal matters opened, versus 5,332 family law matters and 137 other civil matters, Legal Aid Manitoba, *2010-2011 Annual Report*, online: http://www.legalaid.mb.ca/pdf/2011_annual_report.pdf.

¹⁶ Legal Aid Manitoba, online: <http://www.legalaid.mb.ca/pdf/brochure_EN_v4_2011.pdf>.

¹⁷ Legal Aid Manitoba, *2010-2011 Annual Report*, *supra* note 15.

¹⁸ Figures cited in Mia Rabson, "Swan calls on Ottawa for more legal aid cash", *Winnipeg Free Press* (December 2, 2011), online: <<http://www.winnipegfreepress.com/local/swan-calls-on-ottawa-for-more-legal-aid-cash-134896763.html>>.

¹⁹ *Supra* note 7 at 9.

²⁰ Michael Trebilcock, *Report of the Legal Aid Review 2008*, online: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf.

B. Legal Insurance

Another promising area for reform is the promotion of legal insurance. This is widely used in Europe, where it is often sold as an add-on to home and car insurance. 90% of Swedish households,²¹ 75% of French and Germans,²² and 59% of U.K. residents²³ are covered by some form of legal insurance. In 2009, the European market was estimated at 7 billion euros.²⁴ DAS Canada, a leader in this field, has recently begun marketing legal insurance in Canada outside of Quebec, and La Capitale General Insurance has been selling the product in Quebec since 1992. Provision of legal insurance coverage in Quebec is co-ordinated by the profession's governing body, Le Barreau du Québec.

Naturally there are limitations on the effectiveness of legal insurance including deductibles, waiting periods, and the requirement that civil suits be assessed by the insurer as having at least a 51% chance of succeeding. These plans also do not cover criminal and family law matters, where legal assistance is most needed. It may also be a hard sell because many people believe, correctly, that they will never be involved in court proceedings. Professor Michael Trebilcock, author of Ontario's *Report of the Legal Aid Task Review 2008*²⁵ identified an additional problem which is that the majority of legal insurance customers may be high-risk for legal problems, making it difficult for legal insurance providers to succeed in the long term. The Law Society of England and Wales has expressed some concern about the way in which legal insurance plans are provided in that jurisdiction, and have cautioned about the need for strong consumer protection measures in this regard.²⁶

Despite these limitations, the Commission suggests that legal insurance products may represent a cost-effective way of obtaining access to justice for many who could otherwise not afford it.

The DAS Canada policy gives unlimited access to a legal advice helpline and covers costs to pursue or defend a claim (with a \$100,000.00 limit) including personal injury, employment disputes, neighbor disputes and taxation matters.²⁷ DAS Canada says this policy covers 90% of consumer matters in Ontario.²⁸ The starting annual premium is \$360.00. There are important exclusions: defamation, family law and criminal defences.

Ideally the government would provide legal insurance or "legal care", similar to medicare, as a right to all citizens. In 2007, Phillip Slayton, writing in *Canadian Lawyer*, put this question:

²¹ Statistic cited in Luis Millan, "Legal Insurance" *The Lawyers Weekly* (May 2009), online: <http://www.lawyersweekly.ca/index.php?section=article&articleid=908>.

²² *Ibid.*

²³ The Law Society of England and Wales, *Access to Justice Review: Final Report* (November 2010), online: <http://www.lawsociety.org.uk/new/documents/2010/access-to-justice-review.pdf> at 25.

²⁴ Statistic cited in Michael Rappaport, "Read the Fine Print", *The National Magazine* (Oct-Nov, 2010) at 32.
²⁵ *Supra* note 20.

²⁶ *Supra* note 23 at 25.

²⁷ Jeff Gray and Tara Perkins, "Go ahead, sue me - I have insurance" *The Globe and Mail* (July 13, 2011), online: <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/go-ahead-sue-me---i-have-insurance/article2095020/>.

²⁸ *Supra* note 24.

“... do we think that the best legal services which are available are something to which people are entitled, by virtue of living in a civilized community? If we do, the answer is the creation of a publicly funded universal legal insurance program, the counterpart of medicare”.²⁹

Professors Michael Trebilcock and Sujit Choudry recently expressed the same view in *The Lawyers Weekly*.³⁰

Short of such a fund the government might market legal insurance through Manitoba Public Insurance which, as a captive insurer, would be ideally positioned to deliver such a product as an add-on to auto insurance - a common way to deliver legal insurance. Legal insurance plans might also form part of employment benefits packages offered by employers.

Or the bar could take steps to promote the sale of legal insurance through private insurers, as they did in Quebec, more than doubling the number of families with legal insurance plans, from 100,000 to 225,000 between 2002 and 2007.³¹

C. Pro Bono Activities

In the earliest stages of legal aid The Law Society sponsored a legal aid system, not dissimilar to Legal Aid Manitoba, composed of volunteer lawyers who worked without fee. Now Legal Aid Manitoba has stepped into the breach, and the lawyers get paid, albeit at reduced rates. A similar system could be set up for those not covered by Legal Aid Manitoba. The clients would pay an affordable fee and the lawyers would charge reduced rates. The bar has a long tradition of public and pro bono service and currently many are volunteering at the Legal Help Centre and the Public Interest Law Centre. There is reason to be optimistic that they would support such a measure.

Innovative ideas for encouraging and enhancing pro bono activities are being discussed across the country,³² and the Commission believes that many such ideas could be usefully explored.

Increased pro bono work by lawyers would be a cost to them, but is probably manageable with a sufficient pool of volunteers so that the burden on the individual lawyer would be acceptable. However, we should not expect too much of members of the bar who might reasonably take the position that other professions are not obliged to work pro bono.

²⁹ Philip Slayton, “Medicare for the legal system”, *Canadian Lawyer* (October 2007).

³⁰ Sujit Choudry and Michael Trebilcock, “Public Insurance: a solution to Canada’s legal crisis”, *The Lawyers Weekly* (June 10, 2011).

³¹ *Supra* note 24 at 35.

³² Just one example is a recent idea proposed by the Executive Director of the Access Pro Bono Society BC. This “pay or play” approach would require a lawyer to pay a \$300 access to justice contribution as part of his or her annual professional membership fees. That amount is earmarked for the province’s legal aid and public interest legal organizations. If the lawyer provides one or more hours of pro bono legal service during the year, the fee is waived. See Jamie Maclaren “A Pay or Play Proposition for Access to Justice” (January 17, 2012), online: <http://www.slaw.ca/2012/01/17/a-pay-or-play-proposition-for-access-to-justice/comment-page-1/#comment-783119>.

D. Fee Waiver Policies

Several Canadian provinces have statutory provisions allowing courts and administrative tribunals to waive the court fees associated with litigation for people who are unable to afford them.³³ These statutory mechanisms have their historical origins in the doctrine of actions *in forma pauperis*, by which fees payable to argue a legal matter before the Crown were waived to assist persons who would not be heard without such assistance.³⁴

In *Polewsky v. Home Hardware Stores Ltd.*,³⁵ the Ontario Divisional Court found that the absence of a statutory mechanism for waiving court fees for indigent persons was a breach of the common law constitutional right of access to the court. The Federal Court found in *Pearson v. Canada* that, “the absence of *forma pauperis* rule of procedure breaches the rule of law, a fixed feature of the common law.”³⁶

Saskatchewan’s Law Reform Commission has recently circulated a Consultation Paper entitled *Access to Justice: Needy Person Certificates and Waiver of Fees*.³⁷ The Commission recommends a number of measures to enhance that province’s fee waiver policy, including divorcing it from the Legal Aid Commission, reconsidering the means test for fee waivers, and extending the policy to the Provincial Court and administrative tribunals.

Manitoba currently has no general statutory fee waiver policy which would permit a court registrar or judge to waive fees in cases of need.³⁸ Section 9 of the *Law Fees Act* at one time provided that court fees were waived for any person who had obtained a certificate to take, defend or be a party to a proceeding *in forma pauperis*.³⁹ This section was repealed in 1997.⁴⁰

In *Lindsay v. Manitoba*, the Manitoba Court of Appeal reviewed the regulatory history of actions *in forma pauperis* in this province:

Proceedings in *forma pauperis* were at one time regulated by the Queen’s Bench Rules. The most recent version of the relevant rules was to be found in Chapter XXIX of M.R. 115/86. These rules provided that, to proceed in *forma pauperis*, a person needed a certificate obtained from a committee set up by the Law Society of Manitoba. This practice had in fact been superseded by the Legal Aid scheme in force in the province since the early seventies. Proceedings in *forma pauperis* were formally abolished when the new Queen’s Bench Rules replaced the old in 1989.⁴¹

³³ See the British Columbia *Supreme Court Civil Rules*, B.C.reg. 168/2009, rule 20-5; Saskatchewan’s *Queen’s Bench Rules*, rules 569-582; Ontario’s *Administration of Justice Act*, R.S.O. 1990, c. A.6, s.4.3.

³⁴ *Spatling v. Canada (Solicitor General)*, 2003 FCT 443 at para. 2.

³⁵ (2003) 66 O.R. (3d) 600; 229 D.L.R. (4th) 308 at para. 77.

³⁶ (2000) 195 F.T.R. 31 at para. 15, leave to appeal to Supreme Court of Canada denied [2002] SCLA No. 498.

³⁷ Law Reform Commission of Saskatchewan, *Access to Justice: Needy Person Certificates and Waiver of Fees* (December 2011).

³⁸ There are some isolated instances of fee waiver mechanisms as, for example, in section 9(13) of the *Employment and Income Assistance Act*, C.C.S.M. c. E 98 which waives the fees payable in respect of an appeal to the Manitoba Court of Appeal from a decision of the Social Security Appeal Board.

³⁹ *Law Fees Act*, R.S.M. 1987 c. L. 80, s. 9.

⁴⁰ *Statute Law Amendment Act 1997*, S.M. 1997, s. 52, s. 10.

⁴¹ (1999) 85 A.C.W.S. (3d) 531 at para. 5.

The Commission supports the idea of re-introducing a general fee waiver policy in Manitoba, to permit broader access to the institutions of justice in this province. The view that actions *in forma pauperis* were superseded by the legal aid system in the early 1970s is clearly no longer applicable. The scope of Legal Aid's coverage and mandate has shrunk significantly since then, and it can no longer be viewed as a suitable alternative to a more general fee waiver policy. A wide-spread, meaningful court and administrative tribunal fee waiver policy may be another piece in the search for solutions to problems of restricted access to justice.

4. CONCLUSION

There is an absence of statistical data in Manitoba with respect to the number of self-represented parties in the legal system, and the number of those who are outside the system because of cost. An up-to-date empirical study of the legal needs of Manitoba's citizens would be an important first step in tailoring solutions to the problem of access to justice.

It is clear that the costs of litigation are well beyond the means of most, unless their cases lend themselves to contingency agreements or class proceedings. Legal Aid Manitoba does not cover civil lawsuits except for certain specific categories such as family law and social assistance, and even then only for persons of very limited means and in very narrow circumstances.

The Commission does not wish to leave the impression that access to justice is only about cost. The Manitoba Bar Town Hall Meetings Report and Summary identified many other factors such as shortages of family and rural lawyers, countless remands and delays in criminal proceedings, complex rules, and many other issues too numerous to mention. But cost certainly dominates.

The court system is of little or no practical use to a significant number of our citizens and this should be fixed. The issues are: for government, whether it is prepared to increase its investment in legal aid and encourage other reform initiatives; for members of the bar, whether they are prepared to step up their pro bono activities in the absence of adequate government funding; for the public, whether they are prepared to protect themselves by insurance; for the court system itself, whether it can become better adapted to the self-represented.

This paper has outlined only a few possible approaches to the issue of limited access to justice in Manitoba, and there are many other organizations working on this problem. The Law Society of Manitoba has taken an initiative by creating the Access to Justice Stakeholders Committee, consisting of representatives from the courts, Legal Aid, Manitoba Justice, Justice Canada, The Law Foundation, the Faculty of Law and others, and other viable solutions are expected to emerge from this. The Commission will review the Committee's report and may have further comments.

This issue paper is published pursuant to Section 7 of the *Law Reform Commission Act*.