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B. C. CIVIL LIBERTIES ASSOCIATION

Legal Aid

The attached is the main part of the report of a Committee established by the Board of Directors to consider and make recommendations on the subject of Legal Aid. It is now being circulated at the General Meeting on the 27th of May for discussion. The Committee's recommendations in the report are not necessarily the views of the Board of Directors.

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CARDING DATE 25.7.63 P.V

B. C. CIVIL LIBERTIES ASSOCIATION

Report on Legal Aid

Section B

Criminal Legal Aid

The Present Position:

In British Columbia, there is no government operated or government sponsored system of criminal legal aid, neither is there any system recognized by the common law or by statute. There is, however, a legal aid scheme operated by the legal profession. For present purposes, it will be sufficient to describe the scheme operating in the City of Vancouver, where the largest number of criminal cases is tried. For the remainder of the province, there is a system which is similar in principle to the one operated in Vancouver, although different in detail.

The Vancouver scheme is established under the auspices of the Vancouver Bar Association. Any person charged with an indictable offense is eligible for legal aid if

a) He does not have the means to employ counsel on his own,
b) He has no previous convictions, or five years have elapsed since the termination of his last imprisonment, and
c) He wishes to plead not guilty. (This last requirement is not formally stated, but in practice counsel are not generally made available to those pleading guilty.)

Processing of applications is generally done by members of the Salvation Army in attendance at magistrates' courts. When an application for legal aid is accepted by the Salvation Army, particulars are transmitted to a clerk in the Prosecutor's Office, who has a list of counsel willing to take criminal legal aid defenses. The clerk then selects a counsel from the list and puts him in touch with the accused person. Counsel will then conduct the defence without fee, except that in capital cases, a small honorarium is paid by the Attorney-General's Office.

It may be helpful to point out just what is entailed. The idea, held perhaps by some members of the public, that criminal legal aid consists of defending the innocent against the vindictive machinations of an oppressive police force is totally unrealistic. The more typical case is the man whose guilt is ultimately proved beyond doubt, and who, in the interim, lies profusely to his own counsel and to the court, and who probably makes allegations against the police which are usually untrue. A counsel on the criminal legal aid list spends many hours, often days, taking such cases simply to ensure that persons accused of crime receive a fair and adequate trial, and that at times he may be of assistance in preventing a wrong conviction. However, recognition and appreciation of the work which is now done should not inhibit criticism of the system and the objections to it will now be considered.

Criticisms of the Present System

1. The adversary system of administering justice requires for its efficacy that each side should have the opportunity of presenting its case forcefully and thoroughly, and that means by counsel. We believe it to be wrong in principle that a person accused of serious crime should have to depend for the proper presentation of his defence on the charity of the legal profession. It is often alleged that counsel does not put the same effort into legal aid cases as he does into paid work. But to determine the truth of this allegation seems irrelevant. Under any system, the accused must depend to some extent on the integrity, ability and effort of his lawyer, but in our view, he should not have to depend also on counsel's benevolence.

2. Only a small minority of those accused actually receive legal aid. For example, in the year 1960, there were 181 "Miscellaneous and Criminal" cases granted legal aid in Vancouver. (Figure from the Advocate, Sept.-Oct. 1962.) By comparison, there were 5,441 persons charged with indictable offenses in the province in that year. (Figure from the Canadian Year Book for 1962.) Even allowing for the legal aid cases outside Vancouver, it is clear that the number granted counsel is only a very small proportion of the total accused.

3. The range of persons covered by the present scheme is unduly narrow, particularly in excluding those with previous convictions. Within the limitations of a charity scheme, it seems reasonable that counsel should not wish to become an unpaid assistance to those engaged in a career of crime. On the other hand whenever a crime is committed, anyone recently discharged from prison in that locality with a previous conviction for that type of offense is an automatic suspect. Further, if he is arrested and brought for trial, then his record may become known to the court, causing a suspicion and prejudice against him which may greatly exceed the evidence. For these reasons people with recent convictions constitute that class of society most likely to be wrongly accused, and perhaps wrongly convicted. From the 2nd of January to the 30th of March 1962, the number of criminal legal aid applications accepted in Vancouver was 58. Then, when the rule against persons with previous convictions was introduced, the number accepted from the 30th of March to the 1st of October 1962 was 34. (Figures from The Advocate, Sept.-Oct. 1962.)

4. The system makes no provision for those, the majority of cases, when the accused wishes to plead guilty and confess the offense. But in our view, the treatment of the guilty is no less important than the acquittal of the innocent. Further, the present system seems to put a premium on lying, and may even do more to obstruct the administration of justice than to assist it. Thus the hard nut with a concocted alibi will have counsel. But a repentant individual with basically honest traits who wants to "make a clean breast of it and go straight" will not usually receive the assistance of counsel to explain his position to the court, and to argue for that disposition of the case most favourable to himself or most socially useful.

5. The processing of applications, i.e., the means test and the selection of cases for legal aid, is all very much hit and miss. This too is charitable. In particular, there is nothing which guarantees that an accused person will ever be informed at all of the availability of legal aid. Also the handling of the defence should not be channelled through the Prosecutor's Office, even though this channelling is purely a mechanical convenience.

6. Funds for disbursements are not readily available. Quite often, it is necessary for the conduct of a case that counsel should have funds for the transcripts of previous proceedings, for the expenses of witnesses, etc. Funds can be obtained by making application and having it approved, but all this involves delay in bringing on for trial the case of a man who is usually in custody.

7. There is the view that legal aid is done at the expense of paying clients. It is doubtful whether this argument is economically sound. But even so, it seems right in principle that a lawyer's income should be derived in an equitable way from all his clients, not merely from some.

It may be helpful to mention some examples drawn from the experiences of the members of the committee of what is actually happening:

(a) A person charged with an offense may feel a sense of guilt, probably because he is guilty of some lesser offense, and may plead guilty as the automatic expression of his feelings, but without directing his mind intelligently to the wording and nature of the charge. Thus, in one case a woman, who had left her children at home for a few hours whilst taking her customary refreshment at the beer parlour, pleaded guilty to failing to provide the necessaries of life for the said children so that their health was likely to be permanently endangered, contrary to the criminal code.

(b) Without counsel, prosecution evidence often creeps in which is not legally admissible. Also any arguments that might be available on other points of law will probably not be made.
(c) The accused is often unable to express himself clearly in the courtroom atmosphere. Frequently mitigating circumstances are not explained, and one cannot feel confident that a complete defence may not sometimes pass unmentioned. In any event, the number of cases in which the accused has "nothing to say" surely exceeds the number in which nothing can be said.

In these circumstances it is naive to suppose that rich and poor receive anything like equal treatment before our criminal courts.

The Need for Reform

It seems probable that as events proceed, some improvements will be made by the Bar in the administration of the present system. But in our view, no improvements on this structure can overcome the fundamental objection that it is wrong in principle that the defence of persons accused of crime should depend on the charity of the legal profession. For so long as we have the adversary system, it is essential to the administration of justice that both sides be fully and thoroughly presented, and the administration of justice has long been accepted as a function and responsibility of the state. In our view, the assistance of counsel should be a right made effective to the accused by the state through the use of public funds. It seems impossible to reconcile our claims to a free society and the rule of law with a constant striving for justice on the cheap. Further, if the extended use of counsel for defendants should result in fewer or shorter jail sentences and the more efficient conduct of trials, then one cannot be certain that the employment of public funds for this purpose would in the long run result in any greater total cost to the public than the present system. But even if the costs to the taxpayer should be increased by the provision of defence counsel, it is still our view that the proper administration of justice is worth the price.

It is sad to reflect that on this subject Canada lags behind other civilized countries. England, with a standard of living lower than our own, has for some years felt able to afford a system which we describe later. Even in the Soviet Union, where the administration of criminal justice seems, by our ideas, to be unsatisfactory in other respects, the indigent defendant at least has the right to counsel. (See for example "The Soviet Bar" by Zaitsev and Poltorak, published in Moscow in 1959, at pp. 111 et seq.) In the United States, the provision of criminal legal aid has hitherto depended on the state or local authorities. But on the 18th of March 1963, the Supreme Court of the United States delivered its judgment in Gideon v Wainwright (1963) 83 S.Ct. 792 (New York Times 19th March 1963 p. 4). In this case, Gideon was arraigned before a Florida state court, charged with breaking and entering a poolroom, which is a felony by the law of Florida. At trial, he was without funds and asked the court for counsel, but his request was denied. The trial proceeded with Gideon defending himself as best he could. He was convicted and sentenced to five years imprisonment. From his jail cell, he sent a hand-written petition to the Supreme Court of the United States, contending that he had a right to counsel under the federal constitution. Twenty-four states argued amici curiae. Twenty-two supported Gideon and only two supported Florida. The Court overruled its own previous decision to the contrary and a century of practice and unanimously held that the failure of the State to provide Gideon with counsel was a denial of procedural due process contrary to the Fourteenth Amendment, and there was therefore a mistrial. The result of this case seems to be that any indigent person accused of crime before any state or federal court and who requests the assistance of counsel must be provided with one by the state or federal authorities respectively. Mr. Justice Black, delivering the opinion of the Court, said

> " ... reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth .... That government hires lawyers to prosecute and defendants who have money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

Perhaps the most significant feature of the case is the widespread support for the position taken by the Court amongst the authorities responsible for the administration of justice and for meeting the expense of legal aid. Twenty-two states argued for the right of the accused to have counsel provided, and only two against.

Canadian Federalism

Accepting that the provision of counsel for indigent persons accused of crime is a responsibility of government, the next question is which government? The problem here is whether the legislation necessary to establish a criminal legal aid scheme falls within s. 91 (27) of the B.N.A. Act, as "Procedure in Criminal Matters," or under s. 92 (14) as "The Administration of Justice in the Province." There being no clear authority, one cannot express a legal opinion with certainty. However, at common law, the presence of counsel before the court, and the determination of his functions, have always been regarded as procedure. Similarly the provisions relating to counsel in the Canadian Criminal Code and the Canadian Bill of Rights seem to be justified constitutionally under S. 91 (27) of the B.N.A. Act as Procedure in Criminal Matters. Also in the Gideon case cited above, the right to be provided with counsel was treated as a matter of procedural due process. Finally, the arguments which justify making criminal law and procedure national, rather than provincial, seem equally applicable here. There are also two slightly analogous areas which may offer some guidance. One is the mode of trial, and in particular, the right to trial by jury. It seems beyond doubt that this is a matter within the scope of federal legislation. The second is the prosecution of offences. Generally speaking prosecutions are conducted by provincial or municipal agencies, and are the responsibility of the Provincial Attorney-General. However the conceptual basis for this seems to be the delegation by federal legislation to provincial authorities of administrative functions, rather than original provincial action under s. 92 (14). Thus the powers and functions of the Provincial Attorney-General in criminal prosecutions are defined by the federal Criminal Code, not by provincial statute. It seems, therefore, that the provision of counsel in criminal cases fits more rationally under S. 91 (27) than it does under S. 92 (14). On the other hand it may be that there is some measure of overlap, and that if the Province should make provision for counsel in criminal cases, then it could be held intra vires as The Administration of Justice in the Province. But even assuming that the power to establish legal aid exists in both governments, still there can be no doubt that the federal power is the more extensive. For dominion legislation could provide, but provincial legislation could not, that where an accused person without means asks for counsel, but is not provided with one, then any trial which proceeds will be a nullity. For these reasons it is most desirable that legal aid in criminal cases should be provided for by federal statute. Failing this, a provincial scheme would be an improvement. We turn now to consider particular schemes.

The Public Defender System

This scheme has for many years been in operation in several of the American states. It is also one of the alternatives proposed for the United States courts in the Bill presented by the President to the Congress on the 8th of March 1963. Put simply, a Public Defender is a counsel employed by the government on a regular salary to defend persons accused of crime, and who have not the means to engage a lawyer themselves. It is usual in the metropolitan areas for several public defenders to operate from one office, with a small staff of secretaries and sometimes investigators. The system generally as it stood in the United States in 1956 is described in a pamphlet on "Public Defenders" published by the Institute of Judicial Administration, 40 Washington Square, New York. The system as it works in California is described in a pamphlet by Edward Mancuso, published in 1959 by the National Legal Aid and Defender Association.

Arguments for the Public Defender System

1. It has been proved to work. The first Public Defender Office was opened in Los Angeles County in 1913. From then on, the system slowly but surely spread, as one area after another became convinced of the inadequacy of a system which relied on volunteer counsel. By 1963, 110 Public Defender Offices were established in 16 states and the District of Columbia. With the latest decision of the Supreme Court, the new federal legislation, and a grant this year of $2,300,000 by the Ford Foundation, there seems to be every prospect that the development will be accelerated.

2. The system provides a comprehensive plan whereby any person accused of crime can be represented by counsel with a specialized knowledge of criminal law and procedure, and thereby have an adequate opportunity of presenting to the court any defence he may have, and all relevant material in mitigation of sentence.

3. The system offers a better hope of defence counsel developing an expertise in penology. This is usually of little interest to practising lawyers, although in the majority of criminal cases sentence is the only important issue.

4. Delay is avoided by the more efficient handling of applications which flows from the continual contact between the Public Defender and the Prosecutor's Office, and sometimes also the police and the jails.

5. Investigating officers attached to the Public Defender's Office can be a great aid in the proper presentation of a defense.

6. The system is economical in that it enables the same defence counsel to handle several cases in the same court on the same day. Also it facilitates the arrangement of court calendars.

Arguments against the Public Defender System

1. The indigent defendant has no choice of counsel. But it seems doubtful whether many would want a choice, and of those that do, few would have sufficient information to make a rational selection from amongst the counsel who would be available under any other system.

2. The system may tend to create a sense of routineness, and consequent lack of personal interest in each case. By contrast, the freshness which private counsel can bring to a criminal case might largely compensate for any lack of experience.

3. That the contribution which an independent legal profession makes to the fabric of a democratic society requires that it should be maintained in its present form. But a public defender system would involve no loss of income to lawyers in private practice, and to fear that it threatens the structure of the profession seems unduly sensitive.

4. The familiarity of defense counsel with the prosecutor and the court may tend to aggravate and extend the mystery to the accused and others of the short-hand phrases of police court jargon which, perhaps inevitably, seem to characterize exchanges between a full-time magistrate and a full-time prosecutor.

5. The system penalizes thrift. Thus the careful individual who has scrupulously saved a portion of his earnings to provide for his retirement or unforeseen contingencies will be left to find counsel at his own expense. But another man, who has enjoyed the same income but squandered much of it on the frivolities of life, will be given counsel at public expense. This objection, however, could be mitigated by enabling the court in appropriate cases to require that the accused should reimburse the costs of his defence out of future income. This might be suitable, for example, where the accused is placed on probation.

6. The system is more appropriate to large urban than to rural areas. In small towns, a lawyer in private practice could be appointed a part-time public defender, but obviously the more sparse the population the more cogent the argument becomes for a system that enables any lawyer to be available for criminal defences.

7. A system of salaried counsel may contain no safeguards against an inadequate budget. It appears that in a few of the states the budget provided by the county authorities is not adequate to obtain counsel of sufficient calibre, or in sufficient numbers to cope with the case load. On the other hand, a system based on individual fees to lawyers in private practice would offer a rough but automatic safeguard, i.e. if sufficient funds were not available then lawyers could decline to act.

8. There may be some danger of a public defender being influenced by the executive, particularly in any case of political crime, or where public feeling was running high against the accused. However the danger could be guarded against by providing a) A proper system of selection and appointment of public defenders, independent of the executive, and b) That a public defender could not be removed from office without an order of the court for cause shown.

The English System

The essence of the English system is that where a person accused of crime has not the money to employ counsel, then legal aid may be provided by supplying a lawyer in private practice, who will be paid out of public funds. The provision of criminal legal aid in England is discretionary, and the court will decide in each case whether legal aid should be granted. However the practice seems to be evolving that where an accused is committed for trial upon indictment, then legal aid will usually be provided. Thus in referring to the granting of legal aid upon committing a defendant for trial, the Lord Chief Justice told a meeting of magistrates that "even in the case of pleas of guilty there will seldom be a case where it is not desirable in the interests of justice." (1961), 125 J.P. 342. In trials before the magistrates the granting of legal aid is not usual. Thus, since the magistrates' powers are limited to imprisonment for 6 months, it can be said as a rough guide that legal aid will usually be available where the accused is exposed to the risk of over 6 months imprisonment, but usually not for less. The fees paid are generally regarded by the Bar as sufficient to make the work worthwhile from the lawyer's point of view. The particular lawyer in each case is usually selected by a court official on a rota basis from the list of those willing to act. For a summary of the English law on this subject see Archbold "Criminal Pleading, Evidence and Practice" 35th ed. pp. 137-142, or Stone's Justices' Manual, 90th ed., pp. 212-224.

Arguments for the English System

1. It overcomes the difficulties inherent in any volunteer plan, and provides an indigent accused with a defence counsel who is in much the same position as he would be for a paying client, and thereby it reduces the inequality before the court of rich and poor.

2. It is sometimes contended, perhaps rather strangely, that the system provides a useful opportunity for young counsel to gain experience in litigation. But to regard criminal cases, involving the liberty of the subject, as a training ground to prepare for the subsequent handling of commercial work seems to reflect a perverse reversal of traditional values.

3. It could be operated in such a way as to allow the accused a choice of counsel.

Arguments Against the English System

1. There is no satisfactory sorting process. If it is necessary for the court to consider the merits of the defence to decide whether legal aid should be given, and magistrates often feel that it is, then there is the obvious danger of prejudging the case. However, this objection could be met by providing an independent processing system, or by defining a category of crimes in which legal aid would be available as of right.

2. It involves a wasteful duplication of costs. Thus several defence counsel may be engaged to travel to the same court to take successive cases on the same day, and, of course, this duplication is aggravated by any adjournments. It may be that to some extent, the efficacy of the English system depends on an excess capacity at the Bar, which does not prevail here.

3. The system is potentially susceptible of abuse by political patronage. However, this can be avoided by providing, as is done in England, that the selection of counsel should not be in the hands of the executive.

Before dealing with the third scheme, it will be helpful to consider the position of defence costs in cases where the accused is providing his own counsel.

Defence Costs in Criminal Cases

Subject to some minor exceptions limited to special circumstances, the general position in Canada is that a defendant in criminal proceedings is always left to bear the costs of the defence, no matter how innocent he may be. But it seems quite wrong in principle that a person who has been wrongly accused of a crime should have to pay the costs of establishing his innocence, merely because he can afford to do so. In England, the general position is that where an accused person has been acquitted then the court has a direction to order that the costs of the defence be paid either out of local funds or by the prosecutor (i. e. generally the person laying the information). (See Archbold "Criminal Pleading, Evidence and Practice" 35th ed. pp. 308-332; or Stone's Justices' Manual, 90th ed., pp. 224-233). In our view, the Canadian position is in dire need of revision, although we are not unanimous as to how far the revision should go. One view is that on an acquittal, the accused should be entitled to the costs of the defence as of course, and that the court should have a discretion only on the question of whether the costs should be paid out of public funds or (in very exceptional circumstances) by the person laying the information. Those taking this view submit that it is the only position compatible with an unrebutted presumption of innocence. The other view is that on an acquittal, the court should have a discretion to award the costs of the defence, and if they are awarded, then a further discretion as to whether they should be paid out of public funds or by the informant personally. The discretion to award costs should be exercised unless there is some ground for refusing them, such as

(a) That the accused by his misconduct brought the prosecution upon himself.
(b) That by misconduct the accused or his counsel substantially increased the costs of trial. Or
(c) That the accused did not give evidence.

This last controversial suggestion is intended to be a rough rule of thumb limiting costs to those cases where the acquittal is really on the merits. The objections to this suggestion are that it offends the privilege against self-incrimination, and that it may tempt defendants to give evidence in cases where it would be unwise to do so. The replies to these points are, firstly, that the privilege against self-incrimination need not be extended this far. The rule which provides that an accused person is not compelled to give evidence need not be extended to require that he cannot obtain an advantage by doing so. Secondly, if some defendants should be tempted to give evidence revealing their guilt, then it can hardly be counted a disadvantage of a proposal that it might result in more guilty people being convicted rather than acquitted. Enough has probably been said to indicate the difficulties of formulating criteria calculated to do justice in all cases. However what can be said with confidence is that we can come a great deal closer to it than we do now.

Apart from the criteria for awarding costs, there are also the questions of what items should be included, and the time for payment. It is our view that costs should cover counsel fees, travelling expenses of the accused and his witness, disbursements for transcripts of any prior proceedings, etc., and that they should be payable and available immediately at the close of the case. In support of this view, it may be sufficient to recite one recent case taken from the records of the John Howard Society. A man was arrested in Ontario, where he was living, for an offence alleged to have been committed in British Columbia, and he was brought to New Westminster for trial. He applied for legal aid counsel but was refused. He defended himself as best he could and was acquitted. Then he was discharged onto the streets of New Westminster without money or transport back to Ontario. It seems impossible to comprehend how we can allow such things to happen, and yet we do.. Returning that man to Ontario was clearly a responsibility of government, not of private charity.

The Comprehensive Plan

The object of this plan is to combine in one simple scheme provision for criminal legal aid and for costs. The principles which it seeks to establish are:

(a) That regardless of his means, a person accused of serious crime is entitled to be defended by paid counsel, whose services are promptly available.
(b) That regardless of his means, an innocent person wrongly accused should not have to pay the costs of establishing his innocence.
(c) That the defence costs of a person duly convicted should generally, and where possible, be paid by himself.
(d) That public defenders should be established, but that the alternative of defence by private counsel should be left open, even for indigent defendants, particularly for its suitability in rural areas.

The main features of the plan are:

1. Any person (not a corporation) charged with any offence punishable by at least 3 months imprisonment should be eligible for the provision of counsel under the plan. No means test or other qualification.

2. Public defenders should be appointed and paid salaries from public funds.

3. The accused may elect to be represented by a public defender, or by any named counsel of his own choice who is willing to accept cases under the plan.

4. A tariff of defence counsel fees should be drawn up. The tariff figures should be sufficient to induce counsel to undertake criminal cases under the plan and spend sufficient time on them without being paid substantially less than for other work.

5. At the close of each case, the court should determine, either in its discretion or according to whatever criteria may be established, whether the defence costs should be paid by the accused, or out of public funds, or in very exceptional cases by the informant, and should certify its decision.

6. Where the court certifies defence costs out of public funds, then

(a) If the defence was conducted by the public defender, no further steps would be necessary, except for payment of witnesses' expenses, etc.
(b) If the defence was conducted by other counsel, then the costs should be paid out of public funds with fees according to the tariff.

7. Where the court has certified the defence costs as payable by the accused, then his counsel, whether a public defender or not, should first seek to recover the tariff fees and other costs from the accused by billing him in the ordinary way. If costs cannot be readily collected from him (e.g. because he is imprisoned and has no known assets) and counsel has filed an affidavit to that effect, then the court should certify to the Internal Revenue the amount due from the accused. The Internal Revenue Office should then recover this amount from the accused as and when possible, by a surcharge on future income tax, or any other tax. In the meantime, the costs should be paid out of public funds.

8. Similarly if, in very exceptional circumstances, costs were awarded against the informant, then the defence costs should be claimed from him, and in default of payment, should be paid out of public funds, with a right of reimbursement exercised by the Internal Revenue office against the informant.

9. Counsel in private practice should have the choice of taking cases on the plan or off the plan. If a case is taken on the plan, then he should file a notice with the court to that effect before the hearing. He would be bound by the tariff fees and other terms of the plan, but would also be entitled to its advantages, in particular, the guarantee of payment in any event. If he takes a criminal case off the plan, then he would still be free to negotiate any fee with the accused, but its collection would remain his own responsibility. Even where the case is taken off the plan, the court should still be empowered to award costs on the tariff scale out of public funds or, in very exceptional cases, against the informant, but counsel would be left to collect any balance from his client, and where defence costs are payable by the accused, counsel would be left to collect the whole amount.

10. The system should be available for appeals, except of course that the launching of an appeal must depend on the opinion of counsel that there are grounds for appealling.

We have also considered certain ancillary questions. One is whether legal aid should be extended to juvenile courts. This raises a complex of problems, and on the whole, we have felt it better than this should be left for separate consideration.

Another question is whether any change is required in the ethical rules relating to the conduct of counsel. In particular, should a legal aid counsel be bound to accept his client's instructions as to plea? In the first instance, at any rate, it is our view that the present rules should be maintained. If and when any need for change becomes apparent they can be reconsidered. It should, however, be made clear to the accused that counsel will be available whether he pleads guilty or not guilty. He should not feel under any inducement to plead in a particular way in order to have someone to speak for him.

Summary of Recommendations

1. The principle should be accepted and applied that in all cases of serious crime and where the accused is unable to provide his own counsel, the provision of counsel for the defence is a responsibility of government.

2. The provision of counsel should not be limited by any qualifications, such as a plea of not guilty, or no previous convictions.

3. There should be general provisions for defence costs to be paid out of public funds on an acquittal, at any rate in certain cases.

4. Of the schemes we have discussed, the Comprehensive Plan is the most desirable. Failing this, either a public defender system, or a scheme of payment to private counsel modelled on the English system, would be a substantial improvement on the present position.

5. Provision should be made to ensure that those eligible for legal aid are informed of their rights promptly after arrest.

6. The scheme should include a statutory provision that if a defence counsel is not supplied when one ought to be, then any trial which ensues will be a nullity.

7. If the scheme is established, as we recommend it should be, by federal legislation, then there should be complementary provincial legislation extending it to the more serious category of provincial crimes.

CARDING DATE 25.7.63 P.7

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B. C. CIVIL LIBERTIES ASSOCIATION

Report on Legal Aid

Section C

Civil Legal Aid

The Present Position in British Columbia

As in criminal cases, there is no government operated or government sponsored system of civil legal aid, and the only provision is that made by the legal profession itself. In Vancouver, a legal aid clinic is held in the Courthouse on Wednesday evenings. Lawyers attend on a voluntary basis to give spot advice to people who cannot afford the services of a solicitor. Advice is given both on litigious and non-litigious matters. If court proceedings appear to be necessary, then a solicitor in private practice may be asked to take the case without payment. Generally speaking, voluntary legal aid is available to any person unable to afford a solicitor for any court proceedings of a civil nature in British Columbia, whether the applicant is the intended plaintiff or the intended defendant, but subject to the following list of exceptions, which has recently been drawn up.

i) Matrimonial causes (Egs. Divorce, separation, maintenance, etc.) unless legal aid is requested by a social worker for the benefit of children, or by a medical practitioner because a danger to health is involved.
ii) Defamation.
iii) Breach of promise of marriage.
iv) Probate or administration of estates, except where the refusal of legal aid would cause undue hardship.
v) Election disputes.
vi) Proceedings after judgment for a liquidated sum.
vii) Bankruptcy matters after a receiving order.
viii) Family Court Cases.
ix) Cases within the jurisdiction of the Small Debts Court.
x) Appeals, except where there appears to have been a clear miscarriage of justice.
xi) Where the conduct of court proceedings would be of no substantial benefit to the applicant.
xii) Where the costs, calculated as if it were not a legal aid case, would exceed the amount involved.
xiii) Where the applicant, being an intended plaintiff, is not a Canadian citizen and is resident out of the jurisdiction.
xiv) In any case where the Legal Aid Committee decides that because of special circumstances legal aid should not be granted.

The solicitor handling the case must obtain approval for any disbursements which he finds necessary, and these are later reimbursed to him out of a legal aid fund. If the assisted person is successful, then any costs recovered from the other party should be paid into the fund. If the other party succeeds then there is no provision for the payment of his costs, except of course, that he may be able to recover something from the aided person himself. The number of civil legal aid cases referred to solicitors in Vancouver for the year ending 30th of September 1962 was something less than 230. (Calculated from the figures published in "The Advocate" for Sept.-Oct. 1962.) We understand that New Westminster and Victoria have schemes similar to Vancouver. Outside these cities, the availability and efficiency of legal aid varies according to the benevolence of the lawyers in the particular community.

Criticisms of the Present System

The main criticism of the present system is not that it is administered by the profession, but rather that the legal profession is left to bear the financial burden, and also that it is left with an unfettered discretion to determine the scope of the assistance made available. That justice is not the right of anyone but rather a luxury for the rich remains a truism mitigated only by the charity of the legal profession. Further, a glance at the types of cases excluded and at the statistics of cases handled indicates that the present system is very limited in scope and slight in volume. Also the limited amount available for disbursements results in legal aid cases often being handled in an impoverished way compared with litigation for paying clients. There is also a suspicion commonly expressed, but often unjustified, that the practising lawyer will always give priority to paid work, so that legal aid cases will receive the minimum of attention. In any event, the fact of the service being unpaid tends to induce a feeling that the litigant is disqualified from complaining about the quality of assistance received. Finally there is the psychological factor which probably excludes many of the most deserving cases from assistance. To many, the idea of charity imports a social stigma and a sense of subservience. Thus there are substantial numbers of people suffering injustices which they cannot afford to remedy by court process, but whose sense of self-respect precludes them from asking for the benevolence of the profession.

The Need for Reform

The administration of justice according to law is one of the hallmarks of a civilized society. Another is the protection of the weak against the strong, whether that strength be physical or economic. Both of these factors require that the judicial determination of disputes should be readily available, and yet in this country access to the courts is severely limited.

In our view, it is essential to the proper administration of justice under our adversary system that a legal aid scheme be established in accordance with the following principles:

i) The initial organization and financing of the scheme should be accepted as a responsibility of government. With regard to civil legal aid, it is clear under the B. N. A. Act that this must mean the Provincial Government.
ii) The determination of the circumstances in which legal aid will be available and all other factors affecting the scope of the scheme should also be a responsibility of government.
iii) The administration of the scheme should not be a function of the government. We say this mainly because in a large number of disputes the Provincial Government is an interested party.
iv) It does not seem essential or desirable that legal aid should always be free, but rather that it should be available on such terms and in such circumstances as to make access to the courts a realistic possibility.
v) Lawyers engaged under the scheme should be paid reasonable remuneration.

The only scheme familiar to us which is reasonably satisfactory is the one now in effect in England, and this we shall now consider.

The English System

This was established by the Legal Aid and Advice Act 1949. The legislation, regulations and forms can be found in the "Handbook on Legal Aid", and particulars of the operation of the scheme to date can be found in the 12th Annual Report of the Law Society on Legal Aid, both published by H.M.S.O., London. Under the scheme, legal aid can be obtained for the pursuance or defence of almost any civil claim, and for the conduct of almost any type of civil court proceedings. Exceptions are claims for defamation, breach of promise of marriage and seduction, and proceedings on judgment summonses in the county court.

A person seeking legal aid will first of all complete a form, which can be obtained at the office of a solicitor, a courthouse, or a Citizens' Advice Bureau. The application will then be considered both by the Local Committee, which is a group of barristers and solicitors organized by the Law Society, and also by the National Assistance Board. The function of the National Assistance Board is to determine the financial position of the applicant. Generally speaking an applicant will be eligible if his disposable income (i. e. excluding provision for the maintenance of himself and dependants) does not exceed £700 per annum, and if his disposable capital (i. e. excluding his house) does not exceed £500. The main function of the

Local Committee is to determine whether there are reasonable grounds in law for taking, defending, or being a party to the intended proceedings. Secondly, if the applicant is eligible, then the Local Committee determines how much he should contribute towards the costs of the case and when his contributions should be paid. If the application is accepted, then the applicant, if he has not already chosen a solicitor, may select one from the panel of those willing to take cases under the scheme. There is a similar panel of barristers, and if necessary, the solicitor will advise the applicant on the choice of counsel. Most barristers and solicitors who handle litigation at all are members of the panels. The lawyers are paid out of a legal aid fund. The solicitor is reimbursed in full for his disbursements, and both the solicitor and the barrister are paid at least 85% of the fees which would normally be payable on a solicitor and client taxation. Thus in many cases there is a slight reduction from the normal fee, but this is partially compensated by the absolute guarantee of payment, and most lawyers regard the remuneration as reasonable.

In the year ending 31st of March 1962, 105,224 applications for legal aid were received, and 75,616 were granted. Also 1,914 applicants were granted emergency certificates for assistance pending the determination of their applications. The number of cases in which final results were reported during the year was 37,167. The main reason why the number of new applications greatly exceeds the number of cases concluded is that legal aid was extended for the first time during the year under review to matrimonial proceedings in magistrates' courts. In 79% of cases there was judgment for the assisted person, in 14% there was judgment against him, and 7% were settled. Analysed by courts, the cases concluded during the year were:

Miscellaneous and unspecified	115
Magistrates (usually matrimonial jurisdiction)	13,532
County Courts	3,708
P.D. & A. Divisional Court (usually appeals from magistrates in matrimonial cases)	103
Queens Bench Divisional Court	38
P.D. & A. Divorces	15,897
P.D. & A. Other matters	35
Queens Bench	3,268
Chancery	306
Court of Appeal	164
House of Lords	1
	37,167

During the 12 year period since the scheme began, there have been 583,863 applications of which 411,836 were granted. The volume has increased each year as the scope of the scheme has been gradually extended. The total cost so far is £31,112,000, which has been derived as follows:

Government grant from tax revenue	£ 14,948,000
Costs recovered from opposing parties	7,504,000
Contributions from assisted persons	5,374,000
Deductions from lawyers' fees	2,571,000
Damages retained	715,000
	£ 31,112,000

Thus the average annual cost to the taxpayer for the first 12 years of the scheme works out at approximately 6d. (roughly 7 cents) per head of the population.

The scheme also provides for legal advice, whether in potentially litigious or non-litigious matters. This is partly statutory and partly organized by the Law Society. Anyone over 16 years of age can obtain legal advice for a fee of £1 (approximately $3) by a conference with a solicitor limited to half an hour. If the person cannot afford even this fee then there is provision for payment to the solicitor out of the legal aid fund. During the 1/2 hour, the solicitor may be able to clear up simple problems, or advise the person of the cost of any further legal services he may need, or on his eligibility for legal aid. If necessary, the conference can extend beyond the initial 1/2 hour, with the solicitor being remunerated at £1 per 1/2 hour, by the client if he can afford it, and by the legal aid fund in other cases. In the year ending 31st of March 1962, 43,205 people received advice under the statutory branch of the scheme, the solicitor being paid out of the legal aid fund.

On the whole, the English system is generally accepted as satisfactory throughout the country, and meets with the approval of the legal profession and all political parties. The most significant criticism of the scheme is the allegation of unfairness to non-assisted litigants. Thus for example, if a legal aid plaintiff is unsuccessful, then there is no provision for the defendant's costs being paid out of the legal aid fund, and the possibilities of recovery against the assisted litigant are usually very limited. However, legislation is now before Parliament which goes some way towards remedying this defect. Another criticism is that the scheme is sometimes unfair to those who are just a little too prosperous to qualify. Thus a middle class family for example, might be able to afford an ordinary trial in the High Court, but not if it requires expert witnesses and protracted argument. One proposal being mooted is that the means test should be completely abolished, but of course the contributions of the individual would still be assessed proportionately to his disposable income and capital.

Recommendations

We recommend that a scheme of legal aid should be established in the Province of British Columbia by provincial statute, modelled on the English system, but with some variations. The main points of the scheme we propose are:

1. Subject to the following provisions and exceptions, legal aid should be available to any person resident in the province for any civil court proceedings commenced in the province, whether at first instance or an appeal, and whether the applicant be the intended plaintiff, defendant, or any other party.

2. Exceptions:
   (a) Matters arising as part of the ordinary course of business of the applicant.
   (b) Matters arising out of the pursuance of a speculative venture conducted by the applicant for profit.
   (c) Cases within the jurisdiction of the small debts court.
   (d) Election disputes.
   (e) Proceedings after judgment for a liquidated sum.

3. A lawyer should be appointed on a salary as a full-time legal aid administrator for the province. He should have his office in Vancouver, but be responsible for the organization of the scheme throughout the province. He should have security of tenure. It is obviously important that an individual should be chosen of sufficient calibre, and with imagination and enthusiasm for the new venture.

4. Applications for legal aid should be made on prescribed forms, which should be available at solicitors' offices, courthouses, and social agencies.

5. Each application should be considered by a local legal aid committee, consisting of two lawyers and one social worker from a social welfare office. Such a committee should be established in every municipality, and in other units of appropriate size. In Vancouver, the administrator should be one of the legal members of the committee. If the proceedings involved are within the scope of the scheme, then the committee should determine whether the applicant has reasonable grounds in law for taking, defending, or otherwise being a party to the proceedings, or for launching or opposing an appeal. This point should be decided in favour of the applicant if either one of the legal members is of that opinion. Secondly, the committee should determine the amounts which the applicant should deposit towards the costs of the proceedings, and the times and circumstances in which those amounts should be paid into the fund. Contributions may be by a lump sum, by instalments, and by a proportion of the recovery, according to the circumstances. Regulations should be drawn up for the guidance of the committee in fixing these amounts. Subject to the criteria established by the regulations, the fixing of the contributions should be a matter of co-ordination between the social worker and the legal members, the former using his experience on what people can reasonably be expected to pay, and the latter giving their experience on the costs of litigation. Any excess of contributions over actual costs would be refunded to the applicant. Thus there would be no means test to define the category of persons eligible under the scheme, but the assessment of contributions would increase with the wealth of the individual up to the point where it was not worth his while to become an assisted litigant. This is better than a fixed means test because the cost of litigation varies greatly, and one cannot predict beforehand what the actual costs will be. Thus for example, for proceedings in the Supreme Court, it might be decided by the committee that the particular applicant can afford to pay $2000 over 2 years plus 10% of any general damages recovered. Nevertheless he may decide to accept legal aid to protect himself against the possibility that actual costs may exceed that amount.

6. The applicant should be free to choose his own solicitor from a list of those willing to participate in the scheme.

7. The solicitor conducting the case should be reimbursed out of the legal aid fund for all reasonable disbursements and 90% of the fees taxed on a revised solicitor and client scale.

8. If the assisted person is unsuccessful and costs are awarded against him they should be paid out of the legal aid fund. This possibility should be borne in mind by the committee when making the initial assessment of the contributions of the assisted person.

9. Where a recovery has been made, then the lawyer conducting the case should consult the administrator before delivering the proceeds to the assisted person, and a lien should be exercised for any outstanding contributions to the fund.

10. The income of the legal aid fund should be derived from

a) Provincial grant from tax revenue.
b) Contributions by assisted persons.
c) Costs recovered from other parties.
d) The 10% deduction from lawyers' fees.

11. The possibility of having legal aid cases conducted by counsel on a salary should be kept in mind, but not adopted in the first instance. Some cases might however, be taken by the administrator if he has time available.

12. Consideration should be given to extending the scheme in prescribed circumstances to persons not resident within the province.

13. Consideration should be given to extending the scheme to certain administrative tribunals.

14. Provision should be made for legal advice, and in exceptional circumstances for legal aid in non-litigious matters. For legal advice, we propose the adoption of 1/2 hour conferences with a solicitor for a fee of $5. (We believe that something like this is already available although little known.) During that time, the solicitor could advise the client on simple problems, estimate the cost of any further services that may appear necessary, and advise him on any application for legal aid. For legal aid in non-litigious matters, it seems impossible to define in advance the circumstances in which this would be meritorious. We suggest that in the first instance, legal aid for non-litigious matters should only be granted in exceptional circumstances in the discretion of the legal aid committee. When a body of experience has been built up, it may be feasible to prescribe more definite rules.

Obviously a great deal of thought is required in formulating the details. But a scheme of this kind has worked in England for 12 years, and in our view it can work here too. The adoption of such a scheme seems essential if the administration of justice is to be brought into line with the ideals of a democratic society.
