

# **Getting Ahead of the Curve: Challenges and Opportunities of Recessions for Legal Aid**

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## **In the Grip of a Recession - Again**

Many legal aid systems around the world find themselves in the grip of the current recession, often called the great recession because it is said to be the most serious economic downturn since the Great Depression of the 1930's. Recessions are nothing new to the mature legal aid systems that have been in existence for many years. In Canada, for example, a national legal aid system, with 13 separate legal aid programs (one in each province and territory) supported by a federal and provincial/territorial shared funding program has been in existence since 1972. Interestingly, a recession occurred in 1971-72, the same year the national program for funding criminal legal aid was established. Since then, legal aid has experienced three recessions, in the early 1980's, the early 1990's and the current recession. As well, there have been several serious economic slowdowns that did not quite meet the technical definition of a recession. The recurring nature of recessions and economic downturns provides an instructive history of the experiences of and responses to recessions by legal aid organizations. This paper will touch on both current responses to the great recession and will draw on a few examples of responses to the challenges of past recessions, drawing mainly, but not entirely, on the Canadian experience. The fact that recessions are regular and recurring events that challenge legal aid service providers is significant in itself. This suggests that it might be useful to consider not only the challenges and responses of legal aid to the most recent recession but to recessions more generally.

### **'Top Down' and 'Bottom Up' Pressures Arising from Recessions**

Recessions give rise to what might be referred to as bottom-up and top-down pressures. Bottom-up pressures are the increased legal needs that result from rising unemployment which is a defining feature of recessions. These pressures typically become critical as legal aid systems are squeezed between increasing need and static, or even, declining resources.

Top-down pressures are more directly financial in nature. These pressures take the form of decreasing funding due to declines in interest rates that are characteristic of recessionary periods. Top down pressures reflect the global character of global recessions. Local or regional economies may remain relatively sound in a global

recession and thus may not generate the bottom-up pressures of increased demand related to unemployment. However, top-down pressures can still be a factor. Top-down pressures typically arise from declining interest rates triggered by changes in global financial markets that reduce the funding received by legal aid plans from sources such as Law Foundation investments or from interest on lawyer's trust accounts. Top-down pressures also come from the impact of failing financial markets on government revenues and, in turn, levels of government funding for legal aid.

## **Recession and Increased Need for Criminal Legal Aid**

This section provides an example, drawing on the experience of one Canadian legal aid organization in the early 1990's, of how the demand for legal aid was affected by recession and how that legal aid system responded. The pressure on legal aid for criminal matters is driven by rising unemployment caused by recession. Changes in rates of unemployment are strongly related to changes in rates of certain types of crime, for example robbery and theft. In turn, increasing crime is usually reflected in increases in applications for legal aid. This does not always mean an increase in legal aid service. Legal aid services are often budget-driven rather than demand-led. Coverage policies and financial eligibility guidelines are often used as the safety valves that control the level of service, keeping demand in line with available resources. However, the sections below provide an example from the 1990-1991 recession in Canada, which coincided with a 1990-1993 global recession, in which the recession did trigger substantial increases in caseloads. The response resulted in a significant and lasting change in the legal aid delivery model.

Prior to that recession the Ontario Legal Aid Plan (now known as Legal Aid Ontario) was a demand-led legal aid system with an open-ended budget. Funded almost entirely by the federal and Ontario governments, if demand increased, government funding increased to meet the increased costs. High unemployment during and following the recession in the early 1990's fuelled a 22% increase in approved applications for criminal legal aid during the three-year period from 1990-91 to 1993-94. Coupled with an even greater increase in civil legal aid, which will be discussed below, the cost increase associated with the increase in demand and the level of service resulted in the introduction of a fixed level of government funding for legal aid. The number of full service legal aid certificates<sup>1</sup> declined significantly from 1993-1994 onward, currently 57% below the 1993-1994 level.

Legal Aid Ontario responded to the challenge by introducing a significantly different delivery model for criminal legal aid services called *expanded duty counsel*. The approach can also be referred to as *dispositive duty counsel* because the objective is to dispose of as many matters as possible early in the criminal justice process and, in particular for legal aid, prior to a written application for service. Briefly, expanded duty counsel rests on the reality in the criminal justice system that most matters are relatively simple. In Canada, 90% of all criminal matters are resolved by guilty pleas. In contrast to the traditional facilitating model of duty counsel, in the expanded duty counsel

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<sup>1</sup> Legal Aid Ontario has a *judicare* or private bar delivery model.

approach the same lawyer is assigned to the same court on a continuous basis. Thus the lawyer is able to assist an accused person for more than the first appearance. For many criminal cases, a quick review of the disclosure, a discussion with the Crown and the continuity of assisting a client for two or possibly three brief appearances can resolve the matter. This has proven to be faster and less expensive than the cost of providing the service by means of issuing legal aid certificates to private bar lawyers. Since 1990-1991 the number of duty counsel services has increased by 167% from about 330,000 to 883,000 in 2007-08, while the number of approved applications for full service declined by 35% from 94,000 to 61,000 over the same period. The expanded duty counsel approach has continued to become an increasingly important part of the Legal Aid Ontario criminal legal aid delivery model. This early stage service approach is slowly taking hold in other provinces.

### **Recession and Increased Need for Civil Legal Aid**

Rising unemployment in recessions also propels the need for legal assistance in civil justice problems. Survey research on the prevalence of civil law problems shows that people who are unemployed experience more problems than those who are employed. Also, people who report that unemployment has frequently been a problem during their adult lives are likely to experience a greater number of problems than people who say that unemployment was never a life problem. The results of a recent international survey carried out for the AIG Investment Group showed that people in several countries reported that the 2008-2009 recession has “added stress” to, “strained” or “ruined” their marriages.

Turning again to the experience of Ontario, Canada in the 1990-1991 recession, the recession drove up the number of certificates for family law services by 38% in the three-year period following 1990-1991. This was another part of the financial crisis experienced by Legal Aid Ontario driven by the recession.

Similar to the response to increased demand for criminal legal aid, Ontario shifted away from reliance on a private bar certificate model to the greater use of expanded family duty counsel. Dealing with family law matters is, of course, more protracted than dealing with criminal matters. However, family duty counsel lawyers, assigned to the same court on a continuous basis in a manner similar to expanded duty counsel in criminal court, can resolve immediate issues such as restraining orders and interim custody arrangements. This proved to be an extremely valuable service that can be provided quickly, without a written application for legal aid, resolving immediate legal issues and, stressful and urgent family and child-related problems. Much like the expanded duty counsel approach in criminal matters, expanded family court duty counsel has continued to become an increasingly important part of the Legal Aid Ontario family legal aid delivery model. The number of family law duty counsel services increased by 194% between 1990-91 and 2007-08 from 67,000 to 196,000 per year. Over the same period the number of approved applications for family legal aid declined by one third. It was an effective response to the crisis brought about by the 1990-1991 recession and has become a durable part of the overall delivery model.

## **An Organizational Response to an Economic Downturn**

The Legal Services Society of British Columbia (LSS) provides an example of a different response to economic crisis. Like Ontario, LSS experienced a series of budget cuts following the recession of the early 1990's. However, the LSS experienced a devastating 40% budget cut over several years beginning in 2000. This coincided with a severe economic downturn beginning in that year that had a strong effect on the British Columbia economy. This serves as a reminder that crises in legal aid can be triggered by economic downturns as well as full-blown recessions. The budget crisis resulted in a small reduction in criminal legal aid service, significant reduction in family law service and the almost complete disappearance of service in non-family civil legal aid. In the wake of that crisis, with a small funding increase of about \$5 million, LSS introduced a series of service delivery innovations designed to provide services at less cost in place of the traditional service provided by lawyers. These included a telephone law information line, a web-based advice service, and several priority family law services for cases with a high risk of domestic violence and for complex Supreme Court matters. As a package, this was designed as a "continuum of service" approach to provide the appropriate, although perhaps minimal service, to the particular legal matter. Unfortunately, the government was not sufficiently impressed with these progressive service delivery innovations and budget cuts continued. The experience of managing through this worst-case scenario demonstrated to the LSS management that in these difficult circumstances the organization's greatest strength is its human resources. Through the series of crises LSS has emphasized staff development, leadership training and careful, extensive communication with staff concerning organizational changes resulting from budget cuts. The experience has left a valuable lesson learned for weathering the effects of severe economic slowdowns and recessions; that the organization can withstand and adapt to enormous changes by strengthening internal capacity and human resources.

## **General Observations on Challenges and Opportunities for Legal Aid in Recessions**

The preceding sections have illustrated how legal aid has effectively responded to the pressures brought on by a recession. These are examples of responses that worked, that improved the legal aid system in the longer term and that probably have made legal assistance more accessible in the current recession. The following section offers some more general observations about needs for legal services that are exacerbated by recessions and how legal aid might respond to them.

As a result of the legal problems research that has been carried out in several countries around the world beginning with the seminal *Paths to Justice* research<sup>2</sup> carried out by Hazel Genn in the U.K., we know a great deal about civil justice problems. The following are some of the main generalizations from the Canadian of research<sup>3</sup>.

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<sup>2</sup> Genn, Hazel, *Paths to Justice: What People Do and Think and Do About Going to Law*, Oxford, 1999

<sup>3</sup> Currie, Ab, *The Legal Problems of Everyday Life*, in Rebecca L. Sandefur (ed.), *Sociology of Law, Crime and Delinquency*, Emerald Group Publishing, 2009, pp. 1 – 42.

- civil legal problems that people consider to be serious and difficult to resolve are highly prevalent in all countries where research has been carried out. About one third to one half of adults experience one or more legal problems within a one-year to three-year period.
- many people receive no assistance or inadequate assistance.
- problems frequently do not occur in isolation. According to the Canadian studies, about 15% to 18% of adults experience three or more legal problems within a three-year period.
- there is a momentum to experiencing civil justice problems. The probability of experiencing even more increases with each successive problem experienced.
- legal problems trigger other legal problems. In the Canadian research about one third of legal problems were triggered by another legal problem.
- the impacts of legal problems are not confined within legal silos. Legal problems trigger mental and physical health problems, family and other social problems. In about 30% of cases, according to Canadian data, legal problems trigger a health or social problem.
- civil justice problems, along with a range of health and social problems, are strongly related to crime. The results of the most recent Canadian research shows that 85% of all respondents arrested or charged with a criminal offence experienced one or more civil law problems compared with 45% of the total sample.
- People experience clusters of multiple problems that are associated with social exclusion, a process whereby people fall away from the mainstream, from lives of relative self-sufficiency to lives of disadvantage and dependency on public assistance.

A recession exacerbates this situation. The number of problems experienced by people is likely to increase. Moreover, the dynamics of legal problems, the clustering of multiple problems propelled by the trigger and cascade effects, and the clustering of interrelated legal and non-legal problems are probably further propelled by the increased economic hardships experienced by greater numbers of people in a recession. Legal aid could potentially address these problems.

In general terms, legal aid has at least three very broad functions; the enforcement of rights, assuring access to entitlements for public services and the resolution of conflicts. It can be argued that if legal aid effectively exercised these functions, it could have significant impacts on recessions. Legal aid could diminish the impact of the recession on individuals. It could lessen the impact of the recession on the health care system because legal problems are known to trigger health problems and increased visits to physicians. Finally, legal aid might lessen the impact of recession on the social safety net. Much of this need arises because unemployment leads to mortgage defaults and foreclosures. Large scale policy interventions are necessary to address systemic or structural problems in the mortgage and financial services sectors. However, there are a number of examples in which legal services providers have developed programs to assist individuals facing foreclosures, loss of a family home and the consequences of that train of events. For example, in the U.S the Washington State Northwest Justice Project and

the North Carolina Foreclosure Prevention program have been established to prevent foreclosures with apparent success. Victoria Legal Aid, in Australia, has established a similar program to assist people with housing problems.

Recession-related increases in legal problems are more wide-ranging or varied than housing and mortgage foreclosures. In Canada, the Law Help centre in Ontario reports a 30% increase in individuals seeking legal assistance. California court-based self-help centres report approximately a 25% increase in the number of clients. One type of program that several legal services providers acknowledge to be extremely helpful is on-line legal forms. Self-help centres in New York and in California have had great success with programs that allow people access to downloaded and completed court forms, and have the forms reviewed by a lawyer or trained paralegal before the individual appears in court to file the document. The emphasis on programs to assist people with so-called “do-it-yourself” legal forms makes sense with reference to results from the 2008 Canadian Survey of Legal Problems. Respondents who had attempted to resolve a legal problem through self-help measures were asked; in retrospect, what do you think would have helped achieve a more satisfactory outcome? 16.4% identified someone to explain the legal aspects and help complete legal forms. The percentage of respondents identifying this form of assistance was highest for problems with disability pensions, 66.7%; immigration problems, 50%; and family law problems, 44.4%. Other volunteered responses were: additional or better information, 30.4%; an advocate or mediator to intervene on my behalf with the other party, 24.4%; and a lawyer to resolve the problem by legal means, 28.9%.

This example of assistance with legal forms suggests the value of pro bono lawyers to assist self-representing litigants and others taking self-help measures. This recalls a response that was widespread among U.S. legal service providers in the recession that occurred during the early 1980’s. During that period many legal services providers experienced severe budget cuts and reductions. In response, the Legal Services Corporation required that 10% of LSC funding must be devoted to developing *pro bono* legal services.<sup>4</sup> *Pro bono* legal assistance is currently a strong component of legal services to the poor overall in the U.S. The legal services network, with a strong pro bono component is possible stronger today, and better able to meet the demands of recessions, in part, because of this early response.

Many legal aid providers are experiencing the top-down pressures described above. It has been reported that overall in the U.S. IOLTA funding has declined by 21% since the beginning of the recession in 2007, leading to a crisis in legal aid funding for many legal services providers. This is a direct consequence of falling interest rates caused by the recession. Similarly, in several Canadian provinces, the legal aid commissions are suffering from declines in funding from Law Foundations, again a consequence of falling interest rates.

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<sup>4</sup> Moses, Joy, And Justice for All: Prioritizing Free Legal Assistance During the Great Recession, Centre for American Progress, 2009

It has been suggested that one approach to smooth out these impacts of recessions could be achieved by establishing dedicated funds that would accumulate surpluses in good or, high interest periods, and use the accumulated monies to even out funding to legal aid in poor or, low interest periods. It would be necessary for foundations to establish and manage the long-term dedicated funding mechanisms. It would also mean lowering contributions to legal aid as a trade-off for stability.

### **A Longer View of Recessions and Legal Aid**

There are many good ideas from both current and past experience about how to deal with the pressures brought about by recessions. Some of them, drawn from legal aid systems with long histories and several experiences with recessions have stood the test of time. However, initiatives that work in one place and time do not always work in another. ‘What works’ depends on the specific types of legal problems, the nature of client populations, the laws and the manner in which the courts and other parts of the justice system operate. Proclaiming with confidence what will work is risky business.

This section will step back from the great recession and take a look from a wider angle. By listening to economists, we know a couple of basic things about recessions. We are never sure if a recession is coming. We never know if a recession is upon us until fully in the midst of one. Economists are almost always, of necessity, looking backwards at the statistics for the last quarter. We are never sure if a recovery is underway or what the timing will be. And, for sure, we never know when the next one will be coming. We know that recessions are, if anything, uncertain.

There is another thing we know about recessions. We know that recessions are inevitable. Economic slowdowns and their more severe cousins, recessions, are normal aspects of market economies. Paradoxically, while the onset and the impacts of recessions might be very unpredictable, it might be possible to prepare for them in advance. In fact, given the uncertainty surrounding recessions, anticipatory action might be the best thing that can be done.

### **Are ‘Mature’ Legal Aid Organizations More Vulnerable to Cuts During Recessions?**

This section will examine this question by looking briefly at the history of legal aid in Canada. There have been three periods in the expenditure history of legal aid in Canada; the growth period, the “dirty 90’s and the post 2000 revival. During the growth period, from the early 1970’s to 1990, year over year expenditures increased continuously. A major recession that occurred in the early 1980’s and several economic slowdowns seem to have little effect on legal aid. In the entire period from the early 1972-1973 to 1989-1990, taking into account all legal aid plans, there were only 5 budget cuts in the entire period taking into account all the legal aid commissions. By way of contrast, there were 40 major reductions in expenditures during the “dirty 90’s”, covering the period from 1990-1991 until the end of the decade. It is worth noting that the decline in GDP during the 1981-1982 recession was 6.7% compared with the 3.4% decline in the 1990-1991

recession. The reasons why tough economic times had comparatively little effect in the growth period are not entirely clear. Perhaps it is because legal aid was a new institution, growing from very small beginnings. Budgets were small. Perhaps the idea of access to justice had greater evocative power.

This brings to mind somewhat of a parallel with circumstances in the current recession. Several mature legal aid plans are suffering in the current recession. In England and Wales the Legal services Commission is experiencing staffing constraints and is relying increasingly on contracting out to control costs. As well, in England and Wales, a reduction of 30% in fees for barristers has been proposed to bring payments in line with those of prosecutors. The legal aid commission in the Republic of Ireland had an 8% budget cut. The legal aid commissions in several Australian states are struggling with static budgets and increasing demand. At the national level in the United States, the Legal Services Commission budget has been increased by \$40 million. However, there are reports that many legal aid organizations are experiencing budget cuts and reductions in the level of service. On the other hand, several eastern European countries are establishing new legal aid systems; Georgia, Bulgaria, Lithuania and Hungary. In particular, it has been reported that Bulgaria has increased spending on legal aid by 30% during the past year.

It is possible that new legal aid systems are not perceived, as their older cousins seems to be, as “black holes” voraciously consuming public funds, not perceived as producing value for money and therefore not politically popular. This suggests that managers of emerging legal aid systems should look cautiously down the road to the next recession, and consider how they should prepare when they will be at the helm of more mature legal aid systems.

The recession that hit Canada in 1990-1991, that was part of the 1990-1993 global recession, triggered a very bleak decade for legal aid in Canada. This is an example of the most severe impacts of recessions on legal aid. The recession was accompanied by high government debt, declining government revenues resulting from the recession. Because of these factors, governments were predisposed to cut public sector budget, including legal aid. The impact of the recession that occurred in the early 1990's was compounded by a major economic slowdown in 1995-1996 that arrived on the heels of the earlier recession. Expenditures and levels of service declined throughout the decade. Generally, the largest of the provincial legal aid systems experienced the most severe budget cuts. As well, the budget cuts experienced by Canadian legal aid commissions that following the 1990-91 recession occurred mostly in the years after the recession as governments struggled with the high debt and reduced revenues left in the wake of the recession.

The impacts of the current recession are becoming clear only now as politicians and economists are now predicting its imminent end. This is not surprising since it seems that there is often a lag between the onset of a recession and its full impact on legal aid. There are a number of reasons. The depth and duration of a recession are usually not clear and governments may delay decisions about financial cuts. Legal aid budgets are



set a year in advance. Reductions in interest rates likely affect next year's funding. Unemployment, a major factor driving demand for legal aid, rises later in the recessionary cycle and usually remains high following a recession.

Based on the Canadian experience, it is also curious that although in the midst of the most severe recession since the Great Depression the impacts are, so far, not what one might have expected. There has been little impact so far. One of the thirteen Canadian legal aid "plans", in the Province of New Brunswick, has experienced a budget cut directly related to the recession. Several others are experiencing reductions in Law Foundation grants because of low interest rates. Fortunately, these sources of funding are relatively small compared with funding from the provincial and federal governments. It is surprising, on the other hand, that the Province of Ontario, the part of the country effected most strongly by the recession, has announced in the midst of the recession a \$150 million increase in legal aid funding over the next four years. This was in part a response by the government to a withdrawal of services by lawyers for serious cases such as homicides. Nonetheless, this does emphasize the uncertainty surrounding the impact of recessions on legal aid. However, on the less positive side, because of the high unemployment that typically follows in the wake of recession and the government constraints on funding that may occur after the recessionary period, impact will likely continue after the "technical" recession has ended.

### **Concluding Observations**

The last section offers three concluding observations; mere observations being much safer than conclusions, recommendations or advice when faced with uncertainty.

In a recent discussion of the impact of recessions on legal aid, the CEO of one European legal aid organization said with a mix of cynicism and seriousness; 'Don't let a good crisis go to waste'. Recessions do indeed present opportunities. Crises often allow organizations to make changes that would be unacceptable in more stable times. Financial constraint, inadequate funding to meet demand and doing more with less have been constant features of legal aid. On the slightly more positive side, however, because constraint has been a constant in legal aid, so also has innovation. There are always changes and innovations one wants to introduce. Moreover, recent research has taught legal services providers a great deal about legal problems and the nature of legal needs. This body of research following the *Paths to Justice* study has taught us how needs can be better understood and addressed. However, organizations are often characterized by inertia, especially when budgets are inadequate and the demand exceeds the resources available. The squeeze between demands and resources may become greater, even critical, in times of recession. However, crises often allow organizations to make changes that would be resisted in better times. Examples from Ontario, Canada following the recession in the early 1990's and from the U.S. following the recession of the early 1980's show how responses to recession can result in beneficial and durable changes to legal aid delivery. However, responding to recession after it has taken hold can be painful.

Don't wait for the next recession to occur. Many things about recessions are uncertain, except that another recession or economic slowdown will inevitably come along sooner or later. One might think of viewing recessions as "peaks" or "spikes" exacerbating the balance of resources and demand along a long path of less than adequate funding, of doing more with less. It may be possible to prepare for the next recession(s) by making research and innovation a constant part of the legal aid organization. However, that condition should be thought of as 'necessary but not sufficient'.

A perennial problem is that legal aid is often not well understood by policy makers and its importance as a part of the justice system is not appreciated. That suggests that legal aid organizations must be able to demonstrate the value of legal aid. The following suggestions might help being prepared for recessions when the first indications of trouble appear on the horizon.

- Make research and innovation a constant.
- Focus on outcomes, not only outputs (outcomes are the effects you want to achieve).
- Be able to answer the question: what is the value of legal aid to the society? Funding for legal aid competes for scarce resources with other public services.
- Be able to show how legal aid contributes to an effective and efficient justice system.
- Be able to show how legal aid links with broader issues of public policy.

Finally, the combined effects of budget cuts and increasing demand will place increasing stress on legal aid staff. Cuts in programs may be unavoidable. However, one legal aid society in Canada that has experienced significant budget reductions following a recession in the early 1990's and again following an economic slowdown in 2000 has learned that investing in internal communication and staff development builds the internal capacity to deal with the impacts of recession. It has been the experience of the legal aid plan in British Columbia, Canada that money spent on change management workshops to assist staff to adjust to organizational change, training and development for staff, leadership training have given the organization the capacity to deal with wrenching organizational change.

Recessions may indeed present opportunities. However, it might be possible to lay the groundwork to seize on those opportunities well in advance. Of course, recessions will present immediate needs for assistance with problems related to loss employment, mortgage foreclosures and other legal needs that may be especially critical in recessionary times. As well, there may also be opportunities to build longer term, durable capacity to ride out the next recession better than the last one. The great 19<sup>th</sup> century American landscape photographer, Ansel Adams, once said: "chance favours the prepared mind."