



Department of Justice Ministère de la Justice
Canada Canada

TECHNICAL REPORT

**FACTORS DRIVING
HIGH COST LEGAL AID CASES
PRELIMINARY ASSESSMENT**

Ab Currie

Revised

April 1999

TR1998-10e

UNEDITED

**Research and Statistics Division/
Division de la recherche et
de la statistique**

**Policy Sector/
Secteur des politiques**

Canada 

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*The present study was funded by the Research and Statistics Division,
Department of Justice Canada. The views expressed herein are
solely those of the author and do not necessarily
represent the views of the Department of Justice Canada.*

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Types of High Cost Cases

There are three quite distinct types of high cost legal aid cases; 1) occasional-meritorious, 2) occasional-mundane, and 3) systemic. High cost cases of the first type, the *occasional-meritorious* very expensive cases, arise unexpectedly and assume a degree of importance well beyond the individual matter. A hypothetical example might involve the appeal of a murder conviction that becomes a matter of wrongful conviction, and ultimately address matters of fundamental importance for the justice system concerning Crown prosecutions and police investigation and charging. The Guy Paul Morin case in Ontario is a good example of this situation. The magnitude of the case, and the significance of the case for the integrity and repute of the justice system, are often not apparent until such a case is well under way. The unique and important nature for the justice system of high cost cases of this type suggest that special protocols should be in place to fund the legal defence, once the significance of the case becomes apparent.

A second type of high cost case might be termed *occasional-mundane*. These are exceptionally high cost cases which arise from time-to-time that have no particularly important precedent value. Examples of these cases would be conspiracy cases involving multiple co-accused, or murder cases with complex DNA evidence and expert witnesses.

A third type of high cost cases are *systemic* high cost cases. This category represents the type of high cost cases which are a constant feature of legal aid cost structures. These cases are “normal” cases focusing on the guilt or innocence of the accused, without the significant issues of legal principal or public policy typical of the occasional-meritorious type. This type of high cost case is the focus of this paper. A category of cases which is a recurrent feature of the cost structure of a legal aid organisation is at least subject to systematic examination. There may be some ways to control the costs of high cost cases of this type.

Identifying Systemic High Cost Cases

This type of case is difficult to define. Legal aid plans tend to define this type of high cost case by a somewhat arbitrary definition based on a cost threshold. To take a few examples, the British Columbia Legal Services Society defines high cost cases as those costing \$10,000 or more. The Ontario Legal Aid Plan considers any case costing more than \$20,000 as a high cost case. Legal Aid New Brunswick, a much smaller legal aid plan than either Ontario or British Columbia, defines a high cost case as one that costs more than \$5000. Clearly, the concept of a high cost case is elastic. The financial cutting point or definition of “high cost” reflects the overall expenditures of the legal aid plan, and what the managers feel is significant in terms of the legal aid budget.

A “relative” definition would appear to be the best approach to defining systemic high cost cases, because it would reflect the relative magnitude of the problem for organisations of different sizes with different financial capacities. The question is really not what is the dollar amount that defines a systemic high cost case. The appropriate question is, rather: at what point is the amount of money spent on a certain cluster or group of cases highly disproportionate to the number of cases?

This still does not actually provide a definition of a high cost case. Rather, it suggests a methodology for approaching the issue of systemic high cost cases. The question: what is high cost?, really becomes a policy question of what is tolerable, and can anything be done about it?

This approach is one that identifies disproportionality in the distribution of expenditures. Legal aid plans can ascertain various cut-off points at which a certain percentage of the case load consumes a given proportion of expenditures. The actual cases making up the bands between the cut-off points can be identified. Analysing aspects of the particular high cost cases might lead to explanations as to why the cost was so high, and would hopefully suggest factors that can be controlled.

To construct the initial data, all cases over \$5000 are listed from most to least expensive. The cumulative costs are calculated for the cases ranked most to least expensive: 1, 1+2, 1+2+3, etc. Then each cumulative total as a percentage of total expenditures is calculated. The table below shows a sample calculation. This process is continued until cut-off points of 5 per cent, 10 per cent, and so on are determined. Count the number of cases that fall within the boundaries of the cut-off points, and calculate the percentage that these cases equal of the total case load. In the hypothetical example above, 3 cases would equal 0.3 % of the total case load, which is consuming 8.0 % of the budget.

Table I Sample Calculation of Cumulative Costs

Case Identifier	Type of Case	Cost	Cumulative Total	Percent of Total Expenditures*
001	Murder	\$40,000	\$40,000	2.0
002	Conspiracy	\$70,000	\$110,000	5.5
003	Murder	\$50,000	\$160,000	8.0

* Assume total expenditures \$2,000,000. Assume a total of 1000 cases.

Some Data on High Cost Cases

Three jurisdictions have been able to provide actual data; British Columbia, Alberta and New Brunswick. Calculations such as illustrated above produced the following results. This is a very preliminary analysis based on only three jurisdictions. The data are being used for exploratory purposes. However, it would be preferable to have information from other legal aid plans, especially the larger plans in Ontario and Quebec.

British Columbia

In British Columbia for 1995 - 1996, 0.5 per cent of the criminal legal aid case load consumed 25 per cent of criminal legal aid expenditures. This included 158 cases out of a total of 28,335 criminal legal aid cases for that year. Twenty-five per cent of the budget represents \$ 6,039,867 out of total expenditures of \$ 24,127,327. This represents a considerable disproportionality between number of cases and expenditures, a very small number of cases consuming a disproportionately large percentage of expenditures.

The types of cases falling within this high cost case band are shown below. The vast majority of cases, 48 per cent, are homicides. Slightly under 9 per cent were sexual assaults. Each of drug trafficking and kidnapping/confinement made up less than 50 per cent. All of the other types of cases occurred only a few times.

**Table II Profile of Cases Consuming Disproportionate Amount of Expenditures
British Columbia 1996-1997**

Type of Case	Number
Murder/Manslaughter	34.3
Sexual Assault	6.5
Drug Trafficking	32.0
Kidnapping/Confinement	2.9
Other	24.2
Total	306

It is interesting that 34 per cent of all cases, some with costs up to \$45,000, represent a large number of types of legal matters. The fact that the high cost case problem in British Columbia is not limited only to a few types of legal matters. Whatever the factors that are driving high cost cases, they appear to be built into the system in such a way as to have pervasive effects.

New Brunswick

The 1995-96 data from New Brunswick show a similar pattern. The data represent cases costing \$5000 or more. In this case, 1.1 per cent of the case load, 17 cases in total, consumed 25 per cent of total criminal expenditures. This amounted to \$283, 956 out of total criminal expenditures, excluding provincial offences, of \$1,130,942.

Table III Profile of Cases Consuming Disproportionate Amount of Expenditures
Nouveau-Brunswick 1995-1996 to 1997-1998

Type of Case	1995-1996	1996-1997	1997-1998
Murder	12	7	17
Attempted Murder	1	-	-
Narcotics	2	-	-
Assault	-	1	-
Sexual Assault	-	1	1
Attempt./Accessory/Conspiracy	2	-	1
Total	17	9	19

The New Brunswick high cost data for 1996-97, representing cases costing \$5000 or more, show a disproportionate pattern, but not of the same magnitude as the previous year's data. In that fiscal year, 0.6 per cent of the criminal case load consumed 10.0 of total criminal legal aid expenditures. In terms of absolute numbers, this represents 9 cases, and expenditures of \$110,381 on the nine high cost cases, out of total expenditures of approximately \$1,096,360. Most of the high cost cases were homicides.

The 1997-98 data show a similar pattern to 1995-96. In 1997-98 1.2 per cent of the case load consumed 21.5 per cent of expenditures. This involved 19 cases, costing \$251, 188, out of total criminal legal aid expenditures of \$1,169, 003.

Alberta

The high cost case data for Alberta show a different pattern from the British Columbia and the New Brunswick data. For 1996-1997, there were 68 cases costing over \$5000. This equals 0.05 % of the total case load. The total cost was \$558,732, 5.5 % of total criminal expenditures of \$10,110,453. Clearly, the Alberta legal aid plan does not show the same degree of disproportionality as the other two provinces.

The high cost cases from Alberta represent a range of case types.

Table IV High Cost Cases, Alberta, 1996 -1997

Type of Case	Number
Homicide	30
Conspiracy	8
Sexual Assault	6
Assault	5
Appear, Orders, Recog.	3
Criminal Neg.	2
Narcotics	2
Manslaughter	1
Robbery	1
Attempted Murder	1
Fraud	1
Other	8
Total	68

The data for Alberta show a considerably less disproportionate expenditure pattern for the most expensive cases, compared with British Columbia or New Brunswick. As one would expect, the actual cost of cases is relatively low in Alberta.

The table below compares the cost of murder cases in the three provinces, as an illustration. Murder offences are the most common among high cost cases. Homicide cases are by far the most common type of high cost case in the three jurisdictions included in this analysis. These cases comprised 44per cent of all cases in Alberta in 1996-97, 48 per cent of all cases in British Columbia in 1996-97, and 72 per cent of all high cost cases in New Brunswick over the period 1995-96 and 1996-97.

In terms of cost, the average cost of a homicide case in Alberta for the period covered by this preliminary study was approximately 60 per cent of the average cost in New Brunswick, and 20 per cent of the average cost in British Columbia. It is possible that the B.C. costs are somewhat inflated by the practise of issuing one legal aid certificate for all co-accused in a case. This would increase the cost of particular cases, and decrease the total number of cases. On the other hand, the B.C. data reflect billings in the fiscal year and not the cost of completed cases. This would have the tendency to deflate the calculation of average case cost.

Table V The Cost of Murder Cases in Three Jurisdictions

Province	Year	Average Cost	Range
Alberta	1996-1997	\$8,676	\$14,336 to \$5,006
New Brunswick	1995-1996	\$14,588	\$25,069 to \$6,181
	1996-1997	\$14,198	\$38,593 to \$7,500
British Columbia	1995-1996	\$43,543	\$191,571 to \$10,034

Factors Explaining High Costs

There are at least four general explanations for high legal aid costs. These four explanations are probably closely interrelated.

Supplier-Driven Inflation

This is the explanation that places emphasis on the private bar. Simply stated, private bar lawyers who supply legal aid service may tend to attempt to bill to the maximum levels allowed under the tariff.

Supplier driven inflation has a dynamic which operates over time. The number of lawyers in private practise has increased. The number of lawyers dependent on legal aid for a major portion of their income has increased. especially for the criminal bar. This has put into motion a dynamic which has resulted in constant upward pressure on costs.

Legal Aid-Driven Inflation

Supplier- driven inflation may operate somewhat independently, but not entirely. The large and well-funded legal aid plans might work in concert with supplier-driven inflationary factors. Generously funded legal aid reflected through high tariffs, with few restrictions and generous allowances for disbursements, especially for special costs for expert witnesses, might set in motion an inflation of standards and expectations with respect to criminal defence. This might even become fixed over time in the case law. The normal and expected level of effort gets pushed up beyond “full answer and defence” to a “leave no stone unturned” expectation.

From this perspective, legal aid-driven factors become an opportunity structure with respect to supplier-driven inflation.

System-Driven Inflation

There a number of general factors that might result from changes or conditions in the legal system. In a similar fashion to the legal aid-driven inflation hypothesis, these factors might be viewed as an opportunity structure within which supplier-driven inflation operates.

1.Criminal Procedure

Certain aspects of criminal procedure might tend to increase costs. *Disclosure* is one such procedural element. The disclosure requirement in criminal cases that resulted from the *Stinchcombe* decision has meant that defence counsel now typically reviews the large amount of police evidence gathered for a case. This is a general factor that adds to the cost of the defence for all criminal cases.

Certain elements of criminal procedure may relate to only specific types of offences.

2. The Charter

The Canadian Charter of Rights and Freedoms has added to the range of defences that can be raised in a criminal trial.

3. Complex Scientific Evidence

In particular, DNA evidence has come into increasingly common use. The cost of testing, of the expert witnesses, and of the greater complexity of proceedings has increased the cost of many criminal trials.

Crown Prosecution-Driven Inflation

It is frequently observed in several jurisdictions that Crown Prosecutors, especially federal prosecutors, are extremely zealous in pursuing prosecutions. Many separate charges are filed. The number of witnesses and the amount of evidence introduced are excessive. Appeals are frequent. The tactics used by prosecutors tend to make cases as lengthy and complicated as the law will allow. Crown prosecutors may choose to proceed by direct indictment. This usually has the effect of lengthening the trial because matters that would have been dealt with in the preliminary hearing become part of the trial itself.

Why Are Cases Less Expensive in Alberta? Preliminary Thoughts

The fact that high cost cases are less expensive in Alberta, compared with British Columbia or New Brunswick, should provide some basis for identifying the drivers of high cost cases. Certain features characteristic of the Legal Aid Society in Alberta provide some tentative explanations for the relatively low costs in that province.

The Rules of Coverage in Alberta require that a lawyer conduct a legal aid case in a manner that minimises cost. Part IV, 3. states that: "A lawyer who accepts a certificate shall perform his legal services in such a manner and incur only such disbursements as he would with a client of modest means." The Legal Aid Society staff that reviews and taxes billings continually provide administrative weight to this approach by the "frugal manner" in which they administer disbursements and additional costs beyond those normally allowed under the tariff.

It should be noted that British Columbia has a somewhat similar regulation requiring that lawyers employ strategies that are "reasonable and necessary"

The client contribution program in Alberta may also have the effect of reducing costs. It may be that lawyers are less likely to run up the bill because the client ultimately has to pay at least a portion of the bill.

The tariff in Alberta is also relatively low, compared with British Columbia. This could partially explain the lower costs in Alberta compared with B.C., but certainly not the observed difference in the average cost of murder cases. The tariff in Alberta is not lower than in New Brunswick.

In Alberta persons accused of murder have a right under the Criminal Code, but there is no requirement for a trial by jury. Thus it is reported that there are fewer jury trials in Alberta than in other provinces. This might explain some of the cost difference between New Brunswick and Alberta.

The Alberta situation appears on the surface to represent an environment, or a set of factors, that tend to reduce costs. The low tariff, the “client of modest means” philosophy, the manner in which the tariff rules are applied, the client contribution program are the factors that may be producing lower costs.

Further Analysis

The preliminary assessment presented in this paper is only suggestive of the factors driving high cost cases. Additional analysis would certainly be required to produce conclusive answers to the question of what produces disproportionately high costs.

The kind of research would be likely to produce the most useful results would be a comparison of roughly “similar” high cost cases between provinces such as Alberta and British Columbia. This research would assess factors such as the legal strategy chosen in the case, the cost of elements of the case, the legal strategy of the Crown, the level of court, and the control exercised by the legal aid administration. In this manner the factors explaining the cost difference could be identified.

The existence of an “environment” or a “set of expectations” that drive high costs presents a different set of issues. Historical analysis linking tariff increases, policies regarding exceptional costs, and other factors with increases in the cost of particularly expensive cases might confirm and explain how the high cost situation was produced over time. On the other hand, The factors that might be identified by the comparative case research would point toward aspects of the high cost case problem that are subject to some control.

Discussion

The research suggested above would help explain certain aspects of the factors driving high cost cases. However, as the discussion about possible factors driving the cost of expensive legal aid cases suggests, a pattern of high cost cases may be the product of a very complex set of factors that could have emerged over decades. Controlling the factors driving high costs and bringing case costs under control may require an equally long term and multifaceted management process.

A “big case management” program suggests itself as an initial step to begin to control high cost cases. In the longer term the management of high cost cases may involve managing a complex of factors: the tariff, relations with the private bar, and communication with Crown prosecutions, as well as strategies for the direct management of large cases, in order to eventually promote an environment that tends to depress rather than increase high cost cases.