Court File No.

THE KING'S BENCH
Winnipeg Centre

B E T W E E N

CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicant

- and -

ATTORNEY GENERAL OF CANADA and THE GOVERNMENT OF MANITOBA

Respondents

NOTICE OF APPLICATION
HEARING DATE: To be scheduled

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APPLICATION UNDER Rule 14.05(2) of the *Court of King's Bench Rules* (M.R. 553/88)

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing before a judge, on _____________________, at ___________________________, at ________, at 100C-408 York Avenue, Winnipeg, Manitoba.

IF YOU WISH TO OPPOSE THIS APPLICATION, you or a Manitoba lawyer acting for you must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2:00 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGEMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date ________________________ Issued by ____

Deputy Registrar

Address of court office: 100C-408 York Avenue
Winnipeg, MB
R3C 0P9

TO: **ATTORNEY GENERAL OF CANADA**
Department of Justice Canada
Prairie Region
601 – 400 St. Mary Ave.
Winnipeg, MB R3C 4K5

AND TO: **THE GOVERNMENT OF MANITOBA**
Legal Services Branch
Manitoba Justice
730-405 Broadway
Winnipeg, Manitoba R3C 3L6

APPLICATION

1. The Applicant, the Canadian Civil Liberties Association (the "**CCLA**"), makes this Application for:

(a) A declaration that underfunding of legal aid for criminal defence in Manitoba by His Majesty the King in Right of Manitoba, as represented by the Respondent the Government of Manitoba ("**Manitoba**"), and His Majesty the King in Right of Canada, as represented by the Respondent the Attorney General of Canada ("**Canada**") (collectively, the "**Respondents**") results in violations of sections 7, 11(d), and 15 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***") in a manner that cannot be justified as reasonable limits under section 1 of the *Charter*;

(b) Further or in the alternative, declarations under section 52(1) of the *Constitution Act, 1982* that the legislative scheme violates sections 7, 11(d), and 15 of the Charter, including:

(i) to the extent sections 10 and 11 of the *Legal Aid Manitoba Regulation*, M.R. 225/91 (the "***Regulation***") provide that certain accused shall receive legal aid but fail to ensure legal aid for accused persons who require it for the protection of their sections 7, 11(d), and 15 *Charter* rights and cannot afford counsel, sections 10 and 11 of the *Regulation* are of no force and effect; and

(ii) sections 10 and 11 of the *Regulation* should be read as mandating legal aid for accused persons requiring legal aid for the protection of their sections 7, 11(d) and 15 *Charte*r rights and who cannot afford counsel;

(c) An order that the CCLA has public interest standing to bring this Application;

(d) An order that there be no costs of this Application; and

(e) Such further and other relief as counsel may advise and this Honourable Court deems just.

2. The grounds for the application are as follows.

A. OVERVIEW

3. Under the *Charter*, all accused persons—regardless of their economic status—are presumed innocent and have the right to make full answer and defence, to receive fair trials and to the equal benefit and protection of the law.

4. Yet, in Manitoba, these rights are systemically undermined by Canada and Manitoba's chronic underfunding of criminal legal aid.

5. In Manitoba, due to the longstanding extreme underfunding of legal aid:

(a) Accused persons are unable to secure legal aid in a wide array of cases where counsel is necessary to protect their rights under section 7 and 11(d) of the *Charter*;

(b) When an accused person receives legal aid, funding is frequently inadequate, compromising section 7 and 11(d) rights; and

(c) Among the accused persons whose rights are violated as set out above, Indigenous persons are disproportionately impacted, contrary to section 15 of the *Charter*.

6. Manitoba and Canada cannot meet their onus of justifying these rights infringements under section 1 of the *Charter*.

7. Over the past five decades, funding for legal aid in the province has not kept up with the increasing cost and complexity of criminal prosecutions. Far too many vulnerable accused persons face the state's bluntest instrument without legal representation. The administration of criminal justice entails the harshest, and most pervasive, deprivations of liberty and security of the person that the state inflicts. In light of these highest stakes, superior courts have the remedial powers to address systemic threats to *Charter* rights. The CCLA thus invokes public interest standing to address systemic underfunding of criminal legal aid in Manitoba.

8. Accused persons who apply for, or are in need of, legal aid are among the most vulnerable people in Canada, having the least financial resources, often limited education, and frequently poor mental and physical health. Their disadvantages make it especially difficult to navigate a criminal justice system that has become increasingly complex and harsh. From the onset of criminal charges, these vulnerable accused persons face enormous hurdles before they ever reach a trial, including in attempting to secure legal aid, facing the critical bail hearing stage, identifying viable legal and factual defences, identifying and enforcing breaches of their *Charter* rights, ensuring that Crown disclosure is complete, and deciding their election and plea, all of which commonly requires the assistance of counsel. This marginalized group is also ill-equipped to conduct a criminal trial, with all of its current complexities, without the assistance of counsel.

9. As a result of extreme underfunding of legal aid in Manitoba, and the challenges associated with today's criminal proceedings, economically disadvantaged accused persons who require

counsel to ensure their rights are protected are not receiving legal aid, and even when legal aid is granted, its funding is inadequate.

10. An assumption of the distant past, when circumstances were very different, that legal aid in Manitoba was generally sufficient to ensure legal representation when needed is clearly unsupportable. There has been a fundamental shift in circumstances that requires this flawed assumption be revisited. The effect of many years of underfunding is a widespread pattern of breaching and further endangering accused persons' rights under sections 7, 11(d), and 15. The adverse consequences include uninformed and false guilty pleas, wrongful convictions, inadequate bail hearings and unwarranted detentions, lack of preparation for trial, compromised trials, and lack of full answer and defence through all stages, from ensuring full disclosure, to understanding the Crown's case and presenting defences.

11. Given the systemic nature of the underfunding of Manitoba's criminal legal aid program, and its pervasive negative effects, applications by individual accused persons for state funding do not give a complete picture of the nature and extent to which section 7, 11(d), and 15 rights are imperilled across the province. The individuals who apply for, or should apply for, legal aid are necessarily among the most vulnerable members of society. It cannot rest with them to present the court with the broader perspective that is needed or request the broader remedies that are warranted.

12. The remedies sought by the Applicant are tailored to address a widespread constitutional rights problem in Manitoba, while respecting the government's authority over policy and spending. Ultimately, courts must ensure that criminal cases brought before them do not proceed in violation of well-entrenched *Charter* rights. The declarations sought give the government the opportunity

to decide how to solve the problem that too many accused persons' *Charter* rights are imperilled by legal aid underfunding.

B. STANDING

13. Established in 1964, the CCLA is a national organization that seeks to protect and promote respect for, and observance of, fundamental human rights and civil liberties. The CCLA has several thousand paid supporters, and a wide variety of persons, occupations, and interests are represented in its national membership.

14. The CCLA fights against threats to fundamental rights and freedoms and civil liberties. The CCLA has experience litigating issues in its own right and has also been granted intervener status in courts across Canada, including in the Supreme Court of Canada. The CCLA has been granted public interest standing in over 20 cases and intervened in over 340 cases.

15. The CCLA has a real and continuing interest in the welfare of those who have been charged with criminal offences in Manitoba who cannot afford a lawyer and in protecting these persons' rights and liberties. Moreover, the CCLA has substantial expertise in relation to the issues raised in this Application through its advocacy, public education, and research.

16. This case, which concerns the well-being and fundamental liberties of indigent accused persons in Manitoba, raises a serious justiciable issue.

17. The CCLA, together with its substantial membership, has the resources to ensure that the application is litigated effectively, and in the interests of all those who are, have been, or could be

denied criminal legal aid coverage in Manitoba or receive inadequate assistance at all critical stages of the criminal process.

18. From a practical and pragmatic point of view, and in light of the particular nature of this challenge, this Application is a reasonable and effective means to bring a case of public importance before this Honourable Court. It would be difficult, if not impossible, for individual accused persons, who lack resources, to litigate such a *Charter* challenge to the general inadequacy of criminal legal aid in Manitoba.

19. Accordingly, it would be an efficient and worthwhile use of this Honourable Court's scarce judicial resources to hear and decide this Application.

C. BACKGROUND

i. Shared federal-provincial responsibility for criminal legal aid in Manitoba

20. The criminal legal aid program in Manitoba was formally established in 1971 with the coming into force of *The Legal Aid Services Society of Manitoba Act* (now *The Legal Aid Manitoba Act*, C.C.S.M. c. L105 (the "***Act***") and the creation of the Legal Aid Services Society (now Legal Aid Manitoba ("**LAM**")). LAM opened its doors in 1972, and the introduction of the legislated state-funded program was lauded as a significant landmark.

21. Canada has jointly funded the criminal legal aid program with Manitoba since its inception. Canada contributes to the criminal legal aid program by providing funding through a contribution agreement with Manitoba. Manitoba in turn flows federal and provincial funds to LAM, which must deliver criminal legal aid services in accordance with the *Act* and the *Regulation* (together, the "**legislative scheme**").

22. Canada and Manitoba's funding comprises the vast majority of how criminal legal aid is funded in the province. In the Department of Justice's Legal Aid in Canada Report, Canada acknowledges that legal aid "is essential to fulfilling the government's obligations under the *Canadian Charter of Rights and Freedoms* including the right to a fair trial (section 11(d)); to life, liberty and security (section 7) and to equal protection and equal benefit of the law (section 15)."

23. The current Agreement Respecting Criminal Legal Aid was signed on behalf of Manitoba and Canada in 2022 and is in force until March 31, 2027 (the "**Contribution Agreement**"). In the Contribution Agreement, Canada and Manitoba acknowledge that:

(a) they are "committed to a responsive, fair, efficient and accessible justice system which reflects Canadian values and that ensures economically disadvantaged people in Canada have access to legal assistance when they need it;"

(b) criminal legal aid is a shared responsibility that is "integral to the delivery of an accessible and effective justice system" because, among other reasons, it responds to Canada's international obligations and "allows a collaborative approach to be used to enable the federal government to fulfil its justice obligations;" and

(c) they have a responsibility to provide equitable access to legal services to economically disadvantaged people in serious criminal matters and in proceedings under the *Youth Criminal Justice Act*.

24. The Contribution Agreement expressly states that Canada's funding is expected to enable fair, timely and accessible justice.

25. In exchange for Canada's funding, Manitoba is required to:

(a) Ensure that Canada's contribution is recognized, including in news releases and annual reports;

(b) Provide a minimum annual contribution of its own; and

(c) Maintain "certain minimum standards" of criminal legal aid.

26. The "minimum standard" in the Contribution Agreement is a directive from Canada for Manitoba to "prioritize" certain cases, mainly those where a risk of imprisonment may arise, but the Contribution Agreement is silent on the fair trial rights of accused persons.

ii. The complexity of modern criminal proceedings

27. The criminal justice system has evolved significantly since the early 1970s.

28. Criminal investigations and prosecutions have increased in complexity and duration. The development of new technologies has brought new kinds of investigative techniques, evidence and experts. The advent of the *Charter* in 1982 brought about fundamental changes in the disclosure regime and the ability to challenge breaches of fundamental rights, resulting in more and increasingly complex motions and voluminous disclosure. The criminal law develops rapidly with various amendments and changes over time.

29. Criminal investigations and prosecutions now routinely involve extensive disclosure, electronic communications, digital records, surveillance materials, forensic analysis, expert evidence, and complex evidentiary issues. Criminal proceedings are longer, require substantially greater preparation, and frequently involve numerous pre-trial appearances and motions that were uncommon or far less resource-intensive in earlier decades. For example, in the 2023/2024 time

period, Integrated Criminal Court Survey data reflects that it takes a median number of 233 days to complete adult criminal cases in Manitoba outside of the 7-day resolution period. In 2009/2010, the median number was 192 days.

30. The Supreme Court of Canada has repeatedly acknowledged this new reality in recent years. In *R. v. Jordan*, the Court recognized the "inherent time requirements of the case and the increased complexity of criminal cases." In *R. v. Rafilovich*, the Court confirmed the growing complexity of criminal litigation and emphasized the importance of legal representation to preserving the presumption of innocence. More recently, in *R. v. Kinamore*, the Court referred to the "increasing complexity of sexual offence trials in Canada" and the challenges they pose for the criminal justice system.

31. In 2020, a criminal court workload and case processing study published by Canada indicated that case processing times continued to increase since the *Jordan* decision. More court appearances occur for every final decision made by the court now when compared to only ten years ago.

32. Costs of delivering adequate services to respond to criminal charges, and inherently more complex cases, have correspondingly and foreseeably increased. To ensure that accused persons can make full answer and defence and receive a fair trial, defence counsel need sufficient time and resources to review disclosure, investigate facts, consult experts, prepare witnesses, conduct legal research, advance meritorious motions, negotiate with the Crown, and represent accused persons at every critical stage of the criminal process. The increased use of plea bargaining means that

fairness before trial is even more critical where the discretion of the judiciary is not policing fair trial rights.

33. Despite the reality of modern criminal litigation, the criminal legal aid program remains chronically underfunded. It has failed to keep pace with, among other things, population growth, inflation, the cost of living, and the costs of defending criminal charges today.

D. *CHARTER* VIOLATIONS

34. The longstanding extreme underfunding of legal aid in Manitoba and in any event the legislative scheme results in two main categories of *Charter* infringements: (i) underfunding causes accused persons to be unrepresented or underrepresented in circumstances where counsel is necessary to protect section 7 and 11(d) rights; and (ii) these negative effects are felt disproportionately by Indigenous accused, contrary to section 15.

i. Sections 7 and 11(d)

35. From the moment a criminal charge is laid, the state exposes accused persons to deprivations of liberty and security of the person. The criminal accusation alone engages the security of the person interest because of the grave personal and social consequences for the accused, including the stress of facing criminal charges, social stigma, and being under a "cloud of suspicion," and ostracism from the community. First-time accused persons face the additional heightened risk of receiving a criminal record, which carries a number of important consequences including to their employment prospects, and which can have a profound effect on their lives. These are unavoidable consequences of the criminal justice system, and the prejudice to an accused's security of the person increases the longer the criminal charges remain unresolved.

36. Sections 7 and 11(d) guarantee the right of all accused persons to be presumed innocent, make full answer and defence, and to have fair trials. All accused persons are entitled to know the case they have to meet and to answer that case. These fundamental rights protect against wrongful convictions.

37. As Manitoba and Canada are aware, legal aid is essential to ensuring that section 7 and 11(d) *Charter* rights are protected regardless of the economic status of the accused—these rights are not effective without legal advice and legal assistance, particularly in an adversarial system that places a premium on the conduct of the parties.

38. Accused persons in need of legal aid are of the most disadvantaged people in Canada, having few to no economic resources, lower rates of literacy and education, and high rates of mental illness and addiction. They must be presumed to need counsel to respond to criminal charges today, which are inherently complex. The need for counsel arises from the moment the charge is laid and lasts throughout the adversarial process, from bail, to plea, to trial.

39. The Respondents' underfunding of the criminal legal aid program and in any event the legislative scheme denies accused persons who cannot afford their own lawyers of the legal services they need to properly defend themselves, either through the complete denial of coverage through "eligibility" criteria or inadequate coverage through the "tariff." This has impacts at all stages of the criminal process, including at the bail, plea and trial stages.

40. The eligibility criteria and tariff rates are rationing mechanisms designed to limit the extent of criminal legal aid coverage based on available funding. They do not, and cannot, give any assurance that accused persons' section 7 and 11(d) rights will be protected through counsel when needed. Criminal legal aid rationing is necessarily driven by the extent of funding and, in

Manitoba's case, underfunding, and is in any event core to the legislative scheme. As set out in the LAM Directors' Manual:

> LAM operates under severe financial constraints. It has a finite amount of money available to fund cases. Every dollar LAM spends on one case means there is one less dollar to spend on another. The tariffs set out in *Legal Aid Regulation* (Man. Reg. 225/91, as amended) fix the amount of money LAM pays to lawyers for different types of cases and different steps within a case. At the same time, LAM seeks to fund as many deserving cases as it can.
>
> In the face of these competing priorities the guidelines set dollar caps to determine who is and who isn't financially eligible for legal aid. The caps reflect the "present ability of Legal Aid Manitoba to provide ongoing funding for eligible low-income Applicants". Of necessity they are set at very low income levels.

41. The legislative scheme is silent on the fundamental rights of accused persons but expressly directs LAM to deliver services "in a cost effective and efficient" manner (sections 2.1, 3(1), and 25(3) of the *Act*). By their own terms, the *Act* and the *Regulation* do not assure that legal aid will be granted to the extent necessary to protect section 7 and 11(d) rights. Instead, coverage is driven by underfunding.

42. In addition to the breaches of the presumption of innocence, the right to make full answer and defence, and the right to a fair trial, this backwards system further deprives accused persons of their liberty and security of the person in a manner that is arbitrary, grossly disproportionate, and in violation of the duty of a lawyer's commitment to the client's cause.

a. Unduly restrictive eligibility criteria violates sections 7 and 11(d)

43. The eligibility criteria that determines whether an accused person will get criminal legal aid coverage prevents accused persons who need counsel from accessing legal services and violates section 7 and 11(d).

44. Section 3(1) of the *Act* provides that criminal legal aid is only available to accused persons who are "eligible."

45. "Eligibility" is determined by the *Act* and the *Regulation* (sections 1 and 11.2 of the *Act*), and includes a financial eligibility and matter eligibility component (sections 10, 11, 13 and 17 of the *Regulation*).[1] Eligibility criteria is a rationing mechanism driven by the Respondents' underfunding and is key to the legislative scheme.

46. ***First***, the financial eligibility guidelines exclude a group of Manitobans facing criminal charges who cannot afford a lawyer and will accordingly not have representation, including those charged with indictable offences.

47. Financial eligibility is prescribed by guidelines created by a Management Council established under the *Act*. The current financial eligibility guidelines reflect the maximum annual gross income that can be earned by different family size units in order to fully qualify for legal aid funding:

Family Size	Fully Eligible
1	$31,500
2	$39,500
3	$48,500
4	$58,500
5	$66,500
6	$75,000
>6	$83,500

[1] See Appendix "A" – Financial and Matter Eligibility.

48. The *Regulation* expressly permits LAM to reject an application on the grounds of financial ineligibility.

49. The Manual confirms that “[t]he guidelines play a critical role in LAM’s management of the funding it receives. The guidelines reflect the ability of LAM to provide ongoing funding for eligible low-income applicants”—Canada and Manitoba’s underfunding makes it impossible to fund all the demand for criminal legal aid. LAM can waive strict compliance with the guidelines, but any marked or regular departure from the guidelines is exceptional.

50. Being the direct product of underfunding, the financial eligibility guidelines do not keep pace with the reality of the cost of affording necessary legal services, including among other things Manitoba's population growth, demand for services, and the rising cost of living.

51. ***Second***, the matter eligibility criteria further restrict the availability of criminal legal aid, even if financial eligibility is met, and there is no requirement that the *Charter* rights of accused persons be considered before denying coverage.

52. Section 10 of the *Regulation* requires LAM to provide criminal legal aid to financially eligible accused persons who are charged with indictable criminal offences. These offences are “deemed” to have merit.

53. Section 11 of the *Regulation* permits—but does not require—LAM to provide criminal legal aid to financially eligible accused persons for non-indictable criminal offences, including (a) proceedings under the *Youth Criminal Justice Act*; and (b) summary conviction or provincial by-

law proceedings where there is a "likelihood of imprisonment or loss of the means of earning a livelihood or if special circumstances exist that warrant furnishing legal aid."

54. Section 13 of the *Regulation* deems all hybrid criminal offences as summary conviction offences until the Crown elects to proceed by way of indictment. The vast majority of *Criminal Code* offences are hybrid, with purely indictable offences being reserved for the most serious crimes such as murder. Those charged with summary conviction offences (for example, assault or impaired driving) still face serious consequences including the prospect of imprisonment upon conviction. Section 787 of the *Criminal Code* sets out the default maximum imprisonment term for summary conviction offences at two years less a day.

55. Even for individuals who meet financial eligibility and are charged with an offence captured under the *Regulation*, there are some applicants who "shall" have legal aid denied if their case is deemed to have insufficient "merit." Section 16 of the *Regulation* provides that an application "shall" be rejected where an area director determines, among other things, that "it is unlikely that the applicant will succeed in the matter for which the application is made" or "the cost of the proceeding does not justify the possible benefit to the applicant."

56. The LAM Area Directors' Manual confirms that "A [legal aid] certificate will not issue without a determination as to merit." The Manual describes the merit assessment as follows:

> The [Area Director] assesses the reasonable likelihood of success and the potential benefit to the Applicant to determine if the cost of providing coverage is justified **in light of the current resources available to LAM**. The general test is whether the matter is "significant enough that a reasonable person of modest means would pay a lawyer to represent them."

57. Like the financial eligibility criteria, the driver of merits outcomes is the extent of the budget available. In reality, applicants are denied legal aid because others are perceived to have

more serious charges, yet those who are denied legal aid still face charges that are sufficiently “serious” and “complex” to require the assistance of counsel in order to make full answer and defence, and receive a fair hearing.

58. Ultimately, the eligibility criteria excludes thousands of accused persons who need criminal legal aid services. The eligibility criteria likely causes many of those who are in need of legal aid to not even apply. For those who do apply, the eligibility criteria causes legal aid to be refused. Available Department of Justice data confirms that, in 2023 and 2024, there were 19,348 criminal legal aid applications in Manitoba. Of those applications, 18% were refused, representing thousands of applications. 40% were refused for financial eligibility and 8% for “lack of merit” (i.e., because of the nature of the case or the seriousness of the matter).

59. In addition, 25% of criminal applications by Indigenous accused persons alone were refused. Indigenous accused persons who need legal aid face further barriers in accessing the legal aid system due to among other things, language, their geographic location and proof of income requirements. Owing to Canada’s history of discrimination against Indigenous persons, they are more likely to have negative contact with the criminal justice system and are more likely to live in poverty, have lower levels of education, and higher rates of mental health challenges and substance use dependency.

60. Accused persons without criminal legal aid coverage and who cannot afford their own counsel are forced to navigate the system on their own. Virtually no accused person who appears unrepresented in criminal court can represent themselves without making errors of omission and of commission that place them at a disadvantage. These accused persons are, among other things:

(a) At a higher risk of being held in pre-trial detention or held on restrictive bail conditions, with the attendant psychological and physical harms, including dire jail conditions like overcrowding, lack of access to proper health care, loss of housing, income and employment, the loss of a sense of well-being, and sometimes even death;

(b) At a higher risk of entering uninformed or otherwise improper guilty pleas and thus facing imprisonment or other psychological and physical harms without a full understanding of their legal, factual, or collateral consequences. These accused, particularly where they are held in pre-trial detention, are more likely to plead guilty just to "get on with their lives" or to get out of custody;

(c) At a higher risk of being unable to understand or respond to the Crown's case, including by prohibiting disclosure review, the retention of necessary experts, and pre-trial motions; and

(d) More vulnerable to wrongful convictions.

61. These marginalized accused persons can attempt various purported self-help remedies, including a "*Rowbotham* application" seeking court ordered state funding. However, *Rowbotham* applications require these already disadvantaged accused persons to meet an "exceptional" and outdated test created in 1988, which arose out of a presumption at that time of a "generally adequate" legal aid system that no longer exists in Manitoba. A *Rowbotham* application is a "hail Mary" requiring an accused persons to bring a court application that is challenging and cumbersome, and also entails use of scarce judicial resources. This is no longer a constitutionally compliant protection to an underfunded legal aid system.

b. Inadequate tariff rates violate sections 7 and 11(d)

62. Even where a legal aid certificate is issued, the tariff of fees is not adequate to ensure that section 7 and 11(d) rights are protected. Thus, for those who are able to get coverage, the legislative scheme does not ensure a constitutionally compliant defence.

63. Private bar lawyers make up the vast majority of lawyers who deliver criminal legal aid services in Manitoba. The *Regulation* provides that private bar lawyers must be paid in accordance with the tariff of fees[2] established under the *Act* by the Management Council and cannot accept any other fee, gratuity, or other compensation.

64. Available LAM data confirms that 28,803 criminal adult and 2,319 criminal youth cases were opened in 2024/2025. 75% of criminal legal aid adult clients were Indigenous.

65. The tariff is calibrated to rationing services because of the government's inadequate funding and is not driven by what is actually needed to properly defend the case levied by the Crown and thus ensure an accused's *Charter* rights are protected. The tariff is far below any reasonable market rate and impedes access to effective representation and meaningful participation throughout the adversarial court process, including at the pre-trial release, plea, and trial stages.

66. Bail is an individualized process that clearly requires the adequate assistance of counsel. The bail hearing has been described as "the single most important step" for an accused person in the criminal process, yet contested bail hearings are paid at $105 per hour to a maximum of $210, regardless of the needs of the case, including but not limited to the seriousness of the offence, preparation time, number of sureties, required number of court appearances, and complexity.

[2] See Appendix "A" – Tariff of Fees.

Despite their good intentions and best efforts, duty counsel cannot save the criminal legal aid system from the consequences of the Respondents' underfunding. Duty counsel are significantly constrained in their ability to marshal a proper bail case on behalf of the accused.

67. The vast majority of criminal cases are resolved without a trial. The decision to plead guilty carries significant legal consequences and must be made with an adequate understanding of the charge, available defences, and potential outcomes. Reliance on guilty pleas as a mechanism for resolving criminal cases presupposes that accused persons receive effective legal representation at the stages when plea discussions arise. The tariff further incentivizes early guilty pleas without sufficient preparation. The tariff will fund $1,130 to resolve an aggravated assault case with a plea and only $2,275 (i.e., about $1,000 more) for taking the same case to a one day trial (with an additional $515 for each subsequent half day of trial).

68. The tariff does not incentivize trial cases because it does not pay for the vast amount of preparation that is necessary to properly respond to the Crown's case. Trials take significantly more time than successive and multiple pleas, and thus lawyers are incentivized to take on a higher volume of clients and plead them out instead of spending their time defending cases through trial for a lower volume of clients.

69. Driven by budgetary constraints, the tariff of fees is another rationing mechanism, designed to offer very modest defence compensation with incentives to resolve cases quickly and without a trial. Like bail hearings and reviews, guilty pleas, preliminary hearings, and trials, are also funded as a "one size fits all" block-fee that does not even contemplate preparation time—a basic component of any criminal defence.

70. Manitoba has the lowest spend per case when compared to legal aid programs across Canada.

71. Accused persons being assisted on underfunded legal aid certificates are forced to accept a constitutionally non-compliant defence, despite best efforts of the dedicated, skilled counsel doing legal aid work in Manitoba. Among other things, the tariff incentivizes high volume and low preparedness. It does not provide any compensation for preparation time, which is undoubtedly necessary in all criminal cases. It creates risks of the private bar withholding services, which has occurred in Manitoba in the past, resulting in some accused persons in need not having any counsel.

72. As the *Advocacy and the Innocent Client: Defence Counsel Experiences with Wrongful Convictions and False Guilty Pleas* reported on the Ontario regime, "[d]efence counsel have their hands tied by Legal Aid tariff of hours to expend on a case, so they cannot do proper jobs. As such, accused innocent people are Underrepresented – they appear to have lawyers but the representation is woeful."

73. Accused persons have already experienced and will continue to risk experiencing the tragedy of wrongful convictions either when denied access to counsel or when assisted by counsel acting on underfunded legal aid certificates.

74. In 2017, Richard Catcheway, a vulnerable survivor of the Indian Residential School system, pleaded guilty to breaking into a Winnipeg home, even though he was an inmate at the Brandon Correctional Centre – over 200 kilometers from the crime scene – at that time. Catcheway spent over six months incarcerated for a crime he could not have committed. Mr. Catcheway's lawyer was working on a Legal Aid certificate and failed to identify this basic fact of his defence. Following the case, Nahanni Fontaine, then a Member of the Legislative Assembly (and now

Minister of Families), stated that “[a]n overloaded and underfunded Legal Aid system opens the door to a miscarriage of justice”.

75. Similarly, James Driskell was wrongfully convicted of first degree murder in 1991, and sentenced to life imprisonment with no eligibility of parole for 25 years. Defence counsel was also constrained by the limitations of the legal aid certificate. Many years later, the DNA testing was found to be fatally flawed, and it became apparent that numerous other aspects of his case required well-resourced counsel. In the result, Mr. Driskell spent 13 years behind bars for a crime he did not commit.

ii. Section 15

76. The Respondents’ underfunding of the criminal legal aid program and/or the legislative scheme violate section 15 of the *Charter*.

77. The denial of access to necessary services to accused persons who cannot afford lawyers disproportionately impacts Indigenous accused persons and this creates a distinction based on race. This distinction reinforces, perpetuates, and exacerbates the disadvantages faced by Indigenous accused. Indigenous persons have long suffered the detrimental effects of widespread racism and discrimination in the criminal justice system, including in the prison system—they are significantly overrepresented in the criminal justice system, experience higher poverty rates and persistent income gaps, and are disproportionately reliant on criminal legal aid.

78. Indigenous accused persons are more likely to be arrested, charged, detained in custody without bail, convicted, and imprisoned. They also suffer a disproportionate number of wrongful

convictions. They are more likely to plead guilty to offences, including offences of which they are factually innocent, or for which they have a valid defence.

79. By perpetuating the exclusion of Indigenous accused persons from accessing the services they need to defend themselves, the Respondents' underfunding of the criminal legal aid program and/or the legislative scheme impose a barrier to their ability to properly respond to the criminal justice system.

80. Indigenous accused persons have heightened vulnerabilities due to, among other things, other intersecting grounds including gender identity, age, disability, sexual orientation, and place of residence, and require culturally competent representation and additional resources to ensure meaningful participation in their criminal cases.

81. The landmark Aboriginal Justice Inquiry has observed that:

(a) The Aboriginal Justice Inquiry repeatedly heard that "Aboriginal people did not understand the court process and did not understand their options at various stages in the process", which further enables the overuse of guilty pleas for Indigenous people.

(b) "Aboriginal people who are arrested are more likely than non-Aboriginal people to be denied bail, spend more time in pre-trial detention and spend less time with their lawyers, and, if convicted, are more likely to be incarcerated."

(c) Indigenous people spend "considerably less time with their lawyers" than non-Indigenous people, are more likely to appear in court as an accused person without a lawyer, and are more likely than non-Indigenous people to plead guilty.

(d) The “lack of time spent with a lawyer can have significant consequences for how an accused is dealt with in the system, because the lawyer may be less informed about the circumstances of the offence, the potential defences and the resources available as alternatives to detention.”

(e) The lack of time with counsel enables cultural disconnects which further reinforce the over-incarceration of Indigenous peoples. “An Aboriginal person might feel compelled to plead guilty to a charge if he or she had committed the act” owing to cultural reasons, “even if that person had not had a criminal intent or had some technical defence.”

(f) These issues were particularly profound for Indigenous women. Many Indigenous women “did not understand the court procedures” and others “could not understand the language that was being used.” Alarmingly, “[s]ome knew nothing other than they were told to plead guilty, so they did.”

82. The Aboriginal Justice Inquiry expressly attributed these failures to legal aid, explaining that “[b]ecause of their low incomes, Aboriginal people are not as able as non-Aboriginal people to obtain legal representation” and thousands are denied legal aid every year because legal aid “has rules that severely limit the availability of Legal Aid services”.

83. Tragically, little has changed in the over three decades that have followed the Aboriginal Justice Inquiry and these practices among others still occur today.

84. The Respondents' underfunding of criminal legal aid ultimately deprives Indigenous peoples interacting with the criminal legal system of substantive equality. This reinforces their disadvantage and perpetuates individual and intergenerational inequality.

iii. Section 1

85. None of the *Charter* breaches set out above can be justified in a free and democratic society. They cannot be saved by section 1.

E. RELIEF REQUESTED

86. Manitoba and Canada have long known or ought to have known about the dire consequences of the continued underfunding of criminal legal aid and how such underfunding would cause section 7, 11(d), and 15 harms.

87. The CCLA requests declaratory relief that the Respondents' underfunding of criminal legal aid results in violations of sections 7, 11(d), and 15 of the *Charter* that cannot be justified under section 1 of the *Charter* and, further or in the alternative, sections 10 and 11 of the Regulations must be interpreted in such a manner to ensure the protection of sections 7, 11(d), and 15 of the *Charter*. The CCLA pleads and relies upon the Court's inherent jurisdiction and sections 32 and 52 of the *Constitution Act, 1982.*

88. The CCLA is a non-profit organization that has brought this Application in the public interest. The CCLA does not seek costs and should be relieved of any adverse costs award if its Application is unsuccessful.

89. The CCLA seeks such further and other relief as counsel may advise and this Honourable Court may permit.

90. The CCLA pleads and relies upon:

(a) *The Constitution Act, 1867*, 30 & 31 Vict, c 3;

(b) *The Constitution Act, 1982*, being schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11;

(c) *Canadian Charter of Rights and Freedoms*,

(d) *Criminal Code*, R.S.C. 1985, c. C-46;

(e) *The Legal Aid Manitoba Act*, CCSM c. L105;

(f) *Legal Aid Regulation*, Man. Reg. 225/91;

(g) *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171; and

(h) such other legislation or regulations as counsel may advise.

91. The following documentary evidence will be used at the hearing of the application:

(a) Affidavit evidence as counsel may advise; and

(b) Such further and other evidence as counsel may advise and this Honourable Court may permit.

August 20, 2026

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APPENDIX "A"

Tariff of Fees[3]

Category of Offence	A	B	C
1 Guilty plea, stay of proceedings or withdrawal of charges before a hearing (including all services except where elsewhere provided for in this tariff)	$2,100	$1,130	$595
2 (a) Preliminary hearing or transfer hearing, at which the judge decides the matter based on evidence adduced (including first ½ day of hearing)	$2,100	$1,130	$595
(b) each additional ½ day	$760	$515	$330
2 (a) Trial at which the judge decides the matter based on evidence adduced (including first ½ day of hearing)	$3,490	$2,275	$1,525
(b) each additional ½ day up to and including the 10th half day including sentencing if required	$700	$515	$330
(c) each additional ½ day after the 10th half day of trial including sentencing if required	$840	$515	$330

The three categories of offences are described as follows:

1. Category A offences include some of the most serious offences, such as murder, aggravated sexual assault, offences that "cause death" and criminal organization offences.

2. Category B offences include other serious offences, such as aggravated assault, arson, kidnapping, obstruction of justice, sexual assault, weapons trafficking, robbery and importing

3. Category C offences are a catch-all category for offences not listed in Category A or B, including but not limited to offences such as arson causing property damage, firearm possession and break and enter—all of which carry serious sentences upon conviction, including imprisonment.

[3] *Legal Aid Manitoba Tariff of Fees* (1 April 2025), Part 2 – Fees in Criminal Matters (in force).

CANADIAN CIVIL LIBERTIES ASSOCIATION	and	ATTORNEY GENERAL OF CANADA and THE GOVERNMENT OF MANITOBA	Court File No.
Applicant		Respondents	

THE KING'S BENCH
Winnipeg Centre

Proceeding commenced at WINNIPEG

NOTICE OF APPLICATION

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