THE LEGAL AID CRISIS: TIME FOR ACTION

a background paper prepared by
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for the Canadian Bar Association

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PROLOGUE

This paper was prepared by a consultant for the Canadian Bar Association. It does not necessarily represent the views of the CBA and has not been approved as official CBA policy. The paper is current as of December, 1999.

One of the biggest obstacles in considering Canada's legal aid situation is the lack of comparable information across the provinces and territories. While the Canadian Centre for Justice Statistics publishes annual reports that provide an overview of eligibility criteria, areas of coverage and other relevant topics, information such as expenditure on civil legal aid in each jurisdiction each year or the unmet need for legal aid across the country is much more difficult to ascertain.

In an attempt to fill in some of the gaps in available information, the Canadian Bar Association elicited members' views by distributing a questionaire to lawyers practicing in the areas most commonly covered by legal aid. The questionaire was sent by email to approximately 1100 members in the National Criminal Justice, Family Law and Immigration Law Sections of the CBA and about 90 responses were received. While the questionnaire was neither conceived of, or expected to be a scientific survey, the responses confirmed our anecdotal knowledge of the state of legal aid and the contribution of the profession to access to justice in Canada.

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The Legal Aid Crisis: Time for Action

1. Introduction

The Canadian legal aid system is in a state of crisis. Across the country, needy individuals with serious legal problems are being turned away from legal aid. Too often, people with low incomes cannot access the legal entitlements they are guaranteed by law or are forced to represent themselves in complex legal proceedings. Many private bar lawyers have stopped taking legal aid work because it has become an economic burden. In some places, staff legal aid lawyers are overworked to the point that both their professional obligations and their personal well-being are compromised. The systemic work done by lawyers in legal clinics, aimed at changing legislation, policy and procedures to break the barriers to justice, is underfunded, unrecognized and often the first to suffer from financial cuts to legal aid. In some jurisdictions, lawyers have withdrawn services to bring attention to their plight.

Yet, this is a hidden crisis – a widespread problem bearing hidden costs for all Canadians. The time has come to bring this critical situation into the light. It is time for a public dialogue on the significant role of legal aid in our system of justice and our democracy. The ultimate goal of this discussion is to ensure that the current and future legal needs of low-income Canadians can be met in the most effective and efficient way possible.

The Canadian Bar Association (CBA) has an important role to play in ensuring that this discussion takes place. According to its mission statement, seeking improvements in the law, the administration of justice and access to justice are among the Association's most fundamental goals.

Lawyers see first hand what happens when people are cut off or refused by legal aid, and the repercussions that limited access to justice can have. However, review and reform of the Canadian legal aid system requires collaboration amongst all of the system's participants and stakeholders. These include: low-income Canadians and their representative groups, governments, lawyers, law societies and bar associations, and the general public. This review must be an open process that generates a better understanding of legal aid and is informed by the input and ideas of those parties traditionally seen as outside the system.

The divisive debate about the delivery of legal aid must be left behind. It is a time for fresh, bold approaches and the recognition that legal aid is an integral aspect of the justice system. If legal aid fails, justice fails. We must act with the awareness that access to justice is severely limited for many Canadians at this moment, and both immediate and longer term solutions are required to address their real and pressing needs.

A. CBA Policy and Action on Legal Aid

The CBA has been active on the issue of legal aid for a long time. In the mid-1980s, the CBA's Legal Aid Liaison Committee carried out important studies on the provision of legal aid in Canada. This work, and especially the Committee's *Legal Aid Delivery Models: A Discussion Paper*,[1] made a significant contribution to our understanding of the operation of the legal aid system and the strengths and weaknesses of various models for the delivery of legal services. The following general statement of principle was adapted from that discussion paper and remains a central feature of the CBA's approach today:

> *The objective of an effective and fair legal aid system is to provide and encourage equal access for all Canadians to the full range of essential legal services, of a consistently high quality through a plan adequately funded by federal and provincial governments and assured of independence in promoting the legal welfare of individuals who are unable to afford legal counsel.*

By 1992, the CBA was extremely concerned about the threatened state of the legal aid system mainly as a result of serious underfunding by governments. As a result, the Association established a *Legal Aid Action Plan*. The *Action Plan* was a broad platform of proposed activities including: research, policy development, liaison and information gathering, consultation and public relations. The CBA has actively pursued certain parts of the plan since its adoption at the Association's Annual Meeting in 1993.

As part of this initiative, the CBA adopted a resolution setting out a *Charter of Public Legal Services* and calling upon the federal, provincial and territorial governments:

> *...to fulfil their responsibilities under the Charter of Public Legal Services including the funding of essential public legal services referred to in the Charter, in order to ensure that legal representation is available to individuals with legal problems which put in jeopardy their, or their families', liberty, livelihood, health, safety, sustenance or shelter.*[2]

Also at the 1993 CBA Annual Meeting, the Task Force on Gender Equality in the Legal Profession, chaired by Madam Justice Bertha Wilson, tabled its report. This report concluded

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[1] National Legal Aid Liaison Committee, *Legal Aid Delivery Models: A Discussion Paper* (Ottawa: Canadian Bar Association, 1987) [hereinafter *Legal Aid Delivery Models*].

[2] CBA Resolution 93-11-A.

that the discrepancy between family and criminal legal aid was a serious problem emanating from gender bias in the justice system. The Task Force also found problems with the structure of family law legal aid tariffs, which focus on court appearances rather than negotiation and do not adequately account for the costs of civil litigation. The Task Force report recommended:

> *That federal and provincial governments ensure that adequate legal aid funding for family law cases is guaranteed in all areas of Canada, and in particular that the federal government establish a civil legal aid tariff.*[3]

In 1995-96, the CBA vigorously opposed the federal government's plan to change the funding of civil legal aid from the Canadian Assistance Plan (CAP), which tied federal funding to that provided regionally, to "rolling it in" with a number of other social programs under the Canadian Health and Social Transfer Program (CHST). The Association's concern was that civil legal aid service would suffer when competing for limited funds with health and education.

The 1996 CBA *Systems of Civil Justice Task Force Report* also addressed the issue of access to legal services. It concluded that three interrelated approaches were required to make legal services broadly available to middle and lower-income Canadians. These were:

- *the affirmation of the crucial role of public funding for legal services to provide access to justice for people with lower incomes and to increase the availability of legal service programs to serve them;*
- *an increase in pro bono legal services, including the provision of legal information, to lower-income Canadians; and*
- *the development of alternative funding arrangements and innovative approaches to the provision of legal services.*[4]

The *Report* made the following comments with respect to legal aid:

> *Legal aid systems across the country have been important over the years in assuring access to legal services for lower-income Canadians. Legal aid plans are in crisis, however, in many jurisdictions. Reduced funding has led to restrictions on eligibility criteria and the elimination of some types of services*

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[3] Report of the Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993) at 213.

[4] Report of the Canadian Bar Association Systems of Civil Justice Task Force, Chair: E. Cronk; Honourary Chair: B. Dickson (Ottawa: Canadian Bar Association, 1996) at 69-72.

> *from those covered by legal aid plans. In some jurisdictions this has had a particularly adverse effect on the availability of legal aid funds for civil, as distinct from criminal, law matters. The access to justice issues raised by these developments cannot be over-emphasized.*[5]

The *Report* also noted that the profession is working and must continue to work with governments and recipients of legal aid to ensure that funds devoted to legal aid are used in the most cost-effective manner possible. Potential reforms suggested by the Task Force included:

- *increased use of non-binding dispute resolution and the provision of greater incentives for early settlement in civil legal aid matters;*
- *use of fixed fees for legal aid services;*
- *focused use of technology; and*
- *increased sharing of information about innovations in legal aid between jurisdictions.*[6]

Although the Task Force stressed the crucial role of public funding for legal services for lower-income persons, it also recognized that legal aid systems have insufficient resources to meet the needs of all those who require legal services but cannot afford the full cost of those services. Given this gap between needs and resources, it is incumbent upon the profession and governments to develop alternative funding schemes. The Task Force highlighted four possible options as worthy of further investigation: prepaid legal services plans (also known as legal expense insurance), contingency legal aid funds, contingency fees and tax deductions for legal expenses.

In addition to the work carried out at the national level of the CBA, its Branches have conducted reviews of the operations of legal aid plans in the provinces and territories and have advocated for increased funding for legal aid in their respective jurisdictions.

Over the last few years, the focus has been on two encompassing goals of the CBA's *Legal Aid Action Plan*. These are:

- an increase in federal and provincial funding of legal aid services; and
- the enactment of federal legislation on legal services.

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[5] *Ibid.*, at 71 .

[6] *Id.*

The purpose of this paper is to advance these objectives by providing an up-to-date resource to CBA bar leaders as they foster a positive dialogue on legal aid and work toward developing solutions to this crisis.

B. Toward a Fresh Approach

Legal aid programs across Canada have been the subject of much scrutiny and evaluation, yet much of the past 20 years of review has been fraught with unproductive and divisive debate on the relative merits of various delivery models for legal aid.[7] Rising demand for legal aid and government cutbacks have led to a dramatically deteriorating situation in many jurisdictions.

It is time to take a fresh approach and change the parameters of the debate: to move away from an emphasis on dollars toward a focus on a governmental responsibility for public legal services. This approach requires us to develop a more profound and nuanced understanding of the legal aid situation and to build a public dialogue on this basis. This is not only about money, but also about the legal, constitutional and policy requirements for legal aid. While cost-effectiveness is an important goal, it should not drown out other objectives and principles that govern the delivery of legal aid. Issues of access, quality of service and independence from government have too often been ignored and must be brought back into the conversation.

This paper attempts to initiate this public discussion on the future of legal aid. It provides an overview of legal aid in Canada and selected other jurisdictions and offers some preliminary responses to the following questions:

- *Why do we need legal aid?*
- *What is the state of the current system?*
- *What is the contribution of the legal profession to legal aid?*
- *What are the most promising reform measures?*
- *How can we achieve a renewed legal aid system?*

The responses to these questions set the framework for an informed discussion on the future of legal aid. Within this framework, there is room for a fresh, bold approach to the fundamental

[7] A. Currie, "Legal Aid Delivery Models in Canada: Past Experience and Future Developments" (Ottawa: Department of Justice Canada, 1998) at 2-5 [hereinafter "Delivery Models"].

issues of what types of legal services should be publicly-funded for lower-income individuals and how these services can be most effectively delivered. Our ultimate goal must be a sustainable, responsive legal aid system to address the public need for access to justice.

2. Why Do We Need Legal Aid?

Legal aid is a fundamental aspect of our justice system and democracy. A government funded legal aid program has become a justice-related part of the modern state.[8] It is an integral part of our justice system.

> *Law is also a cornerstone of our democratic community. A society's strengths and weaknesses are measured by the height of the barriers standing before its system of justice. Legal aid as an institution is one of the gateways into the justice system. It opens the door to justice for those whose socio-economic status would otherwise bar entry.*[9]

For many Canadians, legal aid is synonymous with access to justice. Equality of treatment under the law, access to legal advice and services and equal, effective and comprehensive rights for all people are fundamental preconditions of social justice.

To those engaged in the justice system, either as professionals, as users of the system or as those who are denied access to the system, the crucial importance of legal aid is obvious. There are others, though, for whom it is unclear how abstract principles of justice and democracy are linked to decisions about the availability of legal aid. A close examination of the rationale for legal aid is an essential foundation for a public discussion on the future of state-funded legal assistance in Canada.

This section provides an overview of the legal, constitutional and policy arguments for legal aid, under the headings:

(a) legal aid and fairness;

(b) legal aid and the *Charter*;

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[8] Report of the Ontario Legal Aid Review, *A Blueprint for Publicly Funded Legal Services*, Volume 1 (Toronto: Ontario Legal Aid Review, 1997) at 12 [hereinafter OLAR, *Blueprint,* Volume 1].

[9] British Columbia Coalition for Access to Justice, *The Legal Aid Stories* (Fall 1998) [hereinafter B.C. Coalition for Access to Justice].

(c) legal aid and international obligations;

(d) legal aid and the rule of law;

(e) legal aid as an integral part of the justice system; and

(f) the costs of inadequate legal aid.

A. Legal Aid and Fairness

Fairness is the heart of our justice system. Ours is an adversarial system that depends upon a contest between two roughly equal parties. If there is a serious disparity in the power balance between the parties, the fairness of the procedure and the outcome is uncertain. Questions of fairness arise whenever one party is represented in a legal proceeding and the other is not, or where there is a large imbalance in the resources available to opposing counsel.

The relationship between the adversarial system, legal aid and fairness has been described in these terms:

> *The procedure here is founded on the adversary system...it is based on the premise that the truth will emerge from the contest between the two adversaries where each presents its case before an impartial tribunal. Each side will do its best to establish its own case and to destroy the opponent's case. Out of this conflict, truth and justice will surface. Where, however, in fairness and in the circumstances of the case, one of the parties is incapable of self-representation, confidence in the system is threatened. The adversaries must be equal or relatively equal before the tribunal. If they are not, the procedure is in danger of degenerating into one of moral ambivalence.*[10]

Fairness in battle cannot be achieved if only one party is armed. This is not an abstract principle but a hard reality. In criminal cases, this is especially evident where an unrepresented accused is pitted against the professional representation and resources of the Crown.

Other clear examples of unfairness can arise in proceedings concerning state apprehension of children or custody or access proceedings between parents of unequal means. In these

[10] *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)* (1997), 187 N.B.R. (2d) 81 (N.B.C.A.) (Bastarache, J., dissenting).

circumstances, parents, most often mothers, can be particularly vulnerable to legal proceedings. The state or other parent, in many cases with significantly greater resources, can marshal extensive evidence and rely on expert opinion to attack attributes such as caregiving ability. Without legal representation, parents may be ill-equipped to fairly present their own cases, possibly resulting in devastating long term consequences for both themselves and their children.

Similarly, in immigration matters, legal aid is sometimes required based in part on administrative requirements of fairness and an opportunity to be heard.[11]

The relationship between fairness and legal aid has largely developed in the context of criminal law. Prior to the entrenchment of *Charter*, the courts addressed the issue of the right to counsel in the context of an accused's right to a full answer and defence as one aspect of the right to a fair trial. The presence of defence counsel, and more particularly state-funded counsel, was generally not found to be an essential component of that right at common law. The analysis of when the right to a full answer and defence amounted to a right to counsel was determined on a case-by-case basis.

In its 1976 decision in the *Barrette* case, the Supreme Court of Canada held that:

- *where the case against the accused is such that the accused cannot defend himself without testifying, he needs counsel; and*
- *where an offence is serious enough to warrant a sentence of six months in jail, it is serious enough to warrant counsel, if the accused wishes.*[12]

The classic statement of the right to counsel was made by Mr. Justice Seaton in 1974 in the *Ewing* case:

> *I reject the contention that it is always necessary to appoint counsel but it does not follow that it is never necessary to appoint counsel. The trial Judge is bound to see that there is a fair trial. Because of the complexity of the trial, the accused's lack of competence or other circumstances, a trial Judge might conclude that defence counsel was essential for a fair trial. In the past when a*

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[11] The right to counsel in this context is also based on the specific right to counsel granted in provisions of *An Act respecting immigration to Canada,* 1976-77, c. 52, s.1 [hereinafter *Immigration Act*], the fundamental rights to security of the person and the right to a fair hearing under the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. However, these do not, generally speaking, create a right to state-funded counsel.

[12] *R.* v. *Barette* (1976), 29 C.C.C. (2d) 189 (S.C.C.).

> *trial Judge thought he could not secure a fair trial without counsel for the defence, he approached the Attorney General or the Bar. Under similar circumstances today he might contact the Legal Aid Society. If a trial judge concluded that he could not conduct a fair trial without defence counsel and his requests for defence counsel were refused, he might be obliged to stop the proceedings until the difficulties have been overcome. Our law would not require him to continue a trial that could not be conducted properly... .*[13]

The reasoning in this case has been widely followed, both before and after the proclamation of the *Charter*.[14]

The principle of independence is related to the duty of fairness. In the largest sense, a legal aid system cannot be fair if it is not independent of government. Many reviews of legal aid in Canada have emphasized the need for independence in administration:

> *A legal aid scheme must in its administration and operation be divorced as completely as possible from any government department or agency*.[15]

The legal aid program's independence and arms length relationship with government is particularly important for groups that have had a history of conflict with and/or distrust of the government. This was the view expressed by Aboriginal individuals and groups during consultations on the Saskatchewan Legal Aid Review.[16]

B. Legal Aid and the *Charter*

In Canada, this common law requirement of procedural fairness is augmented by constitutional requirements for fairness and equal protection of the law under the *Canadian*

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[13] *Re Ewing* (1974), 18 C.C.C. (2d) 356 at 365-66 (B.C.C.A.), Seaton J.A.

[14] M. Klinger, "The Right to Court-Appointed Counsel in Canada: Its Status and Limits" (Background Paper Prepared for the Permanent Working Group on Legal Aid) (Ottawa: Department of Justice Canada, August 1996) at 7.

[15] Report of the Saskatchewan Legal Aid Committee, Chair: R. C. Carter, Q.C., 1973, cited in *Report of the Saskatchewan Legal Aid Review Committee* (November 1992) at 5.

[16] *Ibid.*, at 43-44.

Charter of Rights and Freedoms (the *Charter*). The jurisprudence to date has been consistent with, and builds upon, the pre-*Charter* requirements discussed above.

Four *Charter* provisions are directly relevant to the provision of legal aid. These are:

> *7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice.*
>
> *10 Everyone has the right on arrest or detention....*
>
> *(b) to retain and instruct counsel without delay and to be informed of that right;*
>
> *11 Any person charged with an offence has the right....*
>
> *(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.*
>
> *15(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

(a) The criminal law context

Since the advent of the *Charter* in 1982, cases on the right to state-funded counsel have provided new challenges. Our courts have been faced with a balancing act: the constitutional requirement to safeguard the rights of the accused to a fair trial and the reality of legal aid plan budgets, including their financial eligibility requirements and their limits as to which offences may be covered by legal aid.[17] Overall, there have been no radical departures from the earlier jurisprudence on the right to a fair trial.

In a strong decision, the Supreme Court of Canada held that section 10(b) of the *Charter* compels the government to establish a duty counsel system, known as the "*Brydges* duty counsel"

[17] Klinger, *supra,* note 14 at 2.

after the precedent-setting case, in order to ensure that individuals have access to counsel immediately upon arrest or detention.[18]

Courts have confirmed that although the *Charter* only explicitly recognizes a right to counsel in section 10(b), it is an implicit component of the right to a fair trial protected by both sections 7 and 11(d). However, this does not mean that there is always a right to state-funded counsel:

> *The right to retain counsel, constitutionally secured by section 10(b) of the Charter, and the right to have counsel provided at the expense of the state are not the same thing. The Charter does not in terms constitutionalize the right of an indigent accused to be provided with funded counsel. At the advent of the Charter, Legal Aid systems were in force in the provinces, possessing the administrative machinery and trained personnel for determining whether an applicant for legal aid assistance lacked the means to pay counsel. In our opinion, those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, in cases not falling within provincial legal aid plans, sections 7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot provide a lawyer, and representation of the accused is essential to a fair trial.*[19]

With respect to section 11 of the *Charter*, a number of cases have now established that in matters of sufficient seriousness and complexity, the "accused cannot receive a fair trial without counsel."[20] However, it is clear that the Supreme Court of Canada will not dictate to the provinces and territories how they should deliver legal aid services and which delivery models should be established.[21] Generally, the courts have not ordered governments to pay for counsel but have rather stayed proceedings where satisfactory arrangements for legal representation cannot be made.

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18 *R.* v. *Brydges*, [1990] 1 S.C.R. 190.

19 *R.* v. *Rowbotham* (1988), 41 C.C.C. (3d) 11 at 65-66 (Ont.C.A.).

20 *Id.*

21 *R.* v. *Prosper* (1994), 92 C.C.C. (3d) 353.

In what has become known as a *Rowbotham* application, accused persons who have been refused legal aid coverage are entitled to apply to the court for a remedy. In the *Rowbotham* decision, the Ontario Court of Appeal indicated that the Court could override a legal aid plan decision that an accused is without sufficient funds and then provide a remedy to the accused. The Court stated:

> *In our view, a trial judge confronted with an exceptional case where Legal Aid has been refused, and who is of the opinion that representation of the accused by counsel is essential to a fair trial, may, upon being satisfied that the accused lacks the means to employ counsel, stay the proceedings against the accused until the necessary funding of counsel is provided. As stated above, the finding of Legal Aid officials that an accused has the means to employ counsel is entitled to the greatest respect. Nevertheless, there may be rare circumstances in which Legal Aid is denied but the trial judge, after an examination of the means of the accused, is satisfied that the accused, because of the length and complexity of the proceedings or for other reasons, cannot retain counsel to the extent necessary to ensure a fair trial. In those circumstances, even before the advent of the Charter, the trial judge had the power to stay proceedings until counsel for the accused was provided. Such a stay is clearly an appropriate remedy under section 24(1) of the Charter. Where the trial judge exercises this power, either Legal Aid or the Crown will be required to fund counsel if the trial is to proceed.*[22]

The Alberta Court of Appeal recently listed factors which should be considered in a *Rowbotham* application:

> *What evidence might be useful and available? For example, it is entirely possible that the accused could in a few minutes lead evidence of:*
>
> *(a) her financial background,*
>
> *(b) her educational background,*
>
> *(c) what she knows of the charge,*
>
> *(d) what particulars she has been able to obtain from the Crown,*
>
> *(e) what efforts she has made to get Legal Aid, with what result,*
>
> *(f) the reasons given by the Legal Aid authorities,*

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22 *R.* v. *Rowbotham*, *supra*, note 19 at 69.

(g) whether she has any other access to a lawyer or agent capable of giving her effective defence to this charge, and

(h) anything else which would help her make the argument that she cannot fairly meet the charge without counsel.[23]

In parts of Canada today, there is a discrepancy between current legal aid coverage and the constitutional requirements of the *Charter*. Legal aid coverage in criminal cases is generally limited to fund representation only if an accused faces incarceration. However, the *Charter* would seem to require coverage in some cases involving complicated matters even though the accused is not facing incarceration upon conviction.[24]

The law on the extent of these rights and their connection to legal aid is evolving. So far, courts have not imposed a requirement of choice of counsel on a legal aid plan,[25] nor have they been willing to review the adequacy of a provincial legal aid tariff where counsel is prepared to act.[26] However, in *R.* v. *Leblanc*, an accused charged with a series of drug offences was unable to find anyone to take on his defence given legal aid cuts and the plan's limits on preparation time. The Court decided that the accused's *Charter* rights were jeopardized and adjourned the matter to hear evidence on the proper *Charter* remedy. The Court made it clear that legal counsel would have to be found immediately or the case would likely be stayed.[27]

(b) Section 7 - Moving beyond criminal law

The potential scope for constitutional protection of access to legal services is much wider under section 7 of the *Charter*. Section 7 provides that where "life, liberty or security of the person" are threatened, the *Charter* guarantees the right to a fair hearing in accordance with the principles of fundamental justice. The "principles of fundamental justice" are the basic tenets of

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[23] *R.* v. *Rain* (1994), 157 A.R. 385 at 390 (Alta. C.A.).

[24] See, for example, *R.* v. *Hill* (1996), 34 C.C.C. (2d) 344 at 352 (Ont. Ct. Prov. Div.).

[25] *Panacui* v. *Legal Aid Society of Alberta,* [1987] 1 W.W.R. 60 at 68 (Alta. Q.B.).

[26] *R.* v. *Rockwood* (1989), 49 C.C.C. (3d) 129 (N.S.C.A.); *R.* v. *Munroe* (1990), 57 C.C.C. (3d) 421 (N.S.S.C.), affirmed on appeal (1990), 59 C.C.C. (3d) (N.S.C.A.).

[27] *R.* v. *Leblanc*, [1995] N.B.J. No. 129 (Q.B.). The Court did not rule on this issue as the Attorney General of Canada reached an agreement with New Brunswick Legal Aid with respect to funding.

our system of justice, and include the right to a fair hearing, which by definition includes the right to participate in a real, as opposed to an illusory manner. In some circumstances, this participation will require state-funded counsel for people without financial means to retain counsel.

A more expansive right to counsel may emerge from the evolving jurisprudence under section 7 than it has under the other *Charter* provisions. The wording of section 7 is sufficiently broad that it can provide a constitutional foundation for publicly-funded counsel in the context of appeals in criminal cases, and in domains outside of the criminal law.[28]

In the recent *J.G.* case, the Supreme Court of Canada applied the protection of "life, liberty and security of the person" guaranteed in section 7 of the *Charter* to child protection proceedings, that is in a non-criminal law context.[29] The Court held that section 7 guarantees a parent the right to a fair hearing, which includes the parent's effective participation in the hearing. Effective participation will sometimes require the assistance of counsel, depending upon the seriousness of the interests at stake, the complexity of the proceedings and the capacities of the parent. The Court concluded that an unrepresented parent would ordinarily need to possess superior intelligence or education, communication skills, composure and familiarity with the legal system to effectively present the case.

In deciding whether to grant legal aid, plans must therefore consider the "life, liberty and security of the person" requirements of section 7 of the *Charter* in some civil, as well as criminal matters. This right protects both the physical and psychological integrity of the individual. In applying section 7 to the interests of a primary caregiver parent, the Supreme Court of Canada recognized that state removal of a child from parental custody constitutes a serious interference with the psychological integrity of the parent and a gross intrusion into a private and intimate sphere. Further, the Court considered the stigma and distress resulting from the loss of parental status.

The Supreme Court's analysis in the *J.G.* case provides some insight into the types of non-criminal cases where there could be a constitutional right to legal aid. It is a very significant precedent in extending the right to counsel to civil proceedings: a precedent that opens the way for further constitutional protection of the right to legal assistance.

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28 Desrosiers, "The Legal and Constitutional Requirements for Legal Aid", in the Report of the Ontario Legal Aid Review, *A Blueprint for Publicly Funded Legal Services*, Volume 2 (Toronto: Ontario Legal Aid Review, 1997) at 503-528 [hereinafter OLAR, *Blueprint,* Volume 2].

29 *J.G.* v. *New Brunswick (Ministry of Health and Community Services) et al.*, [1999] 3 S.C.R. 46.

(c) Legal aid and the right to equality

Section 15 of the *Charter*, the equality rights provisions, may provide a further basis for a constitutional right to legal aid. Equality before the law is meaningless if people are prevented from enforcing their rights. True equality requires that barriers - financial, social and cultural - be removed for all Canadians. The legal aid system is the primary government mechanism designed to overcome these barriers.

The implications of section 15 for the right to counsel were outlined in the minority decision in the *J.G.* case. Madam Justice L'Heureux-Dubé concluded that: "The rights in section 7 must be interpreted through the lens of sections 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society."[30] She held that:

> *Access to domestic legal aid is one of the means by which women are able to attain equality before the law; without it, they do not have the equal protection or equal benefit of the law in the broader sense, and not merely with respect to the legal aid program.*[31]

Section 15, either on its own or in conjunction with section 7, also has great potential as a constitutional means to challenge limited legal aid coverage. One commentator has suggested that there are at least three types of potential section 15 challenges to the legal aid system:

1. *distinctions in level of legal aid resources available to different types of cases which have a differential impact on different groups might constitute discrimination prohibited under section 15 (i.e. priority to criminal vs. family);*
2. *section 7 and section 15 could be read together to develop an approach to security and liberty interests which respect equality guarantees (like the minority judgment in the J.G. case cited above); and*

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[30] *Id.,* at para. 115 (Gonthier and McLachlin JJ., concurring).

[31] P. Hughes, "Domestic Legal Aid: A Claim to Equality" (1995) 2 Review of Constitutional Studies 203 at 219.

> 3. *a constitutional attack on an allegedly inadequate legal aid scheme might be mounted on the basis that the justice system itself is discriminatory on the basis of an analogous ground, that is poverty.*[32]

Again, lack of equal access to legal representation is a fundamental issue of fairness. Erosion of legal aid funding belies our commitment to equal protection and benefit of the law. Legal aid was meant to avoid a two-tiered system of justice: one for those who could pay and one for those who could not. However, it is exactly this tiered system that is present today:

> *Legal aid underfunding has resulted in a tiered system of justice, with at least three types of people who need lawyers. First, there are those who can pay for lawyers privately. Second, there are those who receive Legal Aid from lawyers who receive unrealistically low remuneration for the work and time required to provide the high quality level of representation each client deserves. Third, there are those who are refused the services of a lawyer altogether, since they do not qualify financially or they have a legal issue which is not covered by the tariff.*[33]

(d) Implications of the *Charter*

It is still early in the evolution of the courts' application of *Charter* rights to the legal aid context. What is clear is that the *Charter* guarantees in sections 7, 10(b), 11(d), and 15 provide a constitutional safety net; a minimum threshold of fairness below which governments will not be permitted to let legal aid fall.

The current *Charter* jurisprudence appears to impose modest but significant constraints on the design of provincial legal aid schemes. Courts will require counsel at a minimum in serious and complex cases in the sphere of criminal law and in those civil cases which have an impact on the right to "life, liberty and security of the person", where the accused lacks the skills to act for himself or herself. In general, it appears that the courts will differ to decisions of the various legal aid plans and will not directly require governments to increase legal aid funding or dictate arrangements for the delivery of legal aid. However, in criminal matters, courts may ensure constitutional protection of the right to counsel and a fair trial by staying proceedings, thereby

[32] OLAR, *Blueprint,* Volume 1, *supra*, note 8 at 81. See also Desrosiers in OLAR, *Blueprint,* Volume 2, *supra*, note 28 at 536-38.

[33] B.C. Coalition on Access to Justice, *supra*, note 9 at 4.

forcing governments to either pay for counsel or forfeit the right to proceed against unrepresented individuals.

Based on the jurisprudence to date, it is not at all clear that the courts would refrain from intervening and making a finding of unconstitutionality if confronted with what appeared to be a plainly discriminatory feature of a legal aid scheme or a level of service that was considered so inadequate that the judge could not preside over a fair trial.[34] There is the potential for more expansive scrutiny, particularly with challenges under sections 7 and 15. Constitutional doctrine could be applicable to the design of legal aid schemes. Of particular interest is the potential to expand upon the breakthrough decision in the *J.G.* case to determine the constitutional parameters of civil legal aid.

C. Legal Aid and International Obligations

A third source of principled support for legal aid is derived from Canada's international human rights obligations concerning the rights to a fair hearing, to equal treatment of all persons before courts and tribunals and the entitlement of all persons to equal protection of the law. Canada is a party to a number of international conventions or treaties that address the right to publicly-funded counsel for accused persons. These treaties are only binding at international law and are not incorporated in Canada's domestic law. However, Canadian courts can and do look to international law when interpreting Canadian legislation or *Charter* rights. In this way, international law has an important influence in Canadian jurisprudence.

In international law, the right to legal counsel and legal aid is one aspect of the right to a fair trial in criminal matters. Article 14.3(d) of the *International Covenant on Civil and Political Rights* provides:[35]

> *14(3) In the determination of any criminal charge against him everyone shall be entitled to the following minimum guarantees, in full equality:*
>
> *(d) To be tried in his own presence, and to defend himself or through legal assistance of his own choosing; to be informed if he does not have legal*

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[34] Report of the Ontario Legal Aid Review, *A Blueprint for Publicly Funded Legal Services* (Toronto: Ontario Legal Aid Review, 1997) at 82 [hereinafter OLAR, *Blueprint*].

[35] *International Covenant on Civil and Political Rights* (1976), 999 UNDS 171, [1976] CTS 47.

> *assistance, of this right; and to have legal assistance assigned to him in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.*

The rationale for these rights is that the complexity of legal systems demands that for a trial to be fair, every defendant ought to have the services of counsel who is knowledgeable about the law and the workings of the justice system.

Related to this is the right of the accused to defend oneself in person or through a competent legal practitioner of one's own choosing. The right to counsel can safely be said to be one of the most crucial elements of a fair trial. The United Nations Human Rights Committee has also held that the obligation to provide legal assistance occurs not only at the trial stage, but in preliminary stages and on appeal[36] and for any proceedings concerning the constitutionality of procedures taken in the case.[37] Further, it implies that the counsel shall adequately represent the accused.[38]

This element of the right to counsel is so fundamental to the fairness of criminal trials that even where an accused person has been summoned and fails to appear at the trial, the deprivation of his or her right to legal counsel is not justified.[39]

The issue of whether a State is required to provide free legal advice in all circumstances was considered in a complaint before the UN Human Rights Committee.[40] The Committee concluded that in decisions regarding legal aid counsel, a tribunal is expected to take into account the competence of counsel and the complexity of the matter. The Committee has also commented that counsel should receive adequate remuneration for providing legal assistance under a legal aid plan.[41]

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[36] *Reid* v. *Jamaica*, Communication No: 250/1987 (20 July 1990).

[37] *Currie* v. *Jamaica*, Communication No: 377/1989 (29 March 1994).

[38] See *Murray* v. *U.K.* (1996), 22 EHRR 29.

[39] See *Peeladoah* v. *The Netherlands* (1994), 19 EHRR 81.

[40] *OF* v. *Norway*: *Two Selected Decisions* (1984), HRC 44. The HRC found that the interests of justice did not require Norway to provide free legal advice in a case where the accused was convicted of two petty offences and sentenced to a fine or, in default of payment of the fine, 10 days' imprisonment.

[41] This comment was made with respect to the Jamaican legal aid plan in the context of a capital punishment case, see *Reid*, *supra*, note 36.

Canada has been subject to a complaint under Article 14(3)(d) of the *International Covenant on Civil and Political Rights*. In *J.S.* v. *Canada*, J.S. applied for a legal aid certificate in Ontario but was denied assistance because she was considered not to be ordinarily resident in the province. While the legal aid authority in British Columbia had offered to pay her counsel, the lawyer believed he must refuse that payment because he was not authorized to practice law in British Columbia. The Committee found that there were no grounds for establishing a violation since she was in fact represented before the court and since the legal aid authority of British Columbia had offered to pay her legal costs.

Canadian courts have considered this international jurisprudence in establishing the right to counsel in domestic law. For example, the Alberta Court of Appeal reviewed international law in finding that the right to counsel was a fundamental human right, though the contours of that right remain somewhat ill-defined:

> *The mid-20th century saw the concept of the right to counsel demanded as a social or human right. Expressed as a human right it incorporated an obligation on the state not only to allow counsel but also to pay his cost. As a human right the right to counsel finds tempered expression in the International Covenant of Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Canada is a signatory to each [sic].*
>
> *In both treaties the obligation of the state to provide paid counsel is, in terms, less than absolute. Neither treaty purports to entrench an entitlement to paid counsel on appeal while both treaties extend a positive right to legal assistance at trial only where the interests of justice so require, implying a case-by-case consideration.*[42]

Canada is party to the Organization of American States and is thereby bound to accept the Organization's *American Declaration of Rights and Duties of Man.* Article XVIII of that document addresses the right to a fair trial as follows:

> *Article XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental rights.*

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[42] *R.* v. *Robinson* (1989), 70 Alta. L.R. (2d) 31(Alta. C.C.) at 61. See also a discussion of these treaties in *R.* v. *Rowbotham*, *supra,* note 19 at 61.

Canada is also bound by the *Charter of the Organization of American States* (as amended). The *OAS Charter* contains a much broader provision on legal aid:

> *44 The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of all principles and mechanisms: ...*
>
> *i) Adequate provisions for all persons to have due legal aid to secure their rights.*

Unlike the other international obligations discussed in this section, the *OAS Charter* requirements to provide legal aid appear to be unrestricted in the sense that they are not limited to persons without sufficient means nor to situations in which the interests of justice require legal representation.

Canada is a signatory, but has not yet ratified the American *Convention on Human Rights,* which also addresses the right to a fair trial in Article 8. Section 2 stipulates that:

> *8.2 Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ...*
>
> *d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate privately with his counsel;*
>
> *e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law.*

The European *Convention on Human Rights* has been influential in Canadian jurisprudence despite the fact that Canada cannot be a party to this regional instrument. Jurisprudence under this regional treaty is often cited by the United Nations Human Rights Committee. The European *Convention* addresses the question of the right to state-funded counsel in Article 6.3(c), which guarantees a criminal accused the right "to legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

The European Court has identified a number of criteria to be considered when determining whether the interests of justice require granting legal aid to an accused.[43] These factors are similar to ones developed in Canadian jurisprudence and include: (i) the complexity of the case; (ii) the capacity of the particular accused to present the case himself or herself; and (iii) the seriousness of the offence and the possible penalty that could be imposed. An accused who is granted legal aid is not entitled to choice of counsel and the European Commission has recognized that a state may limit the number of consultations with the appointed lawyer to limit costs.[44]

Like the European Convention, the United Nation's General Assembly's *Basic Principles on the Role of Lawyers* is not binding on Canada but provides a further indication of how the international community views the obligation to provide legal aid. These principles stipulate the following under the heading "access to lawyers and legal services":

> *1 All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.*
>
> ...
>
> *3 Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor, and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.*

International law also contains strong equality rights provisions that have a bearing on the right to counsel.[45] To date, there has been no finding of a right to legal aid in civil cases under international human rights treaties in international law,[46] despite the recognition of the importance of these rights and the inequity in confining a right to legal aid to criminal cases. Nevertheless, international bodies such as the UN Human Rights Committee and the Committee on Economic,

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43 D. J. Harris *et al.*, *Law of the European Convention on Human Rights* (London: Butterworths, 1995) at 262.

44 *M.* v. *U.K.*, No. 9728/82 (1983), 36 D.R. 155 at 158.

45 Universal Declaration of Human Rights, UNGA Res. 217(III), UN Doc. A/810, Articles 7, 22, 23, 25 and 26; *International Covenant on Civil and Political Rights* (1976), 999 UNDS 171, [1976] CTS 47, Article 14(1).

46 See, for example, *Hotel Casino Aregua Parana AG* v. *Austria* (1995), 20 EHRR CD 79 (Eur. Com).

Social and Cultural Rights have noted the practical importance of providing legal assistance to give effect to international obligations to provide equal protection of the law. For example, both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have noted that Canada should enhance equal access to legal proceedings in order to effectively carry out its international obligations.[47] In addition, under the European *Convention,* an argument for legal aid in civil cases may be founded under Article 6(1), right to a fair and public hearing, which has also been held to establish right of access to a court.[48]

International law on the right to counsel in civil cases is underdeveloped, as it is within Canadian law. How these international provisions on the right to equality and the right to access to legal representation in civil proceedings shall apply to civil legal aid is prime for future exploration.

D. Legal Aid and the Rule of Law

The preamble to our constitution recognizes that Canada's legal and political systems are based on the Rule of Law. The Rule of Law replaced systems of rule by arbitrary measures or by unchecked discretion with an understanding that all government actions are bound by rules fixed and announced beforehand.[49] The concept of the Rule of Law is now understood to include the principles that laws must be publicly disclosed and that there must be meaningful access to laws and legal resolution of conflict.

The state's obligation to provide some form of legal aid is fundamentally based on this dedication to the use of legal rules to organize society and regulate conflict within it.[50] Today, our family, criminal, immigration and social assistance laws are very complicated. Most citizens will need a lawyer to help navigate the legal system. The Rule of Law is undermined if that assistance is not forthcoming and the citizen cannot afford to pay for legal representation. The

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47 See, for example, *Concluding observations of the Human Rights Committee*, Canada (7 April 1999, CCPR/C/79/Add.105) at para. 9; and *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, Canada (4 December 1998, E/C.12/1/Add.31) at para 51.

48 *Airey* v. *Ireland* (1979), A 32 para 26.

49 F. A. Hayek, *The Road to Serfdom, 50th anniv. ed.* (Chicago: University of Chicago Press, 1994) at 80.

50 OLAR, *Blueprint*, *supra*, note 34 at 69.

state's obligation to provide legal assistance is not unlimited, but will increase as the complexity of the law in question increases and/or with the potential impact the law can have on individuals without means to acquire help in understanding it.

Traditionally, the state's obligation to fund legal aid was most recognized in criminal law, where the accused faced the power of the state and the threat was the potential loss of liberty. However, this distinction between criminal law and other legal domains has been heavily criticized and is no longer viable.[51] It is founded on a limited notion of liberty that ignores other important forms of personal autonomy, obscures other interests and favours the interests of men.[52]

The state uses law to address legal and policy issues in the criminal, civil and administrative justice systems, and a wide of range of legal and regulatory instruments. In some cases, such as under the *Young Offenders Act* and *Criminal Code* provisions dealing with mental disorder, the requirement for legal aid is specifically acknowledged within the statute. However, there are many other situations where Canadians will also have no choice but to use legal rules to resolve their problems. This is true, for example, in the family law sphere:

> *Family law requires people to use the legal system if they desire a binding solution to matters they are unable to resolve themselves. Effective access to entitlements and remedies provided by the family law system requires legal assistance, which in the case of low-income individuals means legally aided assistance. The claim for an entitlement to legally aided services in family law matters rests on three factors:*
>
> - *the complexity of the state-enacted legal regime;*
> - *the significance of the interests the legal regime has been put in place to protect; and*
> - *the potential for significant power imbalances between the parties in family law disputes.*[53]

The following quote further describes the status of family law in Ontario:

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[51] Dyzenhaus, "Normative Justifications for the Provision of Legal Aid", in OLAR, *Blueprint*, Volume 2, *supra,* note 28, 475 at 483-498. See also, L. Addario, *Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice* (Ottawa: Status of Women Canada, 1998) at 3-7.

[52] *Id.* See also OLAR, *Blueprint*, Volume 1, *supra,* note 8 at 71-73.

[53] OLAR, *Blueprint, supra*, note 34 at 165.

> *Family law is exceedingly complex and subject to frequent legislative amendment. Specific legislative provisions relating to family law include the Divorce Act, the Children's Law Reform Act, the Family Law Act, the Family Responsibility and Support Enforcement Act; and Child and Family Services Act, the Canada Pension Plan Act and the Pension Benefit Act. The complexity of family law is compounded by the fact that most legislation in this field is comparatively recent.*[54]

The obligation on governments to provide legal aid flows directly from the choice of law as an instrument of state policy. The more the state decides to implement policy through legal rules and the more complex the legal rules become, the greater will be the requirement for legal aid.

E. Legal Aid as an Integral Part of the Justice System

Legal aid is essential to our justice system. At one time, it was seen as a charitable service provided to a few individuals through the goodwill of the legal profession. In the 1960s, this emphasis on charity was replaced by a gradual realization that legal aid is a necessary public good and a governmental responsibility, parallel in some ways to society's shift toward state-funded medical care. Decades later though, the reality that legal aid is an inherent aspect of our justice system remains tenuous.

There is a seamless relationship between legal protections and access to legal services, yet this is not fully recognized in legal policy-making. This discontinuity can best be illustrated through the use of examples.

One reason for the increase in the duration of criminal trials, the escalation of costs and court delays is the new regime of procedural defences developing under the *Charter*.[55] Parliament has yet to enact a code of procedure governing *Charter* applications and other procedural defences, so these issues are being litigated on a case-by-case basis. It has been suggested that in effect,

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[54] OLAR, *Blueprint*, *supra*, note 34 at 166.

[55] A. Young, "Legal Aid and Criminal Justice in Ontario" in OLAR, *Blueprint*, Volume 2, *supra,* note 28, 629 at 667.

"provincial legal aid plans have been funding the incremental development of a *Code of Constitutional Procedure* in light of the federal government's failure to enact this type of code."[56]

This problem has also been recognized by the judiciary:

> *...even though the Charter has now been in existence for over ten years, Parliament has failed to create a code of procedure designed to deal with such basic issues as how and when, why and to whom and by whom Charter applications are to be brought. Instead, Parliament has seemingly been content to leave it up to the courts to develop a procedural scheme on a piecemeal basis.*
>
> *With respect, I question this approach, particularly when one considers that the courts are limited in their ability to make broad procedural changes and they have no ability to initiate comprehensive, policy-driven reforms.*[57]

In contrast, the federal government has established child support guidelines to facilitate settlement and reduce litigation, to limit disparities between cases and to reduce cost and delay in resolving these important issues. The irony is that in many jurisdictions, there is insufficient legal aid to allow parents to take advantage of these guidelines.

This lack of continuity between legal reforms and access to them has a profoundly negative impact on public confidence in the justice system. Many reforms of the justice system (such as diversion, alternative measures and case management) can only work if parties have effective legal representation. Without access to legal aid, those reforms are likely to be severely compromised with adverse consequences for all participants in the justice system.[58]

It has been suggested that the implied requirements for legal aid should be an integral part of justice system reform:

> *No further law reform or mediation or ADR initiatives should be undertaken without acknowledging the price attached to make it usable to the people it is*

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[56] *Id.*

[57] Mr. Justice Moldaver in J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996) at 147.

[58] OLAR, *Blueprint*, Volume 1, *supra*, note 8 at 92.

> *intended to help. Until legal aid is available, it is hypocritical to continue spending money to supposedly improve the law people cannot access.*[59]

In fact, all aspects of the justice system have the potential to affect the demand for legal aid. This extends beyond statutory reform to other facets such as charging and prosecution policies:

> *As legal aid has become so much a part of the justice system, both civil and criminal, the interdependence between legal aid and other elements of the justice system have become apparent. Changes in charging practices by the police, changes in Crown prosecution policies or resources dedicated to prosecutions and changes in criminal procedure such as disclosure have all demonstrated the interdependence of legal aid with other elements of the justice system.*[60]

While some legal and judicial reforms increase the demand for legal aid, other reforms could in fact reduce the need for legal assistance. For example, if charge screening, diversion and conditional sentencing are effectively implemented and administered by the Crown, there could be enormous savings for legal aid plans.[61]

The Ontario Legal Aid Review concluded that while improvements in efficiency are possible through better utilization of legal aid resources, "these gains are likely to be quite limited relative to those to be realized by improving the efficiency and efficacy of the underlying justice system through appropriate substantive and procedural reforms."[62] Law and justice system reform must go hand in hand with legal aid reform.

In British Columbia, the 1999 Report of the Chief Judge of the Provincial Court recommended significant changes in how the courts process criminal cases. The B.C. Legal Services Society was actively involved in this reform process. The Report acknowledged the

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[59] See also L. Addario, *supra*, note 51 at 46, recommendation 14:

> *New entitlements in law should ensure a corollary right to legal aid services to be able to access that right. Federal and provincial officials should access the impact of new legislation and judicial decisions for their implications for legal aid coverage. An increased need for coverage should result in a corresponding increase in funding for civil legal aid.*

[60] A. Currie, "Approaches to Determining the Needs of Legal Aid Clients" (Ottawa: Department of Justice Canada, December 1999) (Technical Report, draft, TR1998-13e) at 11) [hereinafter Currie "Determining Needs"].

[61] Young, *supra*, note 55 at 670.

[62] OLAR, *Blueprint*, *supra*, note 34 at 91.

important role of legal aid in the court system and also made several recommendations about legal aid. These were:

> *That the legal aid tariff for criminal matters must be adequate to support full answer and defence while providing incentives for early preparation, timely disposition and effective, high quality defence services to accused who are eligible for legal aid.*
>
> *That the Legal Aid Program needs to receive sufficient stable funding to ensure that legal aid services continue to be made available in Provincial Court criminal matters.*[63]

In sum, legal aid is an essential public service because the justice system cannot function without it:

> *...once it is grasped that justice fails radically unless citizens, irrespective of means, have access to the professional assistance necessary to vindicate their legal rights, legal aid is seen to be as natural and as essential a component of legal justice as the judiciary, the court buildings and the court staff.*[64]

F. The Costs of Inadequate Legal Aid

All Canadians should care about legal aid as its presence or inadequacy affects us all. Inadequate legal aid has costs in terms of the additional burden to the justice system of unrepresented litigants, the impact on justice itself in terms of increased unfairness and the blot it places on legal and constitutional values. In addition, the resultant impact on other aspects of social welfare adds another layer of costs from insufficient access to legal services.

One way to measure the lack of access to legal services is to analyze it in terms of what it "costs" to justice and fairness, values central to our society. It costs us as Canadians every time an accused ends up with a criminal record simply because of insufficient access to the legal advice and advocacy that would have been available to someone with financial means. It costs us as

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63 Cited in B.C. Legal Services Society *Annual Report 1998/99* at 2.

64 L.J. King, *Opening Address*, Commonwealth Legal Aid Annual Conference, 26 May 1984, quoted in Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Australian Commonwealth: 1994) at 226 [hereinafter *Access to Justice: An Action Plan*].

Canadians every time a parent tries to navigate the legal maze of support law and procedure alone to secure a fair agreement for that parent and the child(ren) involved.

In addition to these somewhat intangible forms of harm, we can gauge the impact of insufficient legal aid in terms of more concrete costs. For example, one of the most visible manifestations of insufficient legal aid is the increased number of unrepresented litigants and accused in the judicial system. Unrepresented litigants raise the costs borne by other parties and of system administration. Issues that could be resolved speedily with appropriate legal advice can instead consume significant court time; short trials can turn into marathons. In addition, public confidence in the administration of justice is shaken when cases are stayed because a legal aid plan fails to fund legal representation.

We have insufficient information currently to quantify exactly the effect of decisions taken to limit the availability of legal aid services, yet the fact that there are costs cannot be denied:

> *...CBA-O believes that the reallocation to legal aid funding of even a portion of the "costs" being incurred elsewhere in the justice system as a result of unrepresented or under-represented parties would ultimately result in greater overall cost reductions for the administration of justice.*[65]

Efficient legal intervention can assist individuals in securing safety and economic security. When the legal system fails because it is not fully accessible, other parts of our social welfare system must absorb the costs. Some examples include:

- the costs of those who are unfairly imprisoned or denied the ability to earn a living due to a criminal record that could have been avoided;
- the costs to the state of caring for children who are unnecessarily made wards of the state;
- the costs of safeguarding and caring for women who are unable to access legal protection from abusive spouses; and
- the costs of supporting single parents who are unable to reap the benefits of support provisions in the law.

Similarly, cuts to other government initiatives and social services have magnified the impact of cuts to legal aid funding. As the social safety net narrows, access to an appropriate legal

65 CBA-O Submission to Ontario Legal Aid Review (Toronto: Canadian Bar Association - Ontario, 1997) at 1 [hereinafter *CBA-O Submission*].

recourse increases in importance, but cuts to both social services and legal aid have occurred simultaneously. At the same time, processes such as employment insurance and welfare applications and appeals have become increasingly complex and legalistic.

The costs of inadequate legal aid have been recognized in a number of Canadian reports. For example, the 1996 *Review of Legal Aid Services in Nova Scotia*, includes the following conclusion:

> *We also believe that delivering a broader range of services could in the long run reduce social costs and costs generally in the overall administration of justice. For example, the menu currently gives higher priority to serious criminal matters because liberty of the subject is an important principle. This comes at a cost of not doing apparently less serious matters (e.g. first time shoplifting, breathalysers, etc.). Guilty pleas or guilty verdicts in these cases carry implications affecting future employment, income and education opportunities. To the extent that such outcomes and implications could be avoided with early intervention and representation (however minimal) individuals would be better off in the long run and society in the short run since representation would reduce justice system costs and could reduce broader social costs as well.*[66]

There are strong principled constitutional and legal bases for state-funded legal assistance under the *Charter*, international treaties and Canadian legislation. The requirement for legal aid flows directly from the concept of the Rule of Law upon which Canadian democracy is founded. In addition, there is a strong policy rationale for legal aid based on its importance within the justice system and because the costs of inadequate legal aid appear to far outweigh the false savings made by limiting legal aid. Taken together, these arguments support the view that legal aid is an essential service and a fundamental aspect of Canadian citizenship.

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[66] Legal Aid Review Team, *Review of Legal Aid Services in Nova Scotia* (April 1996) at 8.

3. A System in Crisis

A. Overview of Legal Aid Programs

Each province and territory administers its own legal aid program. Large differences exist across the country in terms of legal aid coverage, delivery models and administrative structures.

The two classic models of legal aid delivery are judicare and staff systems. Today, most provinces and territories have a mixed model of legal aid delivery that incorporate aspects of both systems. Under a judicare system, legal services are provided through members of the private Bar retained by a client after an application for legal aid has been approved. The lawyer is then paid on a fee-for-service basis, involving either a set fee for a particular legal matter, an hourly tariff or a combination of the two. The client can choose any willing lawyer. This is the primary system used in several provinces and territories, including British Columbia, Ontario, Alberta, Manitoba, New Brunswick, Nunavut and the Northwest Territories. Ontario and British Columbia also have clinics for poverty law. Québec has a balanced staff/judicare model.

Under the staff system, legal aid is provided in a manner similar to that of a law firm. Lawyers are employed by an independent statutory commission or, as in Prince Edward Island, directly by the government. Private practitioners provide services only in cases of conflict or where the legal aid client is charged with a criminal offence punishable by life imprisonment, in which case he or she may select a lawyer either from the private Bar or from within the legal aid system. This is the model in Saskatchewan, Prince Edward Island, Yukon, Newfoundland and Nova Scotia.

The following tables provide an overview of Canadian legal aid programs.[67]

[67] Currie, "Delivery Models", *supra,* note 7 at 1-2. For greater detail, see Canadian Centre for Justice Statistics, *Legal Aid in Canada: Description of Operations* (Ottawa: Statistics Canada, March 1999).

Table 1

Selected Legal Aid Data - 1996-1997 [68]

Province/ Territory	Total Populat'n (000s)	Total Expenditures ($000s)	Per Capita Expenditures ($)	Approved Applications	Application Approval Rate (1,000 Pop)	Delivery Model
Newfoundland	569.6	5.545	9.73	10.880	19	mainly staff
Nova Scotia	941.6	10.599	11.26	16.529	18	mainly staff
New Brunswick	760.8	3.608	4.74	1629	2	judicare
Prince Edward Island	136.6	593	4.34	1210	9	staff
Québec	7.396.7	114.238	15.44	241.678	33	balanced staff/private
Ontario	11.271.8	250.142	22.19	111.189	10	judicare; staff for poverty law
Manitoba	1.137.3	15.060	13.24	183.349	16	mainly judicare
Saskatchewan	1.017.5	8909	8.76	21.399	21	staff
Alberta	2.785.8	24.445	8.77	28.014	10	judicare
British Columbia	3.843.6	96.989	25.23	56.018	15	mainly judicare; staff for poverty law
Northwest Territories	66.8	5126	76.68	2007	30	mainly judicare
Yukon	31.4	887	28.25	1372	44	mainly staff

[68] Note: Legal aid plans may count applications differently. Therefore, numbers of approved applications may not be strictly comparable. Source: Canadian Centre for Justice Statistics: *Legal Aid in Canada: Resource and Case Load Statistics* (Ottawa: Statistics Canada, 1997).

Table 2 Legal Aid Service by Type of Delivery [69] Type of Service						
		Young Offender	Adult Criminal	Family	Immigration	Poverty Law
Province/ Territory		Type of Delivery by Percent				
British Columbia	Private bar	79%	85%	87%	88%	6%
	Staff	21%	15%	13%	12%	94%
Alberta	Private bar	57%	100%	97%	100%	n/a
	Staff	43%	–	3%	-	n/a
Saskatchewan	Private bar	2%	2%	4%	n/a	n/a
	Staff	98%	98%	96%	n/a	n/a
Manitoba	Private bar	60%	60%	65%	55%	20%
	Staff	40%	40%	35%	45%	80%
Ontario	Private bar	100%	100%	100%	99%	-
	Staff	-	-	-	1%	100%
Québec	Private bar	49%	63%	43%	80%	40%
	Staff	51%	37%	57%	20%	60%
New Brunswick	Private bar	100%	100%	100%	n/a	n/a
	Staff	-	-	-	n/a	n/a
Nova Scotia	Private bar	8%	8%	25%	n/a	n/a
	Staff	92%	92%	75%	n/a	n/a
Prince Edward Island	Private bar	7%	10%	38%	n/a	n/a
	Staff	93%	90%	62%	n/a	n/a
Newfoundland	Private bar	2%	2%	2%	-	-

[69] Source: Data provided by the legal aid plans. Percentages are based on 1997-98 data.

	Staff	98%	98%	98%	100%	100%
Yukon	Private bar	25%	25%	25%	n/a	n/a
	Staff	75%	75%	75%	n/a	n/a
Northwest Territories	Private bar	80%	80%	95%	n/a	n/a
	Staff	20%	20%	5%	n/a	n/a

The current ongoing crisis of the legal aid system has three facets; underfunding, disparities in coverage from one jurisdiction to the next and fragmentation in the coverage of legal services within each legal aid program.

The current level of legal aid funding is clearly insufficient. Deep cuts in government funding of legal aid plans during the 1990s is a primary reason for this critical situation. Other reasons include the change in the financing of the federal contribution from the Canada Assistance Plan to the Canadian Health and Social Transfer, an increase in client demand due to economic recession and changes within the legal system. In some regions, the cuts are so severe that civil legal aid coverage does not even comply with the statutory mandates of legal aid plans.[70]

Apart from underfunding, the lack of coherence in access to legal aid between jurisdictions is another serious problem. Each legal aid plan specifies which legal issues will be covered, resulting in a wide disparity across the country in access to legal aid. Some plans set arbitrary financial eligibility guidelines that do not take into account applicants' ability to feed, clothe and shelter their families and still pay for the services of lawyers.

These disparities belie the Canadian commitment to equal protection of the law. The fact that a woman who lives in Manitoba is eligible for legal aid counsel to assist in custody and support matters while the same woman with the same legal problems does not have access in British Columbia is highly problematic. It is an affront to our notions of fairness and our constitutional engagement to provide essential public services of reasonable and comparable quality to all Canadians.[71]

In addition, there is a wide disparity in the amount and adequacy of funding committed to family law legal aid services between provinces and territories, particularly when compared to

70 This has been suggested in the case of British Columbia. See P. Bain, "Civil Legal Aid in Canada and Gender", Paper presented at national forum, *Transforming Women's Future: Equality Rights in the New Century* (Vancouver: LEAF, November 1999).

71 *Constitution Act*, 1981, Section 36.

criminal law services. In some areas, civil legal aid is so circumscribed that it is virtually unavailable. For example, in the Yukon, only certain interim family applications are funded, so that even eligible individuals cannot finalize family law issues by bringing them to trial. In many parts of the country, family legal aid tariffs do not adequately recognize or compensate lawyers for the type of work typically done on family law cases, such as mediation and negotiation, provide insufficient compensation for needed disbursements such as translation or expert witness fees, and do not provide sufficient fees or allow sufficient hours to support adequate, widely available and appropriate services.

Finally, fragmentation in coverage is also a major issue. At present, civil legal aid only covers certain specific issues and procedures. For example, family law clients often have several issues that cannot be neatly compartmentalized. A client who wants a divorce is likely to also have custody, access, maintenance and division of property issues. In most jurisdictions, those eligible for legal aid cannot get assistance with the divorce. In many, even if legal aid is granted for the custody, access and maintenance issues in the first instance, the client will be ineligible for assistance with variations to deal with changes in circumstances.

Fragmentation in coverage is problematic because it means that lawyers cannot provide full service to their clients. Partial coverage is incoherent and makes no sense to an individual who requires legal assistance with a set of interrelated legal issues. It also creates inefficiencies in the system. For example, a lawyer may not be permitted under the plan's requirements to use a letter on a custody issue to address other legal issues, even though it would be a simple matter of adding a few sentences.

B. The Unmet Need for Legal Aid Services

There is no comprehensive data available on the extent of the unmet need for legal aid services in Canada. Policy makers can rely only on partial and often impressionistic information in legal aid planning. To date, only one major survey on legal needs was carried out in Canada and that was in Ontario in 1978.[72] However, there have been other smaller studies and consultations that provide some information on unmet legal needs.

[72] W.A. Bogart and N. Vidmar, "Problems and Experiences with the Ontario Civil Justice System: An Empirical Assessment" in A. Hutchison (ed.), *Access to Civil Justice* (Toronto: Carswell, 1990).

Measuring unmet legal needs is difficult because the concept itself does not have one accepted definition. A helpful approach is to look at the distinction between expressed needs and unmet needs:

> *Expressed needs are those that emerge by virtue of clients making an application or placing themselves on a list. Unmet needs are those that are not yet apparent to the service provider. Expressed needs may also be unmet in the sense that certain areas within a jurisdiction are inadequately served. Service in legal matters that are not currently provided, may also refer to aspects of clients' problems which are related or even causal to their legal problem but require solutions other than those normally provided by a lawyer.*[73]

In criminal law, legal needs are mostly system driven. Changes in the law or in police and Crown policy have the greatest impact on the requirement for legal aid. Policies such as diversion and provision of services related to the causes of crime add other dimensions to the needs of legal aid clients. In civil law, legal needs are shaped by a large number of factors, some driven by the justice system and legal developments, and others by personal and societal factors.

Given these conceptual difficulties and the costs associated with survey research, some researchers have suggested that empirical measurement of legal needs is expensive and limited in usefulness.[74] However, several jurisdictions have experimented with developing formulae for allocating legal aid resources according to needs indicators for criminal, family and other civil legal aid services. Australia, New Zealand[75] and British Columbia have all developed models with fairly robust predictive value.[76] The legal aid clinics in Ontario and British Columbia have also had successful experiences with community consultation to identify unmet legal needs.[77]

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[73] Currie, "Determining Needs", *supra*, note 60 at 3.

[74] W. Bogart, C. Meredith and D. Chandler, "Current Utilization Patterns and Unmet Legal Needs", OLAR, *Blueprint*, Volume 2, *supra*, note 28 at 313. See also OLAR, *Blueprint*, Volume 1, *supra*, note 8 at 57.

[75] See G. Maxwell, P. Shepherd and A. Morris, *Legal Service Needs and Provision: A Framework for Research* (New Zealand: Legal Services Board, 1997); G. Maxwell, P. Shepherd and A. Morris, *Meeting Legal Service Needs* (New Zealand: Legal Services Board, 1998).

[76] Currie, "Determining Needs", *supra*, note 60 at 16-18.

[77] *Ibid.*, at 29-34.

The American Bar Association carried out a number of surveys of unmet legal needs.[78] This research culminated in the development of a comprehensive action plan to increase access to legal services.[79]

Surveys of rejected legal aid applicants are also a good source of data on unmet needs.

> *Fairly large numbers of legal aid applicants are rejected in some jurisdictions, and it is possible that some people who would have received service do not even apply. With respect to rejected applicants we need to know if the level of financial eligibility and scope of coverage for legal matters is "right" so as to avoid excluding people who should have received service.*[80]

Both the New Brunswick legal aid evaluation carried out in 1982 and the Ontario evaluation in 1992 surveyed rejected applicants to determine what action they took to address their legal problem following the rejection of the legal aid application. In New Brunswick, 54% of applicants for criminal legal aid represented themselves and 20% retained their own lawyer. In Ontario, 13% of rejected applicants for criminal legal aid represented themselves, while 47% hired a lawyer. None of these evaluations probed deeply into the possible subsequent disadvantages encountered by rejected applicants.[81] A study comparing the outcomes for those who represented themselves and those with legal representation, or examining the hardship incurred by those having to pay for their own lawyer when they really lacked sufficient resources, would provide greater insight into the actual impact of legal aid denials.

Despite these methodological problems, it is possible to surmise the existence of the unmet need for legal aid through a combination of available statistics and illustrative examples.

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[78] B. Curran, *The Legal Needs of the Public: Final Report of a National Survey* (ABA Foundation, 1977); B. Curran, *Report on the 1989 Survey of the Public's Use of Legal Services* (The ABA Consortium and Tulane University, 1989); and *Report on the Comprehensive Legal Needs Study* (ABA, 1994).

[79] See American Bar Association, *Agenda For Access: The American People and Civil Justice* (Final Report on the Implications of the Comprehensive Legal Needs Study, 1996.) This Report is discussed *infra* at 79.

[80] Currie, "Determining Needs", *supra*, note 60 at 8.

[81] *Ibid.*, at 40.

C. Information on Unmet Needs

In preparing this paper in late 1999, all legal aid plans were contacted and asked to provide qualitative and quantitative information on the extent of the unmet need for legal aid in their respective regions. In particular, they were asked to supply:

- *the number of refusals to requests for legal aid (and the reasons therefore)*
- *types of matters for which there is a demand for legal aid but no funding; and*
- *cases in which legal aid was granted but a client was unable to find a lawyer or where difficulties were experienced in finding a lawyer.*

The following statistics and information were gathered from the legal aid plans that responded.

(a) Alberta

In Alberta, there was a 42% decrease between 1994 and 1996 in civil legal aid certificates granted for divorce matters.

The Alberta Legal Aid Society reports that the number of legal aid applications remained virtually unchanged during the 1997-98 financial year over the previous year, and the number of certificates issued increased by 1%. In 1997-98, 28,316 certificates were issued out of a total of 35,713 applications (almost 80%).

(b) British Columbia

In 1999, B.C. Legal Services Society (LSS) undertook a study to look at the impact of budget cuts on lawyers' services to clients, with a particular emphasis on the specific impact of cuts on women.[82] Straight comparisons between years is impossible because of the way that data is collected, but patterns are discernable. The data shows a clear rise in caseload in the early 1990s, followed by a sharp fall later in the decade. There was no statistical indication of a disparate impact on women as compared to men.

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[82] Legal Services Society of B.C., "The Impact of Cutbacks on Legal Aid Referrals", *Report to the Core Services Committee* (September 1, 1999).

Drops in legal aid referrals can be attributed to several policy decisions including:

- tighter eligibility guidelines,
- tighter coverage rules in criminal cases,
- the introduction of Family Case Management,
- lower eligibility guidelines for all cases, and
- reduced coverage in the family law area.

The LSS reports that for each of the last two years, only slightly more than half of the applications for legal aid were approved. However, in 1998-99, almost half of the more than 48,000 applicants who did not get legal representation were diverted to alternate service providers, give summary legal advice and/or given legal information.

To the best of their knowledge, when a client is found eligible for legal aid, LSS is always able to refer them to either a private bar or a staff lawyer. However, their 1998-99 Annual Report recognized that underfunding was beginning to affect access to legal services:

> *The concern that significantly reduced tariff payments would force increasing numbers of lawyers to refuse to provide legal services to poor people became a reality in 1998-99. As part of a campaign to lobby the government for more legal aid funding, private bar lawyers in a number of communities across the province stopped providing duty counsel services or taking eligible criminal category and sexual assault cases.*

In order to deal with this action, work was transferred to staff lawyers in affected communities but duty counsel services in these locations had to be limited to the minimum required by their mandate.

(c) Manitoba

Overall, Legal Aid Manitoba is "unable to say that there is a demand for legal aid that we do not cover". From April through November 1999, Legal Aid Manitoba refused 764 applications for civil coverage, 393 for criminal coverage and 92 from youth, out of a total of 6,716 civil, 6,485 criminal and 1,375 youth applications. The refusal rate during this period was 8.6%. In 1994-95, the refusal rate was 26.4%. The reasons suggested to explain this significant drop in refusal rates are: (1) the establishment of a full service duty counsel program (which eliminates the majority of "summary" refusals) and (2) the institution of an application fee. The application

fee of $25 is charged to those ineligible for a waiver.[83] The fee has encouraged staff not to take applications from those persons who are certain to be refused.

In civil cases, regulations state that counsel can be provided where a lawyer is appropriate and the matter passes a cost-benefit analysis. According to Legal Aid Manitoba, legal aid certificates are not issued to "fine tune" custody and access arrangements. Counsel is not provided in situations that arise out of a commercial endeavour. Legal Aid Manitoba is most heavily criticized for: (1) not covering summary conviction matters and (2) refusing certain types of Aboriginal rights cases (such as those relating to regulation of hunting and fishing).

According to Legal Aid Manitoba, there is no problem in finding lawyers to handle cases once certificates are granted. However, in several complex criminal cases, the tariff rate had to be raised to find lawyers willing to take the cases. Still, in some areas of the province there are few lawyers and therefore very few lawyers prepared to take legal aid cases. From time to time, Legal Aid Manitoba has had to pay a lawyer to travel from another community.

(d) CBA member questionnaire

In February 2000, the CBA distributed a questionnaire on legal aid to its members who were most likely to be involved with legal aid. Ninety-two percent (92%) of respondents believed that the need for legal aid was increasing. This increased need was mostly attributed to the overall reduction in legal aid funding. Other reasons cited, in order of prevalence were: reduction in matters covered by legal aid; lawyers refusing to do legal aid files; changes in financial eligibility; and legislative changes.

D. Beyond the Numbers: The Stories of Inadequate Legal Aid

These global figures provide an overview of the status of legal aid in Canada but are too abstract to be a compelling argument for change. This is a human chronicle, not a statistical one. It is real people who experience real harm caused by insufficient legal aid.

What do individuals do when they are denied legal aid or when their legal needs are only partially covered? They are faced with impossible choices. They represent themselves, often

[83] Waivers are granted for a number of reasons, including that the applicant is: a recipient of social assistance; in a woman's shelter; institutionalized in a mental facility; an adult who is a full-time student; an adult in custody; a ward of child welfare agencies; and a youth in various circumstances.

placing themselves in untenable positions. They are forced to relinquish their legal rights and their entitlements vanish.

It is important to recognize first that insufficient legal aid has a disparate impact on certain groups across Canada. In general, the most disadvantaged groups experience the harshest repercussions from cutbacks to legal aid. At the same time, many Canadians with low to moderate incomes have no access to legal aid because their earnings are above the eligibility level and yet they have insufficient funds to pay for legal services.

The public discussion on the future of legal aid in Canada must be predicated on a thorough understanding of the repercussions experienced because of limited or denied legal aid. The impact of limited legal aid can best be appreciated through stories of those who are denied legal aid or receive only limited coverage. The perceptions of legal aid lawyers and program administrators who have witnessed the decline of legal aid and its impact over a number of years are also illuminating.

The following examples were gathered from three sources: an anecdotal survey of CBA members across Canada in April 1999[84]; a consultation process carried out by the Women's Access to Legal Services Coalition (WALS) in British Columbia[85]; and a national consultation carried out by a coalition of 60 women's groups.[86] The Canadian Bar Association has also established a network of legal aid lawyers from across Canada to provide up-to-date examples of the problems created by inadequate legal aid on an ongoing basis. Here are extracts from those consultations:

(a) Criminal legal aid

- Criminal legal aid is now only available for those individuals who face the threat of incarceration.

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[84] Ottawa: Canadian Bar Association, April 1999.

[85] Women's Access to Legal Services Coalition (WALS), "The Impact of the Cuts to Legal Aid on Women in B.C." (Submission to the B.C. Legal Services Society, February 1998) [hereinafter WALS]. WALS is a coalition of over 40 individuals and groups formed in July 1996 to document the impact and work for the reduction of the inequalities for women in cuts to publicly funded legal services in B.C.

[86] Presentation to the Honourable A. McLellan (Minister of Justice) by 60 National Women's Feminist Groups (September 18, 1997).

- Women are more likely to be charged with offences for which incarceration is not the penalty. So for them, the penalty of a conviction is not incarceration which triggers entitlement to legal aid. It is the loss of their children, the loss of their ability to find work, and the prospect of almost certain incarceration if they come into conflict with the law again. And this is occurring at a time when we are seeing an increasing criminalization of women's attempts to protect themselves, their children and their records.

- The perception of the criminal bar is that unrepresented individuals are more likely to be convicted and receive stiffer sentences.

- The perception of the criminal bar is that unrepresented accused tend to plead guilty, possibly because of an inability to understand the proceedings or whether a defence exists.

- An accused was charged with a weapons related offence and with an offence that relates to proceeds of crime. The trial was scheduled to last one month, and the Crown stated that it would seek a penitentiary term in the event of conviction. The accused applied for and was denied legal aid. An application was made by a lawyer acting on a voluntary basis to stay the proceedings *until* the accused was able to retain counsel. The application was denied but the judge held that the trial was too complicated for the accused to conduct and for the trial to still be constitutionally fair. The accused made ongoing attempts to retain counsel. However, all the fees quoted were approximately three times what the accused could afford. On the scheduled start of the trial, the accused applied to adjourn the trial. This application was also denied and the accused conducted this multi-week trial on his own behalf.

- Bail hearings are being conducted with increased frequency by duty counsel or by an unrepresented accused who is left to his/her own devices in trying to secure release on bail. In Ontario consultations, both the African Canadian Legal Clinic and the members of the Aboriginal community indicated that the problems of securing release for visible minorities has been dramatically exacerbated by the difficulties presented under the new tariff in securing representation at a bail hearing.[87]

[87] Submission to Ontario Legal Aid Review by the African Canadian Legal Clinic (1996) at 11.

(b) Civil legal aid

- In the Northwest Territories (which some consider the best legal aid program in Canada), one client was approved for family legal aid in July 1998 but was only able to obtain a lawyer in March 1999, solely because of the shortage of lawyers willing and able to do legal aid. Recent reports indicate that this shortage has only gotten worse since then.
- Women's Access to Legal Services Coalition[88] has heard many stories of women in abusive relationships who have been unable to access legal services and therefore have been forced to remain in unsafe conditions. Research has found that women who are victims of relationship violence are least likely to seek legal assistance compared with other groups. Those who do approach legal services are sometimes forced back into abusive relationships because of their inability to access health services to document harm or because the requirements to obtain services result in the disclosure of their whereabouts. Aboriginal women are particularly at risk of being forced back to the Native band where the abuse occurred.
- Many women are unable to benefit from new federal child support guidelines because the legal aid plans no longer provide coverage for variation of maintenance orders. All unrepresented litigants find the stylized procedure for applying for variation of maintenance, particularly in the superior courts, extremely difficult; women are forced to forego the benefits of the federal guideline changes on behalf of their children or face the intimidating procedure without assistance.
- One transition house worker described the frustration of having a woman who had a legal aid lawyer helping her with an access issue who was barred from helping her with getting her maintenance. "So even though the lawyer was writing a letter to her ex-spouse's lawyer regarding the access issue, her lawyer could not add in a line asking for a maintenance cheque."
- Another repercussion of the cuts is that it is becoming increasingly difficult to access legal advice and information: "I used to be able to call up the legal aid immigration clinic and get specific information on an issue. Now I won't hear back from them for days. I get the sense that everyone is in over their heads, people are overwhelmed."

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[88] WALS, *supra*, note 85 at 2.

- It is highly problematic to have a legal aid system where one of the criteria that defines entitlement is the existence of abuse. This requires women to overcome often enormous emotional and socio-economic barriers to prove the existence of harm, and the delay involved in doing so may strongly prejudice her chances of success if she finally does obtain representation. This difficulty is amplified where there are multiple barriers involved such as language and cultural issues.
- In terms of civil legal aid, having a financial need for civil legal aid is no longer the criteria for receiving legal aid. Lots of Canadian women are financially eligible but can't get legal aid because they are not deemed to be sufficiently "at risk". A coalition of 60 women's groups concluded that this is a hideous standard: "It means that women have to get the shit beat out of them before they can access legal aid."
- Immigrant women whose sponsorship is withdrawn by a spouse (very often after incidents of abuse) are being denied coverage for an application to vary the terms of their immigration status and, as a consequence, are being deported.
- Rural women's access to legal aid coverage in their own community is almost non-existent.
- Absurd caps and restrictions on family legal aid coverage have meant more women are without counsel half-way through family law proceedings, where custody is an issue.
- There is no guaranteed legal aid coverage anywhere for welfare appeals, tenancy issues, workers' compensation, employment insurance or other poverty law cases - which deepens the financial crisis for poor women. It means their cases and claims are never heard.
- Refugee women who make claims of gender persecution are being denied legal aid coverage for their residency applications; even when there is coverage for refugee claimants, the tariffs are so low that lawyers simply refuse cases.
- Parties who obtain a legal aid certificate face disappointment and frustration in finding a private lawyer who will accept the certificate. The Legal Aid Plan is authorizing only minimal time or a very small block fee for any given case, which

> restricts a lawyer's ability to represent a client properly. As a result, many lawyers are now reluctant to accept a legal aid certificate.[89]

These stories provide a graphic illustration of how drastic the legal aid situation in Canada has become. It is only too easy to envision the actual harm experienced by those who require legal aid but are denied access.

While cuts to criminal legal aid have had very serious consequences, the situation is even worse for civil legal aid for several reasons. The federal government's priority has been to provide stable funding for criminal legal aid, but not for civil legal aid. Also, studies have clearly shown the gender discrimination that underlies the prioritization of criminal law matters.[90]

The WALS coalition summarized the impact of the crisis in civil legal aid in this way:

> *The narrowing and elimination of critical areas of legal aid coverage impacts women's physical and economic security. It diminishes their ability to protect their children from abusive family situations and in some cases from apprehension by the state. Without access to legal services to obtain financial support for their children women are frequently forced to stay in abusive situations or to turn to the state for assistance.*
>
> *Lack of access to legal services often forces a woman to represent herself. This in turn leads to further alienation from the legal system and contributes to problems within an already burdened court system. The restriction and elimination of other means of legal support such as through lay advocacy and representation compounds this problem.*[91]

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[89] Toronto Region Family Courts Committee, *Report of the Working Group on Unrepresented Litigants* (Toronto: March 1997) at 16 [hereinafter Toronto Region Family Courts Committee].

[90] Addario, *supra*, note 51; Hughes, *supra*, note 31; M.J. Mossman, "Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change"(1993) 15 Sydney Law Review 30; M.J. Mossman, "Gender Equality, Family Law and Access to Justice" (1994) 8 International Journal of Law and the Family 357.

[91] WALS, *supra*, note 85 at 14.

E. Problems Concerning Unrepresented Litigants

Increasingly, Canadians are going to court unrepresented. In the words of a coalition of 60 women's groups: "This is the canary in the coal mine: the sign of system breakdown." The growing number of unrepresented accused and parties in civil proceedings has enormous consequences, both for the individuals implicated and for all other aspects of the justice system.

Our justice system is predicated on party participation with the assistance of legal advice and skilled, professional advocates. All of our legal situations, except small claims court, are designed to be operated by lawyers and not laypersons. One author has stated that "because modern law is so complex and voluminous, without an experienced lawyer as a guide, civil justice is unattainable".[92] A study on access to civil justice concluded that while lawyers are not always essential since in some situations other advocates are adequate, "there are few forums in which the likelihood of success or the risk of failure is not strongly affected by representation."[93]

In 1996, a Working Group was struck to identify the serious problems arising from the increase in unrepresented family law litigants in the Metropolitan Toronto court system and to work towards developing solutions to these problems. Data collected at the 311 Jarvis Street Court indicated that over 75% of the parties appearing before that court since the fall of 1996 were unrepresented. This was directly attributed to the reduction of legal aid certificates issued and the services covered. In the same time period, one-third of all litigants in family matters were unrepresented in the General Division of the Ontario Court (the Superior Court).

The Working Group's Report identified a whole series of problems that arise concerning unrepresented litigants. These were classified into categories of problems pertaining to the unrepresented litigant himself or herself, duty counsel, judges, administration, counsel, children's aid society, and court security.[94]

The problems identified include:

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[92] R. Macdonald, *A Study Paper - Prospects for Civil Justice* (Toronto: Ontario Law Reform Commission, 1995) at 80.

[93] I. Morrison and J. Mosher, "Barriers to Access to Civil Justice for Disadvantaged Groups" in Ontario Law Reform Commission, *Rethinking Civil Justice, Volume 2* (Toronto: Ministry of the Attorney General, 1996) at 675.

[94] Toronto Region Family Courts Committee, *supra*, note 89 at 11-18.

- *Unrepresented litigants are given little guidance on how to prepare, present or settle their cases. The process is overwhelming for most of them. The sad result is that many litigants are not bringing claims to protect the safety of their children or to preserve their relationships with them through visitation rights.*
- *Duty counsel are now assisting 15 to 30 litigants per day.*
- *Judges' functions have undergone changes as they appear to be asked to assume the inappropriate roles of intake worker, interviewer, lawyer and social worker.*
- *Judges are receiving insufficient and improperly presented documents and evidence upon which to make informed decisions.*
- *Respect for the courts appears to have declined as unrepresented litigants become frustrated with their inability to understand the legal process.*
- *Court staff have been receiving demands from the public to give them assistance and legal advice and sometimes litigants become irate, frustrated and abusive when they cannot obtain legal advice from the court staff.*
- *Unrepresented litigants increase the time spent by counsel for the other party (e.g. waiting for hours while the unrepresented party sees duty counsel; taking more time to obtain necessary information such as financial disclosure).*
- *Trial management is much more difficult.*
- *In the context of children's aid applications, parents do not have adequate advice or support and these situations often deteriorate quickly with serious consequences for the parents' future rights with respect to their children and for the children themselves.*
- *Courts have had to implement increased security measures.*[95]

The Report also lists the consequences of this array of problems caused by lack of legal representation. The most serious of these are for the unrepresented litigants themselves and for their children:

- *These are some of the most serious issues that the family will ever face. Parents who do not have access to legal advice or representation or where they are*

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95 *Id.*

overwhelmed by the process may make custody and access arrangements and orders that do not reflect the best possible arrangements for the children.

- *In child protection cases, unrepresented parents are not receiving the necessary legal advice to assist them in the reunification of their families or resolution of their child's status.*

- *Unrepresented parties may become polarized in their positions. Children may be caught in the middle of a parent's dispute and this increases the possibility of harm to children.*

- *Without counsel, parties are more likely to settle for inadequate or inappropriate support orders. This can have serious economic consequences for women and children who, statistically, are economically disadvantaged by separation and divorce.*[96]

As these points illustrate, concerns about the quality of the outcome is the most distressing aspect of this growing lack of representation.

Other consequences of the lack of legal representation in family matters can be ascertained from the perspective of the justice system:

- *Case management works at a significantly less satisfactory level of efficiency where litigants are not represented by counsel.*

  - *Settlements or orders based on insufficient evidence are less likely to adequately meet the needs of the parties and are therefore more likely to be re-litigated in the future.*

  - *There are significant cost consequences arising from these problems, which include the following:*

    (a) Judges at the court at 311 Jarvis Street report that they have been forced to reduce the number of new cases that they hear each day by 40% in the past year as a direct result of the increase in unrepresented litigants. This means that it takes litigants longer to get before the court.

    (b) Judges are having to sit for longer hours requiring additional costs for in-court personnel and security.

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96 *Ibid.*, at 18-19.

> *(c) Lawyers on legal aid certificates are spending increased time on cases because of lengthy waits at court and the difficulty in settling cases, thus creating additional costs to the Legal Aid Plan.*
>
> *(d) In a case-managed court, judges do not routinely require the constant presence of court reporters. As a result of the increased number of unrepresented litigants, however, judges at 311 Jarvis Street are now requiring that court reporters transcribe all court proceedings.*[97]

It appears that unrepresented litigants consume more of the justice system's resources than do represented parties.

Similar findings have been made in the context of criminal courts in Ontario. In a submission to the Ontario Legal Aid Review, the Ontario Judges' Association commented upon the hidden costs and problems generated by an increasing amount of unrepresented accused appearing in criminal court:

> *There are undoubted costs to the justice system resulting from the withdrawal of legal aid. There are more adjournments and longer court dockets. Charges which might have been withdrawn proceed. Trials take longer. More witnesses are required. Guilty pleas take longer. People who might have been fined or placed on probation go to jail. Delays and backlogging increase.*
>
> *When the justice system experiences these kind of problems, the public is affected as well as the accused. In cases where delay extends beyond what is constitutionally reasonable, serious charges will be stayed. Witnesses are inconvenienced by repeated attendances in court, when their attendance could have been avoided by agreement between Crown and defence counsel. In some cases an unrepresented accused may be in a position of cross-examining his spouse or child.*[98]

Currently, legal aid plans only protect a relatively small number of criminal accused. The percentage of criminal accused who receive legal aid is: Ontario (27%); British Columbia (32%); Alberta (21%); Saskatchewan (28%); Manitoba (29%); Québec (60%); New Brunswick (10%); Prince Edward Island (48%); Newfoundland (37%); Yukon (42%) and NWT (42%).[99]

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[97] *Id.*

[98] Brief submitted to the Ontario Legal Aid Review by the Ontario Judges' Association (1997) at 35-36.

[99] Young, *supra*, note 55 at 672.

Although a certain proportion of accused persons are financially able to secure counsel, the figures suggest that a large group of indigent people are being left to fend for themselves.

An unrepresented accused can face serious difficulties in the courtroom. For example, Alan Young describes the events in *R.* v. *Finck*[100] in this way:

> *An unrepresented accused facing an array of minor charges made a reasonable and meritorious application for disclosure on the day of trial. The accused simply requested the names of potential witnesses who were present at the time of the alleged offences and the trial judge summarily dismissed the request. It is doubtful that this summary dismissal would have occurred had the request been made by counsel. The accused then indicated that he was unable to proceed and the trial judge called a brief recess. Unfortunately, the accused left the court house, presumably out of a legitimate sense of frustration, and a bench warrant issued. In disregarding the legitimate application of an unrepresented accused, the end result was that this individual spent 89 days in jail awaiting trial for offences which most likely would not have result in a custodial sentence.*[101]

100 *R.* v. *Finck,* [1996] O.J. No.3962 (Ont. Ct. J. Gen. Div.).

101 Young, *supra*, note 55 at 650.

4. The Legal Profession's Contribution

The legal profession makes a substantial voluntary contribution to ensuring access to justice. It can be measured at both an institutional and an individual level. It is important to document this vast contribution to highlight the reality that lawyers support increased legal aid out of a concern about access to justice that is integral to our ethics and professionalism.

A. Statistics on Institutional Contributions

Institutional contributions refer to the ways in which the legal profession as a group supports legal aid. These are global figures and include such items as:

- direct contributions through financial levies;
- the amount of funding generated by interest on trust accounts;
- the overall monetary value of holdbacks;
- the extent to which bills for legal services are voluntarily discounted for compassionate reasons;
- *pro bono* contribution of legal services; and
- volunteer participation of members of the legal profession in governance and/or operation of the legal aid organization.

In addition, in British Columbia and Prince Edward Island, a provincial tax is charged on legal services. This is not actually a contribution of the legal profession since it is for the most part paid by clients, but it underscores the irrational link made by governments between lawyers and funding for legal aid. This would be like requiring doctors to take greater responsibility to fund our medicare system relative to other Canadians. Rather than reducing barriers to access to justice, we can also assume that these taxes on legal services serve as a further financial obstacle to legal services for those who can afford a lawyer.

In Prince Edward Island, the tax on lawyers' services is not even used for legal aid, but goes directly to general revenue. In British Columbia, the tax is theoretically dedicated to legal aid funding, however not all of the tax revenue collected is spent on legal aid. In 1999, tax on legal

services contributed $83 million, yet only $81.5 million was spent on legal aid. That year, the federal government also contributed approximately $25 million to legal aid in British Columbia. In other words, approximately $26.5 million more was raised "for" legal aid through the special tax and the federal contribution than was actually spent on legal aid.

There are few readily available statistics on the contributions of the legal profession to legal aid. One easily quantifiable contribution is the revenue generated through interest on monies placed in lawyers' trust accounts. Law foundations have been established across the country to manage these monies. Money for legal aid is granted annually from the funds in Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Ontario and Prince Edward Island. Elsewhere, there is no regular grant to legal aid but law foundations make special grants from time to time (for example, in Saskatchewan). Some law foundations provide both ongoing and special funds (Alberta, British Columbia and Prince Edward Island).

Other contributions are more difficult to measure. For example, lawyers contribute a great deal of their time and services to legal aid for no remuneration. However, we have no data to quantify the extent of this contribution. For example, in New Brunswick, all detainee (*Brydges*) calls are handled on a *pro bono* basis by criminal law practitioners, who must also absorb their own travel costs related to this work. In that province, family practitioners also provide some *pro bono* work and absorb some of their expenses although it is not readily quantifiable.[102]

The following data provides an illustration of the legal profession's contribution to legal aid in four provinces from an institutional or global perspective.

(a) Alberta

The Alberta Legal Aid Society receives an annual grant from the Alberta Law Foundation amounting to 25% of the money contributed each year from the interest earned on lawyers' trust accounts. In 1998, this amounted to $1,006,456, with a high of $1,959,193 in 1997 and low of $434,346 in 1995. The Society has also been the recipient of special Law Foundation grants.

The Legal Aid Society of Alberta depends on a great deal of hard work by many individuals.[103] In each annual report, the Society acknowledges the committee members who donate an extraordinary amount of their time. For example, regional legal aid committees meet regularly to review appeals on coverage issues from clients and special disbursement requests

[102] Canadian Centre for Justice Statistics, *supra,* note 68 at 69-70.

[103] The Legal Aid Society of Alberta, Message from the Chair, in *1998 Annual Report*, at 2.

from lawyers. Most of the members of the regional committees are lawyers serving in a volunteer capacity.

(b) British Columbia

The British Columbia Legal Services Society (LSS) receives annual grants from the Law Foundation. The grant amounted to $4 million dollars in both 1996 and 1997, $3.5 million in 1998 and $2,975,000 in 1999. The Law Foundation contribution is about 4% of the legal aid budget. LSS has also been the recipient of special Law Foundation grants.

Tariff holdbacks are amounts deducted from lawyers' accounts by a plan at the time of payment, for possible repayment at a later date (usually the end of a fiscal year). The B.C. holdbacks in 1998-99 remained at 10% for family cases; 15% for criminal cases; 17% for immigration cases and 15% for duty counsel. The holdback for criminal appeals changed from 5% to 15%, while family and immigration judicial appeals remained subject to a 5% holdback. In 1998-99, these holdbacks alone translated into a total contribution of $4,381,910 to legal aid from the legal profession.[104]

Approximately 1,700 private bar lawyers participated in legal aid in 1998-99. LSS does not maintain records on the *pro bono* contributions of lawyers. However, in 1998-99, *pro bono* disbursements for civil cases were $183,048, which suggests a fairly high level of voluntary contribution of legal services to several hundred cases. Note 5 to the LSS Audited Financial Statements contains the following comment with respect to donated services:

> *Lawyers from the private bar are retained by the Society to represent eligible clients in criminal, immigration/refugee and family cases. Some lawyers subsidize the Society by being paid fees for their services that are less than those that they would normally charge privately. Because the donated portion of these services cannot be reasonably estimated, it is not recorded in the Society's financial statements*.[105]

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104 The total holdbacks were almost $4,932,735 million and only $550,825 will be repaid. In 1998, the total tariff holdbacks were $4,433,967. B.C. Legal Services Society, *Annual Report 1998-1999* at 45.

105 *Ibid.*, at 45.

One of the LSS's 1999-2000 initiatives is: "In partnership with the CBA and the Law Society of British Columbia explore ways to offer a greater volume and range of *pro bono* services to low-income individuals and groups needing legal advice and representation."[106]

Members of the private bar also participate on a voluntary basis in the governance and operations of the LSS as members of the Board of Directors, board committees and tariff committees.

(c) Manitoba

The Manitoba Law Foundation donates about 50% of its annual revenue to legal aid. This revenue is derived from trust accounts and membership dues.[107] Interest on lawyers' trust accounts varies dramatically from year to year, but legal aid's share of it has ranged from $500,000 to $1,200,000 over the last five years. In addition, there is an annual $150,000 grant to the Public Interest Law Centre (which provides legal aid in test cases) and $45,000 to the University of Manitoba Legal Aid Clinic.

Criminal legal aid bills were discounted by 5% in 1999, although for each of the preceding seven years the holdback had been 12%. In some years, some or all of this holdback was repaid at the end of the fiscal year. The dollar value of this holdback as of December 1, 1999, was $218,969. The holdback for 1998-99 was $398,302, of which 51% has been repaid.

Pro bono services are provided for the Public Interest Law Centre but are difficult to quantify. Legal Aid Manitoba receives about $20,000 a year in fees donated to the Centre by lawyers. In addition, the time provided on public interest cases by private bar lawyers for no fee is unknown, but it is not insignificant.

Volunteer participation of the profession in governance and/or operation of the legal aid organization is not part of the Manitoba model.

(d) Ontario

[106] *Ibid.*, at 6.

[107] Canadian Centre for Justice Statistics, *supra*, note 68 at 54.

Through the Law Foundation of Ontario, 75% of the interest from lawyers' trust accounts is provided to legal aid. This was about 4% of the legal aid budget in 1995. The Law Foundation of Ontario's contribution to the legal aid plan has been (all figures in millions of dollars):

1989-90	35.7
1990-91	33.5
1991-92	17.5
1992-93	18.8
1993-94	5.6
1994-95	12.4 (after negotiation of better interest rates)
1995-96	20.0
1996-97	10.3[108]

According to the *Legal Aid Act* and its Regulations, the Law Society of Upper Canada contributes an amount equal to 50% of the Plan's assessable administrative expenses for each fiscal year. Until 1998, all fees payable to lawyers for legal aid were reduced by 5%. This holdback could be applied to discharge up to half of the total obligation in that fiscal year.

The other 50% was discharged by raising funds through a self-imposed legal aid levy charged to all Law Society members. The levy was in place for 10 years, and was eliminated in 1999.

The following table sets out the amount collected by the Legal Aid Plan through the legal aid levy since 1991:[109]

YEAR	LEGAL AID LEVY PER LAWYER	TOTAL CONTRIBUTIONS BY LEGAL PROFESSION ($MILLION)
1990-91	185	4.7
1991-92	240	5.7
1992-93	292	6.1

108 OLAR, *Blueprint*, Volume 1, *supra*, note 8 at 41.

109 *Ibid.*, at 42.

1993-94	292	6.0
1994-95	292	6.0
1995-96	266	6.0
1996-97	266	6.0

B. Statistics on Individual Contributions

Another approach to measuring the legal profession's contribution to legal aid is from the perspective of individual lawyers. Lawyers support legal aid through:

- holdbacks on their fees;
- block tariffs that force them to choose between abandoning their clients or doing a significant amount of involuntary *pro bono* work;
- accepting hourly rates that represent a fraction of their normal hourly rates;
- complying with onerous bureaucratic requirements to be paid at all; and
- choosing to do *pro bono* work.

Statistics are not available to quantify the average contribution of lawyers to legal aid. The CBA has begun to gather this information in two ways. First, it distributed a questionnaire to a sample of CBA members asking about lawyers' contributions to legal aid and the provision of *pro bono* legal services. Second, the Association has asked a representative group of lawyers to estimate their contribution to legal aid in typical matters.

(a) Questionnaire on lawyers' contributions to legal aid

In February 2000, the CBA sent out a questionnaire on legal aid to a selected group of about 1,100 members who practice in the major areas of legal aid work (criminal law, family law and immigration law). Respondents were asked a number of questions about their participation in legal aid work, legal aid compensation, how to improve the delivery of legal aid, and their *pro bono* and other contributions to legal aid. Eighty-nine lawyers responded, with representation from each jurisdiction.

Respondents were asked to estimate the market value of the legal services that they normally provide beyond the amount compensated by the legal aid plan for both typical and extraordinary cases. They were asked to include any discrepancies between the hourly tariff and normal hourly rate, the value of any hours that were worked beyond those permitted by legal aid, plus any unpaid time for legal aid administrative work.

The average amount paid by legal aid for a "typical case" was $850, compared to the average estimate of market value of the work at $2,678, for a difference of $1,828 per case. In "extraordinary cases", the average amount paid by legal aid was $2,820, compared to the market value estimated at $11,449, for a difference of $8,629 per case.

Questionnaire respondents were also asked about other contributions they made to legal aid. Respondents estimated that the average annual value of their participation in the administrative work of the plan was $1,299. This figure included activities such as participation in *pro bono* clinics sponsored by legal aid, sitting on local legal aid committees in various areas of practice, interviewing and directing clients to legal aid offices, and providing general assistance where no certificate was granted.

Respondents were also asked to describe their *pro bono* contribution to increase access to legal services. The definition of *pro bono* work in this survey had three components:

- *where you accepted a file knowing that you would not be paid ("intentional pro bono");*
- *where you had to reduce the amount billed because of a client's financial hardship; and/or*
- *where you continued working on a legal aid file after the time allowed by the legal aid plan had expired.*

There was a large range in the responses to this question, from 0 to 500 hours of *pro bono* work per year. Lawyers responded that this average number of hours of *pro bono* work has remained relatively stable between 1995 and 1999. The average number of hours of *pro bono* work carried out by respondents in each of the last five years were:

1995	124
1996	91
1997	99
1998	113

1999	107

The average estimates of the monetary value of *pro bono* legal services provided by respondents in 1999 were:

"Intentional" *pro bono* work	$7,717 per lawyer
Charged less due to client's financial hardship	$8,493 per lawyer
Uncompensated legal aid work	$6,209 per lawyer

The vast majority of respondents felt that the legal aid tariff rate did not fairly compensate them for the legal services they provided in each area of law. Less than 10% felt that compensation was adequate for criminal law matters and less than 5% felt that way about family law matters. No respondents believed that legal aid work in immigration or other matters was fairly compensated.

The compensation was deemed to be inadequate in the following ways: hourly rate too low; number of hours unreasonably restricted; and too much unpaid time to administer files. Respondents added the following comments:

- *there is simply no compensation for some services such as bail or remands;*
- *approval delays result in inability to serve clients in a timely manner;*
- *block fees and flat fees are too low; and*
- *insufficient recognition of complexity of files and growing responsibilities (due to changes in practice, etc.).*

(b) Representative models of lawyers' contributions in legal aid cases

To demonstrate the contributions that lawyers make to legal aid in every case that they take on, representative models of lawyers' contributions to specific kinds of legal aid cases were developed. This involved gathering data on the number of hours spent, hourly rate and total billing in "typical legal aid" files in the criminal, family and immigration law fields. This data was also gathered for comparable "non-legal aid" files. The differences in amount received for comparable work between legal aid and non-legal aid files are attributed to:

- the fact that lawyers work more hours than they are actually paid for due to limitations on the number of hours that they can bill in a given legal aid matter; and
- the hourly rate paid by legal aid is well below the amount charged in a private retainer.

Our representative models are set out under the headings of criminal, family and immigration law in the following table. In each case, the figures compare total billings for a comparable matter in a legal aid file and a non-legal aid file. Comments offered to explain the difference between the two figures are provided below.

Criminal

1. Summary Criminal Offences* (British Columbia)	
Legal Aid	$300-900
Non-Legal Aid	$1,500-2,000
*Little or no funding is available for pre-trial and post-trial work in legal aid files, despite the fact that 2-5 hours are regularly spent on this. The remaining difference is due to differentials in the hourly rates.	

2. One day Sexual Assault Trial* (Yukon)	
Legal Aid	$1,000
Non-Legal Aid	$3,000
*Difference is due to both limits in hours that can be charged and in the hourly rate charged.	

3. Murder Trials* (Saskatchewan)	
Legal Aid	$ 4,100
Non-Legal Aid	$12,500
*Difference is mostly due to billing rate: $55 for legal aid versus $150 for private clients. In addition, lawyers require special permission from Legal Aid to spend more than 40 hours on all out-of-court preparation.	

4. Bail Hearings (Saskatchewan)	
Legal Aid	$ 75
Non-Legal Aid	$350

5. Sexual Assault Trials (Saskatchewan)	
Legal Aid	$ 990
Non-Legal Aid	$4,625

6. Possession of Stolen Property (Saskatchewan)	
Legal Aid	$247.50

Non-Legal Aid	$1,500

7. Criminal Defence - Summary Conviction* (Ontario)	
Legal Aid	$ 650
Non-Legal Aid	$1,500
*Difference is due mainly to limits on number of hours that can be billed under Legal Aid Plan.	

8. Indictable Trial Matters* (Ontario)	
Legal Aid	$1,810
Non-Legal Aid	$3,500
*Difference is due mainly to limits on number of hours that can be billed under Legal Aid Plan.	

Family

1. Child Protection - Complex* (Alberta)[110]	
Legal Aid	$ 793
Actual Time Spent at Legal Aid Rate	$3,050
*Payment for pre-trial limited to 13 hours when average amount spent is 50 hours. No payment at all for case research, interviewing witnesses, preparing for cross-examinations and so on.	

2. Divorce - Complex* (Alberta)	
Legal Aid	$1,281

[110] In both examples 1 and 2 under the Family Law heading, trial time is reimbursed for actual time in court at the rate of $155 per half day.

Actual Time Spent at Legal Aid Rate	$5,795
*Payment for pre-trial limited to 13 hours when average amount spent is 65 hours. Payment for solicitors' work (preparation of documents) is limited to 8 hours when an average of 30 hours is actually spent.	

3. Custody* (Alberta)	
Legal Aid	$ 793
Actual Time Spent at Legal Aid Rate	$2,440
*Payment for pre-trial preparation is limited to 13 hours when average amount spent is 40 hours. No payment at all for case research, interviewing witnesses, preparing for cross-examinations and so on.	

4. Interim Custody and Maintenance (Yukon)	
Legal Aid	$ 735
Actual Time Spent at Legal Aid Rate	$1,575
*The Legal Aid billing rate in the Yukon in family matters is $70 per hour, but the average rate for private counsel is $140-200 per hour.	

Immigration Law

1. Refugee Claims (Alberta)	
Legal Aid	$1,525
Non-Legal Aid	$5,000

2. Immigration Appeals - e.g. Deportation Order* (Alberta)

Legal Aid	$1,525
Non-Legal Aid	$5,000
*The difference in these cases is not in terms of hours since these matters generally take between 25 and 35 hours of work, while the Legal Aid Plan limit is 25 hours. However, the Legal Aid rate is $61 while the private rate is $175 per hour.	

In the questionnaire, lawyers were also asked for overall comments on the differences in the number of hours spent or the hourly rate/total billings in legal aid and non-legal aid cases. The comments reveal that most lawyers provide the same service and take the same amount of time working on legal matters for legal aid and private clients, but are paid a fraction for their work on legal aid files:

- *In general the number of hours worked is usually the same, except for client interviews which tend to be longer with fee-paying clients.*
- *Everybody gets the same service from me, legal aid or private retainer. The difference is my remuneration. The reality is that, especially with complex matters, I never get paid for most of the work that I do. If I only did what I got paid for, I could not do a proper job for my clients.*
- *I spend equal time on a comparable legal aid file as I do with a private retainer. My hourly rate in private matters is only slightly higher than the legal aid rate but I get paid for the actual time I put in.*

C. Impact of Underfunding on Lawyers

While the primary focus of inadequate legal aid must be on the impact on those who require legal services and cannot otherwise afford them, it is also important to scrutinize the impact of this situation on lawyers. Our legal aid system depends on lawyers to function. Recent trends, particularly underfunding, have made it extremely difficult for lawyers to take on legal aid and maintain their practices. As lawyers turn away legal aid work, this is turn poses a further threat to access to legal services to those requiring those services.

The CBA has gathered information on the problems faced by legal aid lawyers who are willing to undertake legal aid work through informal surveys of our members. Some of these comments/anecdotes are set out below.

- *Tariffs are low and files are limited in terms of time. For example, in Alberta family law cases, each task has prescribed limits and requires very detailed accounts. For example, "interviewing the client" is limited to three hours and one hour per file is allotted for "reviewing documents". Lawyers end up spending much more time than this on most files and working for nothing.*

- *A lawyer in Nova Scotia has reported that he was recently working on a murder case. He is being paid one third his hourly rate and expects to write off another 200-300 hours to complete the case (75 hours for preparation time is allowed, at $55 per hour).*

- *"At WAVAW we make a lot of referrals to lawyers. Our biggest frustration now is that these lawyers aren't taking legal aid cases anymore...they can't afford it. Women are just getting shuffled around. No one can help."*

- *"As a private lawyer, I used to take legal aid cases routinely. Now I take very few cases. Because of the cutbacks, I can't sustain my practice even if I only do 50% legal aid cases."*

- *One lawyer said that it makes more sense financially to take a case pro bono than through legal aid. The paper work involved, the constant writing for permission to proceed to the next level of the file and the billing requirements all erode the tariff amount of $67/hour, capped at very minimal levels, to a ridiculous amount. With the new case management system, the paperwork required has greatly increased, yet the caps have not been adjusted to account for the increase. Further, once a lawyer begins a file, legal aid can be unwilling to permit a change of counsel, so the lawyer can be stuck in a financially draining situation.*

- *As tariff and block fees permitted for family coverage have deteriorated, it is mainly lawyers with little experience who are handling family legal aid cases.*

- *The criteria to obtain a legal aid certificate has been increasingly restricted, so that only fairly complex cases are aided. At the same time, the only lawyers who will take the cases are those fresh out of law school, who take the file for the experience offered and to build up a practice.*

- *In Québec, the tariff permitted for private family lawyers is so low that most people with more than a few years of call will not accept legal aid. That, coupled with the*

paper work involved, make it impossible to cover both legal aid and your overhead. The lack of senior counsel taking legal aid can be a problem with complex cases.

- *"In 1999, in Prince Edward Island there was maximum family legal aid funding of $500 per case (possibly a couple of hundred dollars' leeway in very extreme cases). Eighty percent of this funding came from interest on lawyers' trust funds (which is officially supposed to be used for public legal education) and only 20% from provincial funds. Lawyers may bill $50 per hour, so the amount of a lawyer's hourly rate in excess of that is pro bono. To make matters worse, lawyers must pay the HST or PST and GST on the bill once it exceeds the $500 cap, whether or not the lawyer actually gets paid. Therefore if the lawyer agrees to continue working on the case pro bono, it actually costs the lawyer money."*

Underfunding has a substantial impact on the quality of legal representation in both the staff and private bar models. In staff lawyer situations, lawyers report quite overwhelming caseloads, all of the time. In Saskatchewan, staff lawyers doing criminal work can easily handle 25-30 cases in court on one day. Clients also experience significant waiting lists to see staff lawyers. This is not a new problem. The 1992 *Report of the Saskatchewan Legal Aid Review Committee* recorded the extremely heavy caseload carried by lawyers acting within the system.

> *Obviously there must be occasions when it will be questionable whether a particular lawyer really has sufficient time properly to handle her or his client's case. In such a situation the lawyer involved might well be concerned about her or his professional position.*[111]

The Saskatchewan Review Committee recommended that funding be provided so as to increase, where appropriate, the number of lawyers engaged in the legal aid system and that the status, salaries and benefits of employees of the Commission be brought into line with those of the Saskatchewan Department of Justice.[112]

The caseload of Nova Scotia staff lawyers is similarly about four times that of the busiest lawyers in private practice in that province.

In addition, lawyers bear indirect costs from insufficient legal aid. The prevalence of unrepresented accused and litigants in court impacts on many lawyers, including Crown counsel, staff lawyers and defence counsel, as well as the justice system as a whole.

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[111] *Supra*, note 15 at 51.

[112] *Id.*

Lawyers are, to a large extent, keeping legal aid delivery alive and functioning, though too often, this is taken on at great personal and professional cost. In an Ontario survey, most lawyers stated that they enjoy and appreciate legal aid work. However, the most common complaint related to fees and services.[113] Despite the fact that the tariff in Ontario is the highest in the country and Ontario legal aid lawyers are receiving more money for legal aid work than their counterparts in other parts of the country, most lawyers (4/5) believe that the tariff compromises their ability to provide quality service.[114] The primary reasons why a lawyer in Ontario will not engage in legal aid work are the low tariff and the complex billing procedure.[115]

Similar responses were received from the national CBA's questionnaire on legal aid. For lawyers who had not taken any legal aid work in the past five years, the reasons given for having chosen not to accept legal aid files at all in the last five years were fairly evenly spread across the following responses:

- *hourly rate too low;*
- *administrative requirements too onerous;*
- *files too complex for hours allowed by legal aid plan;*
- *too much other work;*
- *all of the above;*
- *law firm policy; and*
- *not applicable to area of work or government lawyer.*

Some of the comments made by respondents were:

- *I quit Legal Aid when they no longer even considered paying for time spent over the allowable amount. I was losing too much money, and the effective rate on some files became under $30 per hour, less than the cost of my office overhead.*

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113 *Comprehensive Review and Evaluation of the Ontario Legal Aid Plan: Project Report* (1992) ABT Associates of Canada, Principal Investigator, Colin Meredith, at 162.

114 *Ibid.*, at 168.

115 *Ibid.*, at 163.

- *More senior lawyers are refusing certificates. More lawyers are refusing to take a chance on being paid a discretionary fee for work over the time limits.*
- *I do not take legal aid cases in order to ensure that the quality of my work is not compromised.*

Of lawyers who do take legal aid files, almost 90% of respondents to the questionnaire had declined to take on one or more legal aid files in the previous five years. On average, the lawyers responding had declined 58 files over the past five years. Close to half said that the reasons for declining these files were a combination of: hourly rate too low; administrative requirements too onerous; files too complex for hours allowed by legal aid plan; too much other work; and conflict of interest. The two most frequent single reasons were the low hourly tariff and the files being too complex for the hours allowed by legal aid plan. Respondents also commented that the delay in payment and holdbacks on fees were unfair.

The questionnaire also asked whether or not the cutbacks in legal aid had affected the quality of legal services they provide. Thirty-nine percent said yes, while 60% said no. For those who responded "yes", they included the following comments:

- *delays in approval of legal aid have a serious impact on quality of service;*
- *very difficult to get experts who are prepared to work at legal aid rate;*
- *a client's issues go unresolved because there isn't funding to deal with them;*
- *not enough time to prepare; no time paid for mediation;*
- *I take quite a few cases to make up for the low remuneration. Given the number of cases taken, it is difficult to maintain the level of quality I would like to provide;*
- *decline in quality, especially with respect to drafting of documents; and*
- *less thorough research.*

Several respondents commented that they only took on files where they felt that the legal aid rate was adequate (for example where a block fee was sufficient for the specific case). Several lawyers mentioned that there was no decline in quality of service offered due to recent cutbacks because they limited the number of legal aid files they took. The following quote is illustrative of the experience of many:

> *No, only because I refuse to let it (affect the quality of the work). The consequence, however, is that I simply don't take many certificates. I will only*

> *have one active legal aid family matter at a time. In that way, I can make a living and do some legal aid and still provide quality service. If I don't limit the amount of legal aid, the result is that I have to cut the quality of service in order to do enough volume to cover the overhead. If I was to do as much legal aid as there is demand, and provide quality service, I would be bankrupt in 18 months. Legal aid does not cover my overhead, which is modest in a rural practice.*

Another common response was that the low rate of remuneration for legal aid work means that lawyers cannot give priority where it is needed, because one had to "at times do better paying and less administratively cumbersome files to survive financially". In summary, inadequate legal aid is having a serious, detrimental impact on lawyers. This impact has a correlated negative impact on individuals who require legal aid. The problems include:

- *tariffs so low that legal aid becomes a financial liability;*
- *tariffs out of date and not reflective of practice;*
- *hours allotted per case are completely inadequate; and*
- *unmanageably high case loads for staff lawyers*.

There are serious consequences as a result of these problems. There is a decrease in the number of lawyers providing legal aid services. There are waiting lists for representation in many regions of Canada. Junior counsel are taking on serious cases that would be best handled by more senior counsel. Finally, we are jeopardizing quality of service offered to clients requiring legal aid. This all adds up to reduced access to justice for Canadians.

5. Ensuring Access to Justice: The Reform of Legal Aid

Legal aid is in crisis - this much is clear. To generate the public and political will to address this dire situation, it is important to develop alternative images of how the legal aid system could function cost-effectively while meeting its objectives of ensuring access to justice. The tenor of discussion on legal aid cannot simply be a call for more money and more secure money - although this is clearly an essential step. Additional funding must be met with system reform to ensure access, efficiency and quality of service.

To date, the legal aid budget crunch has mainly been handled through cutbacks - cutbacks in eligibility, in terms of numbers of certificates (cases), in terms of scope and in terms of hours per matter. The challenge now is to develop more creative and satisfactory ways of balancing legal aid budgets.

This section provides a brief overview of current research on legal aid delivery and new approaches for assessing clients' needs and alternative ways to meet these needs. The purpose is to identify the most promising directions for reform at this time.

A. Beyond the Delivery Models Debate

For 20 years, discussions about legal aid have been dominated by debates over the merits of various delivery models, and in particular the relative advantages and disadvantages of the judicare and staff models. The classic review of this debate is contained in the 1987 CBA Discussion Paper, which succinctly outlined the perceived strengths and weaknesses of the four common models of delivering legal aid services (judicare, staff lawyer models, community legal clinics, mixed models).[116] This debate has been marked by a series of evaluations of the cost-effectiveness of the staff model, countered by critiques of these evaluations.[117] This interminable controversy has never been resolved, yet there is strong evidence that it has been transcended by a more open and nuanced dialogue on a variety of legal aid options.

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[116] S*upra*, note 1 at vii-ix.

[117] For a thorough overview of this history see Currie, "Delivery Models," *supra*, note 7 at 2-5.

Over the years, the continuing opposition of the private bar to staff lawyer delivery has been criticized as based in self-interest:

> *This shows that a delivery model is not only a technical-administrative mode of service delivery. There is a politic to delivery models reflecting a set of vested interests, typically very strong vested interests on the part of influential actors in the system. Importantly, what has continually fallen victim to the politics of delivery models is the ability of legal aid plans to experiment with innovative service delivery.*[118]

At the same time, many critics of the Bar's position have also recognized the principled aspects of this opposition, including the legal profession's emphasis on quality of service and concerns over independence and conflict of interest.[119] These arguments cannot be dismissed out of hand. The CBA Legal Aid Discussion Paper described the debate in these terms:

> *There are few topics which appear to arouse such strong and varying opinions as the choice of delivery model. Ideology and personal experience come together on this topic, allowing most lawyers to hold and advocate positions with great conviction."*[120]

Regardless of the merits of these views, the debate appears to have stifled innovation in legal aid delivery. The dichotomy between judicare and staff is inherently limited. After 20 years, there is still no consensus on the relative cost-effectiveness and quality of the two models,[121] given the myriad of ways in which the judicare and staff models can operate. They are both phenomenally flexible systems. An underfunded judicare system would be cheaper that a properly funded staff model and *vice versa*.[122]

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118 *Ibid.*, at 4.

119 *Ibid.*, at 14.

120 *Supra*, note 1 at 19.

121 For example, compare the conclusion in Currie, "Delivery Models", *supra*, note 7 at 9, that the cost-effectiveness of the staff model has been conclusively demonstrated with the views that there is insufficient data to support this conclusion in OLAR, *Blueprint*, Volume 1, *supra,* note 8 at 109-111 and F. Zemans and P. Monahan, *From Crisis to Reform: A New Legal Aid Plan for Ontario* (Toronto: York University Centre for Public Law and Public Policy, 1997) at 143-144 [hereinafter Zemans & Monahan].

122 Young, *supra*, note 55 at 660.

The time has come to shift away from the traditional terrain of this debate. Canada has not been alone in sinking into the mire on this topic. The National Legal Aid Advisory Committee in Australia has concluded that "the protracted debate in Australia over cost differences between legal aid delivered through salaried lawyers and private lawyers should no longer be continued".[123]

Although experts are divided over the cost-effectiveness of the judicare and salaried models of legal aid, there is a remarkable consensus that the ideal way forward for western countries is a model that involves a mixture of judicare and salaried elements.[124] Yet even the concept of a "mixed model" may be outdated. It is somewhat pedestrian to advocate a mixed model, since most legal aid programs have had a mixed approach for many years.

Abandoning the staff-judicare debate allows for a new focus on identifying and experimenting with a wide variety of legal aid delivery options. There is a growing consensus on this approach as illustrated in a recent report on legal aid in Ontario:

> *We believe that the "staff-judicare" debate is both reductive and narrow. The debate is reductive because a simple cost-per-case comparison of the two traditional models does not identify the rich texture of potential measures that exist within each model or the many other alternative measures which have been used to deliver legal aid services. The debate is unnecessarily limited because it does not address fundamental issues essential to the delivery model debate, including the legal aid program's ability to identify, assess, prioritize and respond to client needs.*[125]

B. Innovations in Legal Aid Delivery

The delivery models debate had a narrow focus on cost-efficiency and cost-cutting measures. Recently though, the focus has shifted from living within the legal aid budget towards an emphasis on the quality and range of services possible within that budget.

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123 T.Goriely, *Legal Aid Delivery Systems: which offer the best value for money in mass casework?* Prepared for the Lord Chancellor's Department (London: TPR Social and Legal Research, 1996) at 27.

124 A. Patterson, "Financing Legal Services: A Comparative Perspective", in D.L. Miller and P. Beaumont (eds), *The Option of Litigation in Europe* (1992) at 165.

125 Zemans & Monahan, *supra*, note 121 at 133.

The Ontario Legal Aid Review concluded that the goal of a legal aid program should be to create and sustain a system dedicated to providing effective assistance to as many clients as possible.[126] The objectives would be to ensure that the legal aid system is cost-efficient, high quality and accessible.

According to the Ontario Legal Aid Review, achieving these goals and objectives requires a number of changes from current practice. These are: a greater emphasis on legal aid needs; a more flexible approach to legal aid delivery; moving from a simple to a complex mixed model; and promoting innovative approaches. The following sections briefly outline recent developments under each of these topics.

(a) A renewed focus on needs

The starting point for legal aid reform should be a commitment to the idea of exploring a broader client-centred approach to legal aid needs.[127] This requires us to move away from the lawyer-centred approach and look at other models of defining needs and determining priorities.[128]

One outcome of the client-centred approach to determining the needs of legal aid clients is to prioritize integrated and multi-disciplinary approaches to justice problems. Legal aid should be seen as part of a broader access to the justice system that will apply the most appropriate solutions to problems with consideration of both their legal and their non-legal aspects.[129]

This approach is based on a novel conception of legal need. Traditionally, the idea of legal need flowed from defining legal aid as a juridical right - equality before the law. Today we are moving toward a broader definition of legal need as a social right:

> *In this view legal aid exists to address the substantive economic and social inequality of low-income clients as a class. Legal needs are conceived broadly,*

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126 OLAR, *Blueprint*, Volume 1, *supra 8*, at 133-135.

127 M.J. Mossman, "Towards A Comprehensive Legal Aid Program in Canada: Exploring the Issues" (1993) 4 Windsor Review of Legal and Social Issues 1.

128 Currie, "Determining Needs", *supra*, note 60 at 13.

129 *Ibid.*, in "Foreword".

> *including assistance in obtaining government benefits and promotion of activities which ameliorate the position of the poor in society.*[130]

A number of approaches flow from the starting point of legal aid needs defined from a client-centered perspective. One of the natural outcomes of this approach is that legal aid services are tailored to meet client needs, rather than clients fitting into existing services and approaches.

> *There is now a growing consensus among commentators on legal aid that defining the right array of service components - varying with type of law, client need, case priorities, type of service being offered (e.g. bail hearing as opposed to jury trial), or the collective characteristics of the needs of certain groups of clients, such Aboriginal people or the physically or mentally handicapped - is far more useful.*[131]

An example of this approach is the Family Case Management Program operated by the B.C. Legal Services Society (LSS). If financially eligible, a legal aid applicant is then screened by intake personnel to determine if his or her issues raise a legal matter. If not, the applicant is diverted to other service providers in the community. If a legal response is appropriate, then LSS will issue a certificate.

(b) A more flexible approach

Another consequence of the client-centred approach is a move away from preconceived notions of the nature of available service and toward a more flexible system of service delivery. For example, not all legal needs involve advocacy or representational services. Legal aid programs have begun to move toward graduated levels of services.

Since it is not clear that every legal service needs to be performed by a lawyer, a legal aid program should provide different kinds of legal services. These could include: public legal education, legal advice, representation at many types of proceedings and law reform. Even within the standard litigation approach, there is room for graduated services. There are stages in virtually all legal cases where specialization and division of labour promote expertise and

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130 *From Crisis to Reform*, *supra*, note 121 at 137.

131 S. Charendoff, M. Leach and T. Levy, "Legal Aid Delivery Models", OLAR, *Blueprint*, Volume 2, *supra*, note 28, 543 at 544.

efficiency. In the future, legal aid will involve a broader range of service providers, including staff investigators, paralegals and community legal workers.[132]

At the base of this new approach is the idea that legal aid can and should be provided in many different forms including:

> *A phone call, letter, some summary advice, assistance in filling out a form or a court document, a referral to a non-legal service provider, support in bringing together a group to solve a common legal problem, law reform initiatives to help inform lawmakers about the effects that legislation has or will have on low-income people, assistance with participating in a hearing or complicated and protracted litigation.*[133]

As the Ontario Legal Aid Review report pointed out, many pressing problems can be settled with a couple of hours' work. Options should range according to variety and intensity.

Flexibility could extend to other aspects of legal aid administration. For example, the CBA-O recommended that legal aid plans also build in flexibility in billing methods. According to this recommendation, more experienced practitioners may, in many instances, handle a case in a more efficient manner than junior counsel. However the billing requirements of the current Ontario system are so arduous that it is not worthwhile for a two to three hour billing to be processed, even though senior counsel may be able to resolve a matter in that period of time. One way to address this problem is through a tariff change allowing for increased hourly rates but also alternative block fees in appropriate circumstances. These block fees, which would be less than the maximum hours currently allowed, would absolve counsel of the requirement of detailed time-keeping.

A more flexible approach to legal aid delivery based on client needs could help to narrow the gap between full representation and no representation. Closing the gap would occur through provision of a much greater variety of legal services in order to assist a broader range of potential clients. This would involve invoking a wide spectrum of delivery mechanisms, including, for example, public legal education, duty counsel, supervised paralegals, staff offices, community legal clinics, judicare and block contracting.

One of the underlying themes is the requirement to use specialized legal services judiciously. Alternative ways of providing legal assistance should be fully explored so that legal assistance is available when required.

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[132] Zemans & Monahan, *supra*, note 121 at 156.

[133] OLAR, *Blueprint*, *supra*, note 34 at 56.

(c) From simple to complex mixed models

Current trends in legal aid signify a move beyond a simple mixed model to complex mixed models of service delivery.

> *Legal aid delivery is not a simple, one-dimensional issue. A delivery model must provide the best service possible, in the most cost-effective manner, in ways that address a number of major aspects of service delivery. Legal aid service is provided in different areas of law, to diverse client groups, in different geographical areas, and involving cases that vary from simple to very complex. These and other factors make legal aid delivery a complex and multidimensional problem, not a simple and unidimensional one. It stands to reason, then, that neither private bar lawyers providing service on an individual fee-for-service basis nor staff lawyers providing a similar service as salaried employees will necessarily be the best solution to all delivery problems*.[134]

The various delivery models in a complex mixed model should work together and build toward an integrated delivery system comprised of models that are targeted toward specific delivery problems, functioning in a complementary manner.[135]

> *A complex mixed model is an integrated set of delivery models (staff lawyers, private bar lawyers on fee-for-service certificates, expanded duty counsel, contracting) and structures (clinics) that are targeted at specific service delivery problems. The complex mixed model rests on the recognition that no one delivery model is the best for all purposes, without qualification. The mix will vary from jurisdiction to jurisdiction.*[136]

The model promoted by the Ontario Legal Aid Review fits this definition of a complex mixed model, that is a system consisting of several linked and coordinated delivery models. Under this proposal, the model would include:

- continued significant reliance upon judicare,
- the development of a series of staff offices across the province,
- expanded duty counsel services,

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134 Currie, " Delivery Models," *supra*, note 7 at 9.

135 *Ibid.*, at 10.

136 *Ibid.*, at 13-4.

- increased use of non-lawyer professionals and public education materials,
- a sophisticated intake and case-assessment function,
- effective coordination with other services, and
- a case-management and quality-control program for services provided by both staff and private bar.

This model is similar to the Family Case Management Program instituted by the B.C. Legal Services Society in 1994, which “streams” family law clients, depending on their legal needs. This approach recognizes that each delivery model has specific strengths upon which a complete system can be built.

The idea of a complex mixed model suggests that there are many important choices to be made about legal aid delivery. In terms of the structure of the judicare part of the program, there are issues about hourly rates, fixed fees per case, maximum hours per case, and graduated rates reflecting greater levels of experience or expertise. Another option would be contracting to private law firms or private counsel through a competitive tendering process of a block of cases for a fixed fee per case or a total sum for the block of cases.

On the staff model side, there are fundamental issues such as the right composition of legal, paralegal and non-legal staff, whether the legal and support staff are employed directly by the legal aid administrator or are community legal clinics with independent boards, and whether the clinic should be all-purpose or more specialized.

Finally, priority must be placed on the ways in which aspects of the mixed model fit together to ensure the best fit between client needs and service delivery models. The interaction amongst elements of the program is crucial since options tend to be complementary in some senses and competitive in others.

(d) New approaches

Some Canadian legal aid programs are beginning to experiment with innovative delivery mechanisms. This section provides an overview of some of these new approaches.

i. Contracting

Contracting occurs when a lawyer or law firm bids on a block of cases for a set fee.

Recent legal aid reforms in the United Kingdom have emphasized contracting as an efficient model,[137] but the approach has been heavily criticized by the English Bar.[138] The experience with contracting in parts of the United States has been very disappointing.[139] American studies have found that contract lawyers put less effort into each case, run fewer jury trials, present guilty pleas more often and do not use investigators or expert witnesses. Additionally, less time was spent per case than in the public defender system it replaced.[140]

The United States studies have also found that most jurisdictions implementing the contracting model underestimate the complexity and cost of administering the awarding and monitoring of contracts. Excessive administrative expenditures and fewer firms than expected bidding for the contracts have resulted in prices for legal services actually tending to increase, rather than decline as anticipated.

In Canada, contracting has been used for very specific purposes and met with greater success. It was first introduced in the Manitoba system in 1992 in the Portage Legal Services Initiative as a means to provide legal aid services in a cost-effective way to the rural and sparsely populated Interlake Region of central Manitoba. This experience was successful and continues to be a regular part of the delivery system in that province. More recently, Manitoba Legal Aid has contracted for blocks of 50 young offender cases. Plan administrators believe that there have been considerable savings through this form of contracting, although no formal evaluation has taken place.[141] In British Columbia, both young offender and adult criminal legal aid have been contracted in block fees with a saving of 19% over straight private bar delivery. There were no reported problems with attracting experienced lawyers to deliver quality of service.[142]

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[137] D. Crerar, "A Cross-Jurisdictional Study of Legal Aid: Governance, Coverage, Eligibility, Financing, and Delivery in Canada, England and Wales, Australia, New Zealand, and the United States", Report of the Ontario Legal Aid Review, *A Blueprint for Publicly Funded Legal Services*, Volume 3 (Toronto: Ontario Legal Aid Review, 1997) at 12 [hereinafter OLAR, *Blueprint,* Volume 3] 1071 at 1127.

[138] See for example, "Legal Challenge to Contracting Planned" (1999) The Law Society Gazette 8.

[139] Young, *supra*, note 55 at 664.

[140] *Ibid.*, at 665.

[141] Currie, "Delivery Models", *supra*, note 7 at 10.

[142] Focus Consultants, *An Evaluation of the Legal Services Society's Pre-Pilot Block Contracting Project*, (Victoria, B.C., 1998).

ii. Expanded duty counsel

Expanded duty counsel is another innovation used within the Canadian legal aid system. This system has been in place in Manitoba since 1994. The expanded duty counsel is basically a disposition model of duty counsel. The objective is for the duty counsel to dispose of as many simple cases as workload permits, as early as possible in the criminal justice process. The expanded duty counsel program assumes that a large proportion of cases are quite simple. If the matter goes to trial, it is transferred to a regular staff lawyer or a private bar lawyer. If the outcome is a guilty plea or stay of proceedings, the matter is handled entirely by duty counsel. Cases resolved without trial resulted in substantial cost savings with no compromise in the quality of service.[143]

iii. Ontario pilot projects

The Ontario Legal Aid Plan launched an extensive series of pilot projects to test alternative service delivery models in 1996. These include:

- In criminal legal aid: staff lawyer offices, expanded duty counsel, contracting.
- In immigration legal aid: an extension of the staff lawyer immigration pilot project to encompass detention hearings, special immigration panels, contracting.
- In family legal aid: staff lawyer offices, contracting, expanded duty counsel, unbundled family law services (a form of assisted self-representation).
- In young offenders legal aid: staff lawyer offices, youth court counsel (a form of expanded duty counsel), contracting for court-appointed counsel cases.

iv. Integrated staff lawyer offices

The Alberta Youth Staff Lawyer Offices in Calgary and Edmonton provide a variety of innovative services to meet the special needs of youth. For example, babysitting is provided by a downtown church for the children of young offenders who are appearing in court, and public transit tickets are given to youth to overcome transportation problems that could result in failures

[143] A. Currie, *The Legal Aid Manitoba Expanded Duty Counsel Project* (Ottawa: Department of Justice Canada, 1996) at 71.

to appear in court. Other services include recreational activities, employment counselling aimed at crime prevention and mental health assessment and counselling to assist young offenders in resolving the difficulties that may be underlying their legal problems.[144]

v. Assisted self-representation

Assisted self-representation combines public legal information with summary advice and limited legal assistance.

One experimental assisted self-representation project was attempted by the B.C. Legal Services Society (LSS).[145] Booklets informing clients about how to defend themselves against a criminal charge were prepared by the Public Legal Education Department of the LSS and distributed to rejected legal aid applicants at branch offices throughout the province. The results of the experiment showed that the legal information material did not effectively prepare people to defend themselves. However, the material was extremely useful in other ways, such as alerting them to the potential seriousness of their situation.

The Ontario Legal Aid Plan Pilot Project initiative includes an 'Unbundled' Family Law Services Project. Under this project, applicants are issued a limited legal aid certificate for a few hours of services from a private bar lawyer to get advice or assistance in drafting documents or to advise them about how to represent themselves.[146]

vi. Early intervention

Many of the innovative approaches to legal aid place a high priority on early intervention. The Ontario Legal Aid Review promoted early intervention as a central feature of legal aid reform:

> *...in choosing delivery models in particular contexts, a premium should be attached to early intervention to promote issue identification, settlement,*

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[144] *Legal Aid Youth Offices: Special Initiatives (n.d.)*, reported in Currie, "Delivery Models" *supra*, note 7 at 13.

[145] A. Currie and C. McEown, "Assisted Self-Representation in Criminal Legal Aid: An Experiment in Limited Service Delivery" (Ottawa: Department of Justice Canada, 1998).

[146] *Proposed Pilot Projects: Final Report*, Ontario Legal Aid Plan, 1998.

> *mediation, diversion and referral to other community agencies, rather than withholding legal assistance until disputes have become more intractable and costly to resolve, which may be counterproductive and impose greater demands in the long term both on the legal aid system and the underlying justice system.*[147]

The validity of this approach is highlighted by the experience in other jurisdictions. For example, Ontario currently spends $11 *per capita* on legal aid, while the Dutch spend less than $4 *per capita*. Yet, the Dutch legal aid scheme is widely admired for being "one of the best in the world, probably the best."[148] It has been hypothesized that the Dutch can maintain high quality legal aid service for low cost partially because they have a "strong record of diverting offenders out of the criminal justice system."[149] The CBA has concluded that early representation results in earlier pre-trial release, improved client relations and effective case handling.[150]

vii. Integrated reform

The legal aid debate has shifted from concentrating on an evaluation of the merits of various different models to a debate on the best way to integrate legal aid into other components of the justice process. A 1996 review of legal aid in Nova Scotia concluded that there appears to be little understanding and communication between the various components of the justice system. As a result, the review recommended that legal aid policy development must be undertaken in an integrated fashion with other components of the justice system.[151] Similarly, the Ontario Legal Aid Review concluded that legal aid reform divorced from larger issues of justice reform is doomed to failure.[152]

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147 OLAR, *Blueprint*, *supra*, note 34 at 136.

148 T. Goriely, "Revisiting the Debate over Criminal Legal Aid Delivery Models: A View from Britain", in F. Zemans, P. Monahan, and A. Thomas, (eds.), *Report on Legal Aid in Ontario: Background Papers* (Toronto: York University Centre for Public Law and Public Policy, 1997).

149 *Id*.

150 Legal Aid Delivery Models, *supra*, note 1 at 162.

151 Legal Aid Review Team, *supra*, note 66 at iii.

152 OLAR, *Blueprint*, *supra*, note 34 at 91-92.

C. Alternative Funding Mechanisms

Equality of access to legal services requires that individuals who cannot afford legal services but have viable cases should have a range of opportunities available to them to bring (or defend) proceedings, without necessarily incurring liability for their own legal fees.[153] Legal aid, provided through publicly funded authorities and community legal centres, is the foundation for ensuring access to justice.

It is a fundamental principle of our justice system that legal aid be adequately funded. Part of the solution to the legal aid crisis lies in increased funding by both levels of government. Yet, increased government funding alone will not suffice to meet the unmet legal needs of Canadians. Inevitably, legal aid agencies do not and cannot have unlimited resources. Consequently, a variety of other complementary schemes are beginning to evolve to fill the unmet need for legal services. Some legal aid plans have already begun to seek out other sources of funding. For example, the B.C. Legal Services Society has established a goal of exploring other potential sources of funding.[154]

Further exploration of alternative funding mechanisms is also needed to significantly increase access to legal services especially for those middle-income earners who do not qualify for legal aid but also cannot afford legal representation.

The American Bar Association carried out a multi-year study on the unmet legal needs of Americans. The final report sets outs an "agenda for action" that describes priorities and best practices among possible policy initiatives.[155] The focus of this study was on ascertaining ways for the justice/legal system to use existing resources more simply and effectively to improve access, while simultaneously acknowledging that additional resources may be required. The major goals identified were:

- *increase the flexibility of the civil justice system, thereby expanding the options available to people seeking help with a legal problem;*

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[153] *Access to Justice: An Action Plan*, *supra*, note 64 at 7.

[154] Annual Report 1998-1999, *supra,* note 63 at 5.

[155] Agenda for Access, *supra,* note 79.

- *develop better ways for people to obtain information about their options when facing a legal situation, ensuring that people are able to get referrals to appropriate resources;*
- *make the practice of personal services law more attractive within the profession;*
- *increase pro bono services by the private bar to low-income individuals and households;*
- *increase the availability of affordable legal services to less affluent moderate-income individuals and households;*
- *affirm the crucial role of public funding for legal services that provide access to justice for low-income persons; and*
- *encourage legal services programs serving low-income persons to retain as much flexibility as possible in deciding which cases to accept.*

Many of these goals are relevant for increasing access to legal representation in Canada, and possible ways to address them are explored further below. In reviewing these options, it is important to distinguish between cases that have the potential to generate fees because their resolution could include monetary relief and those that do not have this potential. Many of the alternative funding mechanisms discussed here are particularly relevant with respect to fee-generating cases.

(a) Forms of client contributions

One potential source for legal aid funding is requiring a client contribution. CBA-O has recommended a number of forms for client contributions, including legal aid loans like those used in the Ontario Student Assistance Program, "topping-up" by legal aid clients based on financial ability and direct payment of disbursements by legal aid clients.[156]

(b) Contingency fees

Contingency arrangements have been one of the most important mechanisms for increasing access to civil justice in North America. Usually, lawyers are remunerated for their services in

[156] CBA-O Submission, *supra*, note 65 at 1 and 18.

civil actions at an hourly rate that is payable whether or not the action succeeds. Under a contingency fee arrangement, the lawyer is paid only if the case is successful. In exchange for the risk of not being paid for the work done, the lawyer receives a share of the client's settlement or court award if the case succeeds. The client bears the risk of having to pay the other side's costs if the case is unsuccessful (although in the Canadian context this is generally not a deterrent).

There are several variations of fee arrangements: speculative fees (pure "no-win, no-fee" arrangements); conditional fees (a successful lawyer receives fees enhanced by an "uplift" percentage higher than the regular rate); and contingency fees (successful lawyer gets percentage of the award).

The use of contingency-fee arrangements is widespread in the United States, where they are seen as an important component of access to civil justice. At the present time in Canada, contingency fee arrangements are permitted in every province and territory except Ontario. Even in Ontario, much civil litigation is conducted on an unofficial contingent-fee basis, so a substantial fee is charged in the event of success, but only disbursements in the event of failure.[157] Contingency fee arrangements have recently been permitted in England and Wales. They are limited to personal injury, fatal accidents, insolvency and in cases before the European Commission and the Court of Human Rights.[158]

All of these fee arrangements are of practical value only where the plaintiff is claiming monetary relief and the amount claimed is large enough to cover legal fees and disbursements, plus an adequate award for the client. Contingency fee arrangements are used most often for wrongful dismissal, personal injury, product liability, medical malpractice, some consumer litigation, real estate and estates matters.[159]

Contingency-fee arrangements can also be combined with legal aid schemes. In British Columbia, for example, the rules governing legal aid in civil cases allow a client to make an agreement to reimburse legal aid if the case is successful. At the present time, the client is allowed to keep the first $10,000 recovered, and half of any recovery over $10,000 is available

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[157] Conditional fees are permitted in Ontario under class action legislation.

[158] OLAR, *Blueprint*, *supra*, note 34 at 219.

[159] *Id.*

to pay legal expenses. It has recently been suggested that this could be extended to cases under the British Columbia *Human Rights Code* as a way of stretching the legal aid budget.[160]

(c) Contingency legal aid funds

Contingency Legal Aid Funds (CLAFs) are designed to help civil litigants who cannot afford legal assistance, but for whom legal aid is unavailable either because of the type of case or because the litigant does not qualify financially. Essentially, a CLAF is designed to avoid the need for litigants to pay their legal costs up front. Following the initial infusion of start-up capital that establishes the CLAF, the fund operates on a self-funding basis as successful litigants pay a surcharge on their award back into the fund (in addition to the original loan).

There are two main types of CLAFs operating at the present time. Some CLAFs bear the entire financial burden of the cost of civil litigation conducted on behalf of assisted persons. These funds cover the professional fees of lawyers and pay for disbursements incurred in the course of litigation.

Other CLAFs, sometimes known as litigation lending schemes, provide assistance to litigants for the purpose of paying only for disbursements in civil litigation matters. For example, the fund may provide financial assistance in the form of a loan that attracts interest. If the litigation is successful, both the principle and the interest must be repaid to the fund by the assisted person. Alternatively, a litigation lending scheme may operate on the basis that the applicant contributes to the fund according to his or her ability to pay. In this case, the applicant may be required to reimburse the fund, even if unsuccessful in the litigation. There are variations upon these models.

CLAFs are a relatively new development. There is only limited experience with these funds in Hong Kong and some Australian states, and it is too early to provide a definitive assessment of their potential to increase access to justice.[161]

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[160] In hearings before the B.C. Human Rights Tribunal, complainants are represented by private lawyers paid by legal aid rather than human rights counsel. B. Black and K.E. Thomson, "Report on Legal Representation Models under the B.C. *Human Rights Code*" (published paper prepared for the B.C. Human Rights Commission, March 1998) at 11.

[161] See discussion in *Access to Justice: An Action Plan*, *supra*, note 64 at 259-68.

There are two CLAF-type funds currently operating in Canada. Both Ontario and Québec have established funds pursuant to class action provisions.[162]

In Ontario, the Class Proceedings Fund ("Fund") was established by the Board of Trustees of the Law Foundation of Ontario. The purpose of the Fund is to assist representative plaintiffs in financing the disbursements incurred in prosecuting class actions. It does not pay lawyers' fees.[163] The Fund was endowed with a seed grant of $500,000 from the Ontario Law Foundation. The Fund is administered by the Class Proceedings Committee which approves applications based on a number of criteria including: the merits of the case, the plaintiff's access to other sources of funding, the public interest, the likelihood of certification, and so on. The Committee will lean towards funding cases that raise issues of broad public importance or that are directed towards improving the situation of persons or groups who are historically disadvantaged.[164]

The Fund is intended to be self-funding and requires successful plaintiffs to pay back the amount paid out by the Fund plus 10% of the award or settlement. The plaintiffs and their counsel must seriously consider whether the need for assistance from the Fund justifies such a large deduction from the ultimate award.[165] One of the major benefits offered is that the Fund, rather than the class representative, will be responsible for any adverse cost award.[166] There have been relatively few applications to the Fund to date.

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[162] See *Class Actions in Canada*, Chapter 8, "Funding Agency Support", 8-1 to 8-9.

[163] *Law Society Amendment Act* (Class Proceedings Funding), 1992, S.O. 1992, c.7.

[164] O.R., reg. 771/92, s.5. *Edwards* v. *Law Society of Upper Canada* (1994), 36 C.P.C. (3d) 116 (Class Proceedings Committee).

[165] M.G. Cochrane, "Conditions for instituting class actions" in A. Prujiner and J. Roy, eds. *Les recours collectifs en Ontario et au Québec/Class Actions in Ontario and Québec* (Montreal, 1992) at 62.

[166] Under the statutory two-way costs rule, the losing party in a class action must pay a substantial part of the winner's legal bills. The Class Proceedings Fund was established in part to deal with the serious disincentive posed by the risks of burdensome costs being imposed.

Québec has also set up a fund, administered by the "Fonds d'aide aux recours collectifs" ("Fonds"), which facilitates bringing class actions .[167] Detailed procedural requirements for the application are fixed by regulation.[168] In assessing applications, the Fonds will consider:

(1) whether the action can proceed without its assistance; and

(2) the probable success of the application for certification and the action.[169]

From 1978 to the end of 1996, the Fonds made 809 funding decisions and granted funding in 84.3% of these cases. The Fonds provided funding to 65.9% of the class actions filed during this period.[170] If the Fonds agrees to provide funding, it will enter into an agreement with the class representative specifying the terms on which funding will be provided. The Fonds may provide for legal fees, expert fees, the costs of notice, and other expenses necessary for the bringing of the class action. The Fonds has rights of subrogation over the amounts provided.[171]

The recipient reimburses the Fonds for the amounts paid by it. If the class proceeding is successful or settled, the Fonds is entitled to a levy payable out of the proceeds of the litigation. This is calculated in a number of ways.[172] The right of recovery applies in every class action, not

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[167] *An Act respecting the class action*, R.S.Q. c.R-21: Chapter II, The Fonds; Chapter III, Assistance.

[168] Québec, *Regulation respecting the Application for Assistance for a Class Action*, R.R.Q. 1981, c. R-2.1, r.1.

[169] *Ibid.*, Section 23.

[170] *Fonds d'aide aux recours collectifs, Rapport annuel 1995-1996* (Montreal, 1996).

[171] *Ibid*., ss.25(g) and 30.

[172] (1) As a percentage of the balance remaining after claims of class members from any collective award; (2) as a percentage of each individual liquidated claim if no collective award is made; or (3) as a percentage of the total award less costs and attorney's fees if the court decides not to proceed with individual claims.

> The percentage is from 50-90% of the balance remaining after individual claims on a collective award. The percentage of each individual liquidated claim varies from 2-10%. The percentage from the total award less costs and attorney's fees if no individual claims are allowed is 30-70%. *Class Actions in Canada*, *supra*, note 162 at 8-9.

only those in which funding has been granted.[173] The right to the percentage also applies in the case of judicially approved settlements.[174]

In 1997, the Ontario Legal Aid Review recommended that "the legal aid authority should coordinate efforts with its justice system partners to establish a Contingency Legal Aid Fund for low-income Ontarians".[175] The CBA Systems of Civil Justice Task Force had also recognized the potential of CLAFs and suggested that the CBA engage in further study of this option.

Like contingency-fee arrangements, CLAFs are limited in that they are only available for cases in which a sufficiently high monetary or property award may be recovered by the litigant who has received financial assistance from the fund.

(d) *Pro bono* schemes

Pro bono refers to legal services provided free of charge. The phrase derives from the Latin meaning "for the public good". Canadian lawyers carry out considerable work for the public's benefit, including self-regulation (for example, disciplinary matters), continuing legal education, community legal education, discounted legal work (charging less than the actual amount of time spent on a matter), and providing legal services to clients without any expectation of remuneration. Undertaking these activities in the public interest is an aspect of professionalism.

Many lawyers dedicate dozens, if not hundreds of hours every year to *pro bono* services. However, the need for legal services remains. Most access to civil justice reports include recommendations for increased *pro bono* activity as one aspect of an overall plan to increase access.[176] The CBA has adopted a policy statement encouraging lawyers to undertake a set

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[173] *Delaunais* v. *Québec (Procureur général)*, [1992] R.J.Q. 1578 (S.C.).

[174] *Fonds d'aide aux recours collectifs* c. *Syndicat des Employés d'entretien et de Garage du Transport de la C.U.M*. (July 27, 1995), Montreal 500-09-001113-893 (Que. C.A.).

[175] OLAR, *Blueprint*, *supra*, note 34 at 225.

[176] See for example, CBA, Report of the Systems of Civil Justice Task Force, *supra*, note 4 at 69-70; ABA, *Agenda for Access, supra*, note 79 at 26-28.

amount of *pro bono* work annually.[177] The Association has also resolved to promote a *pro bono* culture within the Canadian legal profession.

One mechanism to increase access to legal representation through *pro bono* schemes is to establish funds for disbursements, so that lawyers willing to donate their time are not also held responsible for disbursements incurred as part of their efforts. Studies in American jurisdictions demonstrate that it may be impossible to impose a mandatory *pro bono* requirement on lawyers, although there has been some success in imposing this obligation on law students.[178] The ABA has pursued mandatory *pro bono* reporting as a main strategy for increasing the *pro bono* contributions of lawyers.[179]

[177] Resolution 98-01-A.

[178] K. Kelleher, "The Availability Crisis in Legal Services: A Turning Point for the Profession" (1993) Georgetown Journal of Legal Ethics 953.

[179] See, for example, ABA, *State Pro bono Reporting: A Guide for Bar Leaders* (1999).

6. A Revitalized Role for the Federal Government

A. The Role of the Federal Government

Provincial/territorial governments have primary responsibility for the delivery of legal aid pursuant to their constitutional responsibility for the administration of justice. However, the federal government also makes a significant financial contribution to legal aid. At the high water mark, the federal government contributed the equivalent of 50% of the costs of criminal legal aid.

The original purpose of federal-provincial cost sharing of legal aid was, in fact, to support "national standards," at least for criminal cases. There has been considerable retrenchment from this position with the decline of the proportionate federal contribution and the evolution of the relationship between levels of government over recent years. On average, the federal contribution has represented about one-third of the total cost for criminal legal aid. However, the federal government's role has waned over the last decade. A revitalized role for the federal government is essential to rebuilding legal aid in Canada.

The federal government has reduced and in most cases "capped" legal aid funding. The question of the appropriate amount of federal funding is a matter of continuing controversy. The federal role is justified based on the existence of federal legislation which requires legal aid to ensure its fair implementation. This is most obvious in the areas of immigration and refugee law, criminal law and young offenders. For example, the *Young Offenders Act* requires free legal advice to young offenders regardless of their circumstances.

There has been less public scrutiny of the impact of the federal government's passage of legislation in the fields of criminal, family and income-support law on legal aid services.[180] Over the last decade, federal law and policy have substantially increased the demand for legal aid services without a corresponding increase in the federal contribution to legal aid services.

In the mid-1990s, funding for civil legal aid was changed from the Canadian Assistance Plan, which tied federal funding to that provided regionally, to "rolling it in" with a number of other social programs under the Canada Health and Social Transfer Program. The CBA's concern was that there would no longer be any requirement at the provincial/territorial level to

[180] OLAR, *Blueprint*, *supra*, note 34 at 232.

provide civil legal aid, and service was bound to be eroded when competing for limited funds with health and education.

In its *Charter of Public Legal Services*, the CBA set out general parameters for a revitalized federal government role on legal aid:

> *II. Responsibilities of Government*
>
> *8. National standards for all essential public legal services should be embodied in federal and provincial legislation.*
>
> *9. The responsibility for ensuring that essential public legal services are provided lies with the state. This state responsibility should be shared equally between the federal, provincial and territorial governments.*
>
> *10. The federal government creates and supports the need for essential public legal services through legislation in the fields of criminal law, the Young Offenders Act, the Charter, immigration law, divorce law and others. It is reasonable to encourage national standards in essential services and to do so through cost-sharing agreements and equalization payments involving housing, social assistance, unemployment insurance, medical and legal services. In so creating rights and responsibilities, it must also ensure that these can be effectively and fairly enforced.*
>
> *11. The provincial governments have a duty to provide essential public legal services as one aspect of their responsibility for the administration of justice.*
>
> *12. There should be a single federal/provincial cost sharing agreement to fund essential public legal services.*
>
> *13. The legislation embodying national standards and the cost-sharing agreement should be sufficiently precise to provide for effective accountability and enforcement.*[181]

In contrast with the diminution of the role of the federal government in Canada, the Australian Commonwealth (federal) government has taken a proactive role on legal aid. This is true even though, as in Canada, legal aid is administered at the state, rather than federal level. The following section provides an overview of the recent Australian experience.

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[181] Resolution 93-11-A.

B. The Australian Example

The experience in Australia provides an interesting example of the potential role of a national government in a federated state. In 1973, the Australian government decided to pursue a leadership role in the area of legal aid. One of its first steps was the establishment of the Australian Legal Aid Office (ALAO):

> *The Government has taken action because it believes that one of the basic causes of the inequality of citizens before the law is the absence of adequate and comprehensive legal arrangements throughout Australia...The ultimate object of the Government is that legal aid be readily and equally available to citizens everywhere in Australia...*[182]

Initially, the ALAO provided services in federal matters but over time the work shifted to Commonwealth Legal Aid Commission. The Commission's main functions were to advise the government about, coordinate and monitor the cooperative national legal aid scheme. In effect, the Commonwealth moved from being a service provider to being responsible for the funding of federal cases and for pursuing national equity and efficiency. This role continued to evolve over time, and the Commission now provides advice to the government on legal aid policy, including the extent of the need for legal assistance in Australia and the best means of satisfying that need.

The funding basis shifted from funding federal matters to an annual commitment level independent of the nature of the matter. The Commonwealth pays 55% of the agreed total funding for legal aid (sometimes a higher percentage in less populous jurisdictions). These agreements provide for the total funding levels to increase in accordance with changes in the Consumer Price Index and average weekly earnings. There is no provision to alter the total level of funding because of any factor affecting the level of demand for legal aid. For example, increases in the numbers of persons applying for or receiving social security benefits do not affect funding levels. However, steps are being taken to build in a recognition of growing legal needs.[183]

In these agreements, the Commonwealth has reserved the power to monitor and evaluate the activities of the various legal aid commissions and, more importantly, the power to approve, with the respective state government, the Legal Aid Commission's (LAC) proposed program.

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[182] *Access to Justice: An Action Plan, supra*, note 64 at 228.

[183] Currie, "Determining Needs," *supra*, note 60 at 16-18.

The Australian Commonwealth has made no systematic attempts to direct the priorities to be followed by the LACs or to specify national standards. In the mid-1990s, the Access to Justice Committee recommended that the Commonwealth government become more proactive in the legal aid field. In particular, it recommended a partnership between the Commonwealth and the States on legal aid. According to this report, the federal objectives should be:

- *to use scarce resources to provide legal assistance throughout Australia efficiently and effectively; and*
- *to promote national equity in the provision of legal aid services - for example by setting minimum standards for eligibility criteria - to ensure that people are not seriously disadvantaged in gaining access to legal services by reason of their place of residence.*

The Access to Justice Committee also concluded that the Australian government had a leadership role to play in the delivery and development of national policies and programs. This role should include:

- *developing a range of national standards in consultation with legal aid providers and others;*
- *monitoring performance of legal aid programs; and*
- *a clear responsibility to ensure that legal aid provision operates efficiently and effectively in accordance with the objective of national equity.*

This does not imply rigid uniformity among state legal aid commissions. All retain the capacity to innovate and develop new programs and modes of providing service, a process of continuous improvements in the legal aid system. The Access to Justice Committee recommended that, in conjunction with an effective process for identifying best practices, innovation and experimentation, it is essential that minimum standards be set by the Commonwealth. The report observed the following problems with legal aid in Australia:

- *inadequate consideration with regard to national equity considerations;*
- *inadequate planning for changes affecting demands on legal aid services; and*
- *inadequate means of ensuring that national resources are used most effectively.*

Among the report's chief recommendations is the development of a "legal aid impact statement" through which a national agency would report on factors affecting the demand for

legal aid and allow government to negotiate on appropriate changes to base levels in legal aid funding.

The Australian government's approach to legal aid is a good model for Canada. The Australian government takes a stronger national role in the funding of legal aid, explaining the much greater uniformity in service in that country.[184]

C. Legal Aid and the Social Union

The timing is auspicious for the federal government to renew its interest in legal aid and to revitalize its role. In February 1999, the Canadian governments adopted a framework agreement to facilitate federal, provincial and territorial relations. Known as the "Social Union Agreement", this document provides a strong foundation for a stronger federal role in legal aid. Some of the guiding principles it contains are:

"All Canadians are equal"

- *Treat all Canadians with fairness and equality*
- *Promote equality of opportunity for all Canadians*
- *Respect the equality, rights and dignity of all Canadian women and men and their diverse needs*

and

"Meeting the needs of Canadians"

- *Ensure access for all Canadians, wherever they live or move in Canada, to essential social programs of reasonably comparable quality.*

The Social Union Agreement also highlights the need for governments to work in partnership for Canadians through joint planning and collaboration. All of these points provide support for the proposition that the federal government must take active steps, in collaboration with the provinces and territories, to rebuild the legal aid system with a view to increasing national equity.

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[184] OLAR, *Blueprint*, *supra*, note 34 at 243.

7. The Way Forward

This paper has summarized the compelling legal and public policy arguments for increased legal aid funding. Most importantly, Canadians must come to understand legal aid as a social welfare issue. Perhaps it will be the harm caused by underfunding of legal aid that will speak the loudest. The nature of this harm bears repeating:

> *People are driven to the law and to court by the most critical, serious, and often dangerous situations imaginable. Children may be hurt, perhaps permanently, criminal records established, sometimes in cases of innocence, people are losing their shelter and very ability to feed themselves and their dependents. The severity of these cases makes it essential that they not go into court uninformed or without representation. The trauma of having to go to court over personal issues cannot be overstated. This is compounded when a person is forced to go through it without professional representation. They need lawyers, trained in the law and its technicalities, to represent their interests and ensure that their rights are upheld.*[185]

The time has come to initiate in earnest the search for constructive solutions to the legal aid crisis. In the author's view, the CBA must take action to create an increased awareness of the critical need for action on legal aid within the profession and general public. This is a first step toward influencing government policy.

It is proposed that the CBA's platform on legal aid include the following specific points:

- Legal aid is an essential public service, like medical care.
- The crucial role of public funding for legal services that provide access to justice for low-income persons must be affirmed.
- Funding for legal aid plans must be increased, and this increased funding should be linked to compliance with minimum national standards for legal aid services.
- Appropriate eligibility criteria for civil and criminal legal aid coverage applicable throughout the country should be developed.
- The federal government should renew its commitment to legal aid by:
    - increasing its financial contribution;

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[185] B.C. Coalition for Access to Justice, *supra*, note 9 at 1.

- taking a leadership role in negotiating national standards for legal aid;
- creating a national civil legal aid tariff;
- substituting cost-sharing agreements for federal transfer payments in order to hold provincial governments accountable for their spending on civil legal aid;
- undertaking extensive consultations on the legal aid needs of specific groups including women, native communities and persons with disabilities;
- allocating a new and stable fund of money for civil legal aid and making it the responsibility of the Department of Justice;
- promoting and funding pilot projects to foster innovation in legal aid delivery;
- assisting in the information-sharing and coordination of reform efforts among jurisdictions;
- developing and implementing a “legal aid impact statement” to proactively identify federal laws, procedures or policies that affect the demand for legal aid;
- undertaking ongoing research into strategies to implement law and procedures that encourage access to justice and an efficient, integrated justice system; and
- promoting national equity in the provision of legal aid.

It is proposed that the Canadian Bar Association should take a leadership role on legal aid by:

- lobbying for the reforms noted above;
- investigating and developing alternative funding mechanisms to increase access to legal services;
- renewing its leadership role on *pro bono* initiatives; and
- helping to identify “best practices” that might help to address current unmet legal needs.

A comprehensive plan to advocate for increased legal aid should include methods by which our justice system can both use existing resources more effectively and be simplified to improve access, while at the same time acknowledging that additional resources will be required. We

cannot ignore the fact that the problem at the end of the day remains that legal aid is still an underfunded system.