

# Legal Aid and Legal Advice in Canada: An Overview of the Last Decade in Quebec, Saskatchewan and Ontario

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# LEGAL AID AND LEGAL ADVICE IN CANADA

AN OVERVIEW OF THE LAST DECADE IN QUÉBEC,  
SASKATCHEWAN AND ONTARIO

By FREDERICK H. ZEMANS\*

## I. INTRODUCTION

This paper will discuss some of the significant developments in legal aid and legal services in Canada during the last decade. Particular emphasis will be placed upon the delivery systems of the provinces of Ontario, Québec and Saskatchewan, and upon the experimental projects developed within each of these jurisdictions. These projects go beyond a case-by-case approach to provide the citizen with an opportunity to participate in the legal aid delivery system and in the administration of justice.

In reviewing legal aid in Canada, one is immediately struck by its rapid growth during the last decade. The expenditure of public funds on legal aid throughout Canada, including the Northwest Territories, for the year 1976-77 was estimated to be in excess of \$70 million.<sup>1</sup> Seven years ago, the total expenditure of public funds on legal aid outside of Ontario was less than \$1 million.<sup>2</sup> At that time, the first federal assistance was given in the form of grants by the Department of National Health and Welfare to establish community clinics in four Canadian provinces.<sup>3</sup>

The contemporary history of Canadian legal services began in 1967 when the Ontario Legal Aid Plan, having obtained a substantial financial commitment from the Ontario government, became the first provincial plan to pay lawyers to handle both civil and criminal cases. This plan was an adaptation of the English "judicare" model with the private practitioner as the deliverer of legal services in both criminal and civil matters; it is governed and administered by the legal profession through the Law Society of Upper Canada. The Ontario model has become the flagship of legal aid plans in Canada and

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<sup>1</sup> According to a brief on the Federal-Provincial Agreement concerning legal aid prepared by the provincial Attorneys General for submission to the Minister of Justice in June, 1977.

<sup>2</sup> Expenditures on legal aid in Ontario during 1971 were approximately \$11 million. See Law Society of Upper Canada, *Fifth Annual Report of the Ontario Legal Aid Plan* (Toronto: Law Society of Upper Canada, 1972) at 21.

<sup>3</sup> These four clinics were: Dalhousie Legal Aid Service in Halifax, N.S., Community Legal Service, Inc. in Point St. Charles, Montréal, Qué., Parkdale Community Legal Services in Toronto, Ont., and the Saskatoon Community Legal Assistance Society in Saskatoon, Sask.

is Canada's oldest and most expensive provincial plan,<sup>4</sup> but its coverage has remained primarily limited to the resolution of criminal and domestic litigation. During the 1976-77 fiscal year, the cost of the Ontario plan amounted to slightly over \$28 million in a province with a population of approximately 8 million people.

The extremely rapid development of legal services in Canada during the past decade can be attributed to a growing consciousness of the need of the poor for greater access to the services of the legal profession. During the late 1960s, Canadian law schools—and more particularly their students—established legal aid clinics, and assisted poverty and self-help groups which were responding to the social ferment of the period.<sup>5</sup> As well, low-income communities and the legal profession were both pressing for government funding of legal aid and community clinics. Recent commitments of provincial and federal monies has meant that Canada currently exceeds by a wide margin the *per capita* expenditures on legal aid both in England and the United States.<sup>6</sup>

Recognition of the need for an effective legal aid system existed; the major issue was the model to be used: the *judicare* model or the community legal services model. Canada was torn between its two historical allies, Eng-

<sup>4</sup> According to an address by John D. Bowlby, Q.C., Chairman of the Legal Aid Committee of the Law Society of Upper Canada at the First International Colloquium on Legal Aid and Legal Services held in London, England. (Oct. 25-28, 1976). But see the chart incorporated into note 6, which indicates that on a *per capita* basis, Québec spends more on legal aid.

<sup>5</sup> See N. Lareson, *History of Legal Aid in Manitoba* (unpublished paper, 1977). Changing professional role models were hastened by young and progressive faculty members in Canadian law schools and by radical professional groups such as the Law Union in Ontario. As more Canadian law students participated in American graduate programmes, the writings of Edgar and Jean Cahn, as well as Stephen Wexler began to have an impact.

<sup>6</sup> It is difficult to get accurate comparative figures with respect to *per capita* expenditures on legal aid. The Canadian average is approximately \$3.36 per person, as the following table demonstrates:

BUDGETS, POPULATIONS, PER CAPITA EXPENDITURES AND COVERAGES, PER PROVINCE, 1977-78

Province	Approved Budget	Population	Per Capita Expenditure
Alberta	\$ 3,880,000	1,867,000	\$2.08
B.C.	8,226,500	2,512,000	3.27
Manitoba	3,269,000	1,033,000	3.16
New Brunswick	775,000	694,000	1.12
Newfoundland	625,000	558,000	1.12
Nova Scotia	1,225,000	836,000	1.47
Ontario	30,522,200	8,394,000	3.64
P.E.I.	70,600	122,000	0.58
Québec	26,366,900	6,285,000	4.20
Saskatchewan	3,239,470	945,000	3.43
Sub-total	\$78,199,670	23,246,000	\$3.36

I have been unable to obtain comparable figures for the United States for both civil and criminal representation in 1977, but some writers estimate the American expenditures on legal services to be approximately \$1.25 per person. See R. Penner, *The Development of Community Legal Services in Canada* (unpublished paper, August, 1977) at 146.

land and the United States. By 1970, the ferment with respect to legal aid had permeated the law societies and provincial governments in Canada. Nova Scotia, Québec and British Columbia assessed their limited legal aid services and pressed for substantial provincial government funding of previously voluntary schemes.

Stimulating the debate further, and in the eyes of many lawyers, creating further tension, the Department of National Health and Welfare funded the Dalhousie Clinic in Halifax, the Saskatoon Community Clinic in Saskatoon and the Point St. Charles Clinic in Montréal in 1971. All three of these clinics had close ties with law schools in their respective communities. As well, in March, 1971 the same department gave a grant to Osgoode Hall Law School to create a community clinic in Toronto. The writer was the first director of this project, Parkdale Community Legal Services.

The fire was further fuelled in September, 1971 by *The Legal Services Controversy: An Examination of the Evidence*,<sup>7</sup> a study prepared for the National Council of Welfare by Larry Taman. The report compared the Ontario *judicare* and neighbourhood legal services delivery schemes.

Shortly thereafter, in October, 1971 Edgar and Jean Cahn spoke at the First Canadian Conference on Poverty and Law in Ottawa. They noted the growing controversy over the appropriate legal aid model in Canada and attempted to develop the "Canadian Compromise." They sought to defuse what they called "a new Holy War between the true believers of conflicting orthodoxies."<sup>8</sup> Although sharply critical of *judicare* as a programme which "resists any form of accountability" and "which tends to become a full employment programme for lawyers rather than an instrument of justice for clients," they ultimately recommended that the distinctions between the United States and Canada should encourage Canada to develop its own unique delivery system; it should not "preclude experimental use of *judicare* to supplement neighbourhood legal services offices. . . ."<sup>9</sup>

In the latter part of 1972, a subcommittee of the Law Society of Upper Canada published a report taking issue with the legal services model. The *Community Legal Services Report*<sup>10</sup> described community clinics as placing legal aid applicants in the position of "captive clientele" for the full-time lawyers employed in such clinics.<sup>11</sup> The report forcefully recommended the maximum use of the private bar as duty counsel on a part-time basis in any clinic facilities that might be established.<sup>12</sup> Concerned that staff lawyers would de-

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<sup>7</sup> (Ottawa: National Council of Welfare, 1971).

<sup>8</sup> I. Cotler et al., eds., *Law and the Poor in Canada* (Montreal: Black Rose Books, 1972), at 44 ff.

<sup>9</sup> *Id.*

<sup>10</sup> *The Community Legal Services Report* (Toronto: Law Society of Upper Canada, 1972), was prepared by a subcommittee of the Law Society of Upper Canada Legal Aid Committee. The subcommittee was composed of Patrick S. Fitzgerald, Peter de C. Cory, and Lyle S. Fairbairn.

<sup>11</sup> *Id.* at 7.

<sup>12</sup> *Id.* at 31.

liver inferior service, it recommended that there should not be a division within the profession.

Each of the Canadian provinces provides legal aid in unique and distinct ways. In the past decade, all ten Canadian provinces have been stimulated to review their provision of legal services to the underprivileged and to develop unique adaptations of the *judicare* or neighbourhood legal service delivery models. All have established plans to provide some services in criminal cases. Only Prince Edward Island and New Brunswick lack an extensive legal aid scheme to provide services in civil matters as well. British Columbia, Manitoba, Québec, Saskatchewan and Newfoundland have established bodies independent of the legal profession for the administration of their plans. In the other provinces, legal aid remains under the control of the private bar. The Osler Report on Legal Aid in Ontario in 1974<sup>13</sup> recommended that the control and administration of the legal aid plan should be vested in a statutory non-profit corporation named "Legal Aid Ontario" comprised of twenty persons of whom nine should be appointed by the Law Society of Upper Canada.<sup>14</sup> This recommendation was not adopted by the Ontario government.

Nova Scotia, Saskatchewan and Prince Edward Island have chosen community legal centres with staff lawyers to deliver legal services. Alberta, New Brunswick and Newfoundland have followed Ontario's lead and chosen *judicare*, while British Columbia, Manitoba and Québec have developed mixed systems that reflect the Canadian compromise. Ontario and Alberta are subtly modifying their *judicare* schemes. Although both plans are still controlled and administered by the provincial law societies, community clinics are no longer deemed repugnant. Both Alberta and Ontario are experimenting with clinics in remote areas. The Ontario plan is funding over thirty autonomous clinics through a Clinical Funding Committee created in 1976. The Canadian debate continues, but the tension has decreased as compromises are reached and the realities are discovered. Although the citizen perspective in Canadian legal aid is in its embryonic stage, detailed examination of legal aid in Québec, Saskatchewan and Ontario reveals a gradual development of schemes responsible to the public.

As interpreted by the Canadian and British courts, sections 91 and 92 of *The British North America Act* have given the federal government exclusive legislative authority in matters of criminal law,<sup>15</sup> while the provincial governments are responsible for the delivery of legal aid services by virtue of their exclusive jurisdiction over the administration of justice<sup>16</sup> and matters of property and civil rights.<sup>17</sup> Despite the primary responsibility of the provinces for the administration of legal aid, the federal government contributes to the costs

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<sup>13</sup> *The Report of the Task Force on Legal Aid* (Toronto: Ministry of the Attorney General, 1974). The task force was chaired by The Hon. Mr. Justice John H. Osler.

<sup>14</sup> *Id.* See the summary of major recommendations in the Report, Recommendations 1 and 2, at 119.

<sup>15</sup> Section 91(27) of *The British North America Act, 1867*, 30 & 31 Vict., c. 3 (U.K.).

<sup>16</sup> *Id.*, s. 92(14).

<sup>17</sup> *Id.*, s. 92(13).

of legal aid in criminal matters. In 1972, the federal government entered into an agreement with the provinces for cost sharing of legal aid services delivered in criminal matters.<sup>18</sup> The federal contribution was set at 90 percent of the provincial expenditures to a maximum of \$0.50 *per capita*. To benefit from this agreement, each province must provide legal aid services to any financially eligible person who is charged with an indictable offence or prosecuted under the *Extradition Act*<sup>19</sup>, the *Fugitive Offenders Act*<sup>20</sup> and in all Crown appeals in federal criminal cases.

During the last decade, the federal government has indicated that it wishes to increase its involvement in legal aid services. It initially became involved through the innovative demonstration programmes of the Department of National Health and Welfare and the Department of Justice. In 1975, the federal Minister of Justice indicated that the federal government was seriously considering a more substantial presence in the area of legal aid by attempting to set minimum national standards for the availability of comprehensive legal services to the economically disadvantaged through cost sharing in the provincial legal aid programmes.<sup>21</sup>

Poor people compose approximately one quarter of Canada's population. Statistics Canada estimates that in 1973, 17.2 percent of all Canadian households were below the poverty line.<sup>22</sup> This is an absolute subsistence poverty line which is up-dated for changes in the cost of living. These figures must be compared with the relative poverty figures prepared by the Canadian Council on Social Development which estimates that in 1973, 22.9 percent of the Canadian population was below the poverty line. A third indicator of poverty is the Special Senate Committee on Poverty which states that in 1973, 27.4 percent of the Canadian population was living in poverty.<sup>23</sup>

A close scrutiny of the available data with respect to low-income people in Canada indicates that in terms of basic food, shelter and clothing requirements, as determined by 1961 real living standards, the situation of the low-income Canadian has improved; that is, fewer Canadians are going without these basics. In terms of possessing an adequate quantity of goods and services in relation to what the average Canadian possesses, however, the plight of low-income Canadians has not improved; the real position of the poor has not

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<sup>18</sup> See the *Agreements Respecting Legal Aid in Matters Related to the Criminal Law* concluded between the federal and provincial governments during the period from Dec. 28, 1972, to Nov. 25, 1974.

<sup>19</sup> *The Extradition Act*, R.S.C. 1970, c. E-21.

<sup>20</sup> *The Fugitive Offenders Act*, R.S.C. 1970, c. F-32.

<sup>21</sup> The Hon. Otto Lang (then Minister of Justice), "The Future of Legal Aid in Canada" in *Access to Justice: Report of the Conference on Social Development* (Ottawa: Canadian Council on Social Development, 1975) at 78.

<sup>22</sup> See D. Ross, *Canadian Fact Book on Poverty* (Ottawa: The Canadian Council on Social Development, 1975) at page 12. More recent figures published by Statistics Canada on the distribution of income among Canadians suggest that some three million Canadians live in poverty. See *Bearing the Burden, Sharing the Benefits: Taxation and the Distribution of Income* (Ottawa: National Council of Welfare, 1978) at 1.

<sup>23</sup> See *Poverty in Canada: Report of the Special Senate Subcommittee on Poverty* (Ottawa: Information Canada, 1971).

increased relative to that of the average Canadian.<sup>24</sup> The enormous increase of new wealth in Canada since 1946<sup>25</sup> has had little direct benefit for the poorest earners but, rather, has gone to raising the standard of living of the wealthy.<sup>26</sup>

Although Canada has developed a multitude of federal and provincial social welfare schemes, their impact on real poverty has been demonstrated to be minimal.<sup>27</sup> The creation of old age pensions, unemployment insurance, family allowance benefits and welfare payments tend to reduce the most acute aspects of poverty. The income and social security programmes created in the last two decades in Canada have prevented the inequality between the rich and the poor from worsening; however, they have not reduced inequality within Canadian society. The organized and articulate of the poor are demanding a citizen's or "civilian perspective" in Canadian legal aid as a result of their concerns with the Canadian income tax structure and social welfare programmes.

The following discussion will consider the specific legal aid schemes in three provinces: Québec, Saskatchewan, and Ontario. These provinces have been chosen because they represent the three basic methods of delivering legal services to the poor. Québec has chosen to implement a mixed *judicare*/staff scheme, while Saskatchewan primarily uses staff lawyers in community law offices. Ontario retains the *judicare* system, which delivers legal services through the private bar.

## II. QUÉBEC

It was not until 1972 that Québec had any comprehensive legal aid system outside of the city of Montréal. Prior to that time, there had been limited

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<sup>24</sup> While the average Canadian earner had a purchasing power increase of \$1,603 between 1946 and 1971 (in 1961 dollars), the top decile of earners received almost three times that amount (\$4,576). In contrast, the bottom 50 percent of earners had a net purchasing power increase of only \$360, while the poorest decile lost an average of \$126 per earner in the same period. Had the change been measured from 1951 to 1971, the results would have been more dramatic as the poorest decile has lost an average of \$184 while the richest gained \$4,840. See L. Johnson, *Poverty and Wealth* (Toronto: New Hogtown Press, 1974) at 6-7.

<sup>25</sup> *Id.*

<sup>26</sup> *Bearing the Burden, supra* note 22, at 1:

The lowest-income twenty percent of Canadians receive barely 4% of the total national income. The highest-income twenty percent, in contrast, receive more than 40%—a share ten times as great. The injustice of such an unequal distribution of income is compounded by the fact that the relative shares have remained virtually unchanged over the quarter century that the government has been gathering such data. In 1951 the bottom fifth of Canadians received 4.4% of the national income and the top fifth got 42.8%. In 1976 the counterpart figures were 3.9% for the group at the bottom and 44.0% for those at the top.

While the respective proportions of total income have remained more or less constant, the income gap separating the richest and poorest twenty percent of Canadians has grown enormously over the past twenty-five years as a result of the multifold increase in national income. In 1951 the gap stood at \$3,060—adjusting for inflation, the equivalent in 1976 dollars of \$6,900. By 1976 the difference between the richest and poorest fifths had increased to \$18,000. In other words, the gap, expressed in dollars of equal value, had multiplied by over two and a half times.

<sup>27</sup> See Johnson, *supra* note 24.

availability of legal services in most areas of the province. In Montréal, the local Bar had set up a legal aid bureau operating in both the criminal and civil areas in 1956. The Legal Aid Bureau of the Bar of Montréal had a number of salaried lawyers acting as public defenders in criminal cases. On the civil side, the bureau referred cases to practising lawyers prepared to accept them on a gratuitous basis.<sup>28</sup> All Montréal lawyers were liable to be asked to take on such cases,<sup>29</sup> and it was considered their professional obligation to handle legal aid cases without remuneration. Most of the civil cases handled were matrimonial, and the standard of service was acknowledged to be quite low.

In 1967, in an effort to assist in the establishment of a broader service, the Government of Québec began to make increasingly larger annual grants.<sup>30</sup> During the year April 1, 1970 to March 31, 1971, more than 18,000 persons received, free of charge, the professional services of advocates through the Montréal Bureau.<sup>31</sup> With constantly increasing numbers of applications, the Bureau staff of salaried lawyers was no longer able to meet caseload needs and, as a consequence, greater pressure was put on the voluntary services of advocates in private practice. In an attempt to create a more structured legal assistance plan, the Bar of the Province of Québec and the provincial government signed an agreement in the summer of 1971<sup>32</sup> whereby the Bar agreed to provide legal assistance in criminal matters at a tariff of 60 percent of the established fee schedule and free of charge in civil matters.

Québec opened its first community clinics in the early 1970s.<sup>33</sup> These were influenced by, and to a great extent emulated, American neighbourhood legal service offices.<sup>34</sup> In March 1972, Bill 10, *The Legal Aid Act* of the Prov-

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<sup>28</sup> Most writers date the initiation of legal aid in Québec at 1951 when the Québec Bar set up a legal assistance system. Little data is available with respect to this scheme other than that very limited services were provided. In civil matters there were *in forma pauperis* proceedings which allowed for the dispensation of court costs in a limited number of proceedings. See W. Merricks, *Québec's New Plan* (1972), 122 New L.J. 853. Considering the size of Montréal's population, the service provided was minimal. As an example, in 1964 there were 3,000 applicants for legal aid but only 700 cases were court representations and 75 percent of these were domestic disputes.

<sup>29</sup> *Supra* note 28. Although the Bar claimed that all lawyers were required to take legal aid cases, it is clear that a very small percentage of the profession provided this service except in cases where a contingency fee of 15 percent of damages recovered was obtainable.

<sup>30</sup> I. Cowie, *Delivery of Legal Services in Canada* (Ottawa: Department of Justice, 1974) at 37.

<sup>31</sup> *Id.* at 37-38. More than 4,550 of these persons were assisted by approximately 1,500 advocates in private practice. The other cases were handled by salaried lawyers of the staff of the Bureau.

<sup>32</sup> The pressure to develop a more adequate legal aid system provoked the government and the Bar to enter into two successive agreements with respect to legal aid during the winter and summer of 1971.

<sup>33</sup> The Point St. Charles clinic, the first clinic in Québec, opened as a community-controlled clinic in 1969 and hired its first staff lawyer in 1970. In 1971 and 1972 legal aid clinics were opened in Québec City and Sherbrooke.

<sup>34</sup> Community Legal Services Inc. in Point St. Charles was stimulated by an article by Professor Herbert Marx, "Law Graduates and Their People Awareness," *Montreal Star*, Aug. 2, 1969 at 11, col. 1, describing the Cambridge, Mass. Community Legal Assistance Office.

ince of Québec was introduced, providing for the creation of a "Legal Services Commission," independent of both the government of Québec and of the legal profession. It was to be composed of ten persons<sup>35</sup> chosen because of their special knowledge and awareness of the legal problems of the underprivileged. Legal services were to be provided in each region of Québec by local corporations<sup>36</sup> whose boards of directors were to have at least one-third local residents as well as one-third lawyers.<sup>37</sup> Clients' problems were to be handled by full-time lawyers and each local office was to have a director of legal services.<sup>38</sup> Between the provincial commission and the local corporations, there were to be regional corporations which had a limited advising and co-ordinating role. Community clinics and the involvement of low-income communities constituted the philosophical thrust of the 1972 draft legislation.

Bill 10 met with considerable opposition from the Québec legal profession who felt that they were under pressure from the provincial government.<sup>39</sup> Only recently, the government had implemented a new small claims court act<sup>40</sup> which, in an attempt to provide more expeditious and less expensive resolution of smaller actions, had excluded lawyers from appearing in that court.<sup>41</sup> The provincial Bar passed a resolution requesting a *judicare* system for Québec similar to the Ontario Legal Aid Plan, arguing that a *judicare* system provides for independence of the legal profession and for the right of the client to free choice of a lawyer.<sup>42</sup> A small group within the Québec Bar supported the proposed legislation and was critical of the stance taken by the profession.<sup>43</sup> The General Council of the profession proposed a compromise solution which advocated freedom of choice to the poor client through a mixed legal aid system combining neighbourhood legal services with utilization of lawyers in private practice.

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<sup>35</sup> *The Legal Aid Act (Loi de l'aide juridique)*, S.Q. 1972, c. 14, s. 12.

<sup>36</sup> See ss. 31-50. The intention of Bill 10 was to create a neighbourhood legal services scheme in Québec similar to the American model established under the *Economic Opportunity Act of 1964*, 42 U.S.C.A. § 2809(3) (1973).

<sup>37</sup> Section 35.

<sup>38</sup> The Director of legal services was to be an advocate (s. 37).

<sup>39</sup> Merricks, *supra* note 28, at 854.

<sup>40</sup> This act was entitled "An Act to Promote Access to Justice." It was enacted June 29, 1971 and became Book 8 of the Code of Civil Procedure.

<sup>41</sup> The Québec government also introduced a new professional code which the profession saw as detracting from its autonomy. See Merricks, *supra* note 28, at 854.

<sup>42</sup> Québec lawyers argued that: "The freedom to choose the professional or the clinic from which one wishes to receive legal services answers the profound aspirations of a good number of the underprivileged. It would not be equitable to establish structures in the area of justice which tend to set up a justice for the poor and a justice for the rich." Similar arguments have been put forward by various representatives of the profession at the national and provincial level in Canada. See Canadian Bar Association, *Legal Aid Liaison Committee Report* (Ottawa: Canadian Bar Assoc., 1972).

<sup>43</sup> The *Fédération des Avocats du Québec (FAQ)*, comprising about one-fifth of all Québec's lawyers, argued that there is an essential conflict between the Bar's two roles of protector of the public interest in the administration of legal aid and regulation of professional misconduct and as a lawyers' "trade union."

The Québec government accepted some aspects of the compromise position and, although it was unwilling to divert the public funds necessary to create a *judicare* scheme, it did make major concessions to the Bar by broadening the previously very limited category of cases in which referrals could be made to private practitioners. In addition, it upgraded the role of the regional corporations by de-emphasizing the local clinic as the basic unit for legal services. The *Legal Aid Act*<sup>44</sup> of the Province of Québec received Royal assent on July 8, 1972 and on August 23, 1973 members of the Legal Services Commission were appointed.

The Act provides for the Commission to be responsible for ensuring the provision of legal aid to economically underprivileged persons; for establishing regional legal aid corporations; and for providing legal aid.<sup>45</sup> The Commission is also responsible for developing information and research projects relevant to the legal problems of the poor.<sup>46</sup> Eleven regional corporations in various areas of Québec have been charged with providing legal aid to their region by establishing legal aid bureaus in various parts of their territory. Board members of these corporations are appointed by the Commission: one-third from the legal profession and one-third from the residents of the area served.<sup>47</sup> In addition, the regional corporations are to promote the establishment of committees, to advise the directors of the bureaus on the needs of the economically disadvantaged of the area and, if necessary, to make recommendations to the regional corporations.<sup>48</sup>

The Québec *Legal Aid Act* provides for continuation of community-based clinics in existence prior to the introduction of the Act and for the establishment of new clinics upon the recommendation of the regional corporation.<sup>49</sup> These clinics are to retain their community boards of directors and to be semi-autonomous. Unlike the bureaus, they do not fall under the direct jurisdiction of the regional corporations.<sup>50</sup> There were four clinics at the time that the *Legal Aid Act* was proclaimed. In 1974 there were five clinics.<sup>51</sup> By 1976 only two clinics remained, and during the summer of 1977 funding of St. Louis Legal Services in Montréal was terminated by the Commission. The entire

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<sup>44</sup> *Supra* note 35.

<sup>45</sup> The Commission is charged with the provision of legal aid to the underprivileged by virtue of s. 22(a) and with establishing legal aid corporations by s. 22(b).

<sup>46</sup> The responsibility for information projects is contained in s. 22(f) and for research projects is contained in s. 22(g).

<sup>47</sup> The composition of the board is given in s. 35; however, the final third of the board is not stipulated.

<sup>48</sup> The advisory committees are to have a maximum of twelve members with area representation to promote the needs of local lower income residents [s. 32(d)].

<sup>49</sup> Section 32(c).

<sup>50</sup> The local corporations are dependent upon the regional corporation for their funding on an annual basis and therefore must meet the standards and priorities set by the corporation.

<sup>51</sup> I. Cowie, *supra* note 32, at 39. They had been established at Laval University at Point St. Charles, at the University of Sherbrooke at St. Louis, Montréal, and in Hull, attached to the University of Ottawa.

concept of community clinics would seem to be in jeopardy in Québec.<sup>52</sup> In a system that attempts to deliver legal services through a combination of staff lawyers, community clinics and the private bar, loss of major clinic facilities endangers the quality, the quantity and the availability of community legal service. It is questionable whether or not staff lawyers or the private Bar are ready or even willing to fill the significant gap left by the loss of the clinics.

If a person wishes to obtain legal aid in Québec, he must apply to a local bureau office.<sup>53</sup> If he is financially and legally qualified, a legal aid certificate will be issued except if summary advice is given. Legal aid is to be available to any "economically underprivileged" person.<sup>54</sup> The Act generously defines the areas in which he can obtain legal services.<sup>55</sup> The Québec scheme makes legal aid a right and not a privilege, and defines it as "every benefit granted . . . to an economically underprivileged person to facilitate access to the court, professional services of an advocate or a notary and necessary information concerning his rights and obligations."<sup>56</sup>

The Québec plan provides for a compromise judicare-staff lawyer scheme and allows the client the right to a specific lawyer of his choice.<sup>57</sup> Although commentators<sup>58</sup> and administrators of the plan stress the absolute free choice of counsel,<sup>59</sup> the most recent statistics reveal that 75 percent of all cases were handled by staff lawyers through the bureaus. In contrast, Legal Aid Manitoba,

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<sup>52</sup> The Legal Services Commission allegedly "ordered the closing of the office on very short notice and re-assigned two staff lawyers with lengthy experience in the community to other positions in the provincial scheme." Jim Stewart wrote in the *Montreal Star*, Jul. 6, 1977, at A-5, col. 6, that "the St. Louis office and others like it (the Point St. Charles legal clinic recently accused the government of trying to kill it through budget cuts) didn't harmonize too well with legal aid bureau's bureaucrats. They were based on ideas of citizen participation, popular services, community needs, and local decision-making."

<sup>53</sup> During 1976-77 the Québec plan operated 88 full-time offices in 74 cities and towns and employed 295 staff lawyers, 404 support staff and 45 articling students.

<sup>54</sup> Economically underprivileged is defined in section 2 as "any person who in the opinion of the Commission or, as the case may be, of a legal aid corporation, lacks sufficient financial means to assert a right, obtain legal counsel or retain the services of an advocate or notary without depriving himself of the means of subsistence," according to the criteria established by regulation.

<sup>55</sup> Examples of areas where legal aid is prohibited pursuant to Regulation 3.19 are defamation actions, an action for breach of promise by the plaintiff only, or the defence of a parking ticket.

<sup>56</sup> Section 1(c).

<sup>57</sup> The applicant is not presented with a list of generally unknown lawyers from which to select, as is the case in Ontario and other judicare provinces, but rather the legal aid recipient must request the services of a specific lawyer. The applicant will obtain a staff lawyer unless he requests otherwise (ss. 51, 52).

<sup>58</sup> See I. Cowie, *supra* note 32. See also R. Brooke, *Legal Services in Canada* (1977), 40 Mod. L. Rev. 522.

<sup>59</sup> A. Saint-Cyr, "Legal Aid Services in Canada," in *First International Colloquium on Legal Aid and Legal Services* (Palo Alto, Calif.: Int'l Common Law Exch. Soc., 1976).

a more judicare-oriented mixed delivery system, handles approximately 75 percent of its cases through lawyers in private practice.<sup>60</sup>

During the initial year of operation, the Québec Commission determined that the cost per case handled by lawyers in private practice amounted to approximately \$200 plus 10 percent for administrative expenses. In contrast, cases handled by staff lawyers cost approximately one-half this amount.<sup>61</sup> It should be noted that the Québec Act allows the Commission the flexibility to designate that certain types of professional services must be rendered exclusively by staff lawyers.<sup>62</sup>

The Québec Act provides some experimental and supplementary services which attempt to deal with problems of the low-income community and to go beyond the specific problems presented by individual clients. The Act provides for services for groups, although regulations for such have stringent financial eligibility criteria.<sup>63</sup> Various community education projects have been undertaken and monies have been allocated by the Commission for education and advertising.<sup>64</sup>

Within the first year of operation, the Commission established a research and information department<sup>65</sup> at its Montréal offices. This department was established because the Commission recognized that the plan provided services to approximately one-third of Québec's population<sup>66</sup> and yet little research data was available on Québec's low-income population and its legal problems.

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<sup>60</sup> *Id.* In 1975-76, 77.6 percent of all recipients in Québec were served by staff lawyers, while only 22.4 percent were served by private practitioners (see page 36). In the same year only 25.7 percent of all recipients in Manitoba were served by staff lawyers, while 74.3 percent were served by private practitioners. In Manitoba there are 26 salaried lawyers and 10 articling students employed full-time in neighbourhood clinics with 600 lawyers on legal aid panels.

<sup>61</sup> R. Cooper, "Report on the Quebec Legal Aid System," in M. Cappelletti, ed., *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (Dobbs Ferry, N.Y.: Oceana Pub., 1975) at 617.

<sup>62</sup> Section 52 of the *Legal Aid Act* states that the Commission may provide in certain exceptional situations, taking into account the requirements of good management, that certain professional services for legal aid shall be exclusively rendered by advocates employed by a corporation.

<sup>63</sup> These criteria seem to have been designed, in fact, to deter groups from seeking legal services. Regulation 3.11 requires that the names, addresses, occupations, assets and debts of *each* member of the group be given.

<sup>64</sup> "Minute Juridique" was a legal information campaign in which 100 one-minute texts directed to the average citizen were prepared by legal specialists dealing with topical legal problems. These were broadcast over one year and the most popular eighteen were rewritten and presented on television by well-known artists for twenty-six weeks and repeated several times a week at prime viewing times. Over 500,000 copies of booklets containing the "Minute Juridique" scripts were distributed free in legal aid bureaus and credit unions.

<sup>65</sup> The Commission hired three lawyers, two sociologists, one librarian and three law graduates to staff the back-up centres.

<sup>66</sup> Québec has a population of 6,285,000 and it is estimated that approximately one-third of the population, or 2 million, are eligible for legal aid.

The research division provides opinions in specific cases<sup>67</sup> and conducts staff development seminars for bureau lawyers. The dearth of Canadian legal resources in the areas of law practised and the bureaus' remoteness from adequate law libraries stimulated the research division to produce a loose-leaf resource manual of sociological and legal data relevant to low-income citizens.

With a *per capita* expenditure of \$4.20 for 1977-78 (as compared to Ontario at \$3.64 and Saskatchewan at \$3.43), Québec has the highest per citizen investment in legal aid. Use of legal aid services is continually expanding; applications in 1976-77 increased 13.7 percent of the previous year. The upper income limits of the financial eligibility requirements were increased in April, 1978 so that the legal aid programme could keep pace with inflation. For example, a couple with two dependents can now earn \$180 per week and still qualify for legal aid; previously, the cutoff point was \$155 per week. Although this increase in the maximum acceptable income does not extend the provision of legal services to a new group, the mere fact of retaining services for the same group will cost the programme an additional \$3,605,100 in 1978-79.<sup>68</sup>

As of March 31, 1977 legal aid offices were situated in one hundred Québec cities, and there were 306 salaried staff lawyers, 438 support staff, and 16 articling students or law students. Staff lawyers have an average of 5.1 years experience.<sup>69</sup>

The Commission des Services Juridiques has expressed only limited support for the training and use of paralegals. The Commission leaves the development of lay advocacy and paralegal programmes to each bureau and limits its involvement to assessment of projects and funding when budgets permit. Thus, the 1977 report cites four instances of recent paralegal projects.

The Community Legal Centre of the Mauricie/Bois-Francs region, for example, initiated a project to train representatives of citizens' groups to assist in social welfare and unemployment insurance matters. This project is to encourage clients to solve their own problems with some assistance from a community member.

The Community Legal Centre of the Northwest Region has attempted to facilitate access to legal aid among native peoples by hiring an Inuit on a part-time basis to assist advocates visiting the Poste-de-la-Baleine area. As well, in conjunction with the Grand Council of the Crees, the regional corporation hired and trained a court worker to become the liaison officer between legal aid advocates and the Cree reserves of Waswanipi and Fort George. The measure of success of this operation is indicated by a request from the Grand Council of the Crees to hire three additional court workers.

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<sup>67</sup> During the first year of operation, 600 opinions were provided in specific cases submitted by staff lawyers.

<sup>68</sup> See "Bedard Extends Legal Help," *Montreal Star*, Apr. 17, 1978 at A-11, col. 3.

<sup>69</sup> *Fifth Annual Report, March 31, 1977* (Montréal: Commission des Services Juridiques, 1977).

A survey of former Québec legal aid recipients<sup>70</sup> reveals some rather interesting data. While aid was given to approximately as many men as women, 90 percent of the women aided sought help for civil problems, while 43 percent of the men sought help in criminal matters. The average age of a legal aid recipient was 39.7 years. Most recipients were urban residents with little education and an average annual income of just over \$7,000 for a family of three to four persons. Some 20 percent were single parents, and nearly all of these were female. These statistics suggest that the Québec plan has had little impact on the standard of living of legal aid recipients. The Sociology Section that conducted the survey concluded that the figures confirmed:

. . . that legal aid clients are recruited amongst the economically deprived groups of society; not only are the clients economically weak when they just come to our Bureaus, but they still are one or two years later. This last statement, however, throws cold water on the hopes that the war on poverty could be won through legal aid.<sup>71</sup>

Despite the initiatives in poverty law research, community education and test case litigation, the Québec scheme during its early years has not fought the war on poverty that it had proclaimed, but rather has emphasized a case-by-case approach to legal aid. The Québec Legal Services Commission has not encouraged local participation in the newly created bureaus. The Legal Services Commission commenced a study of local citizen participation in the legal aid plan. Produced by Diane Deschamps, this report was entitled "Advisory Committees: Participation or Illusion"<sup>72</sup> and indicated that local citizens had very little say in the operation of the legal aid plan. Less than 25 percent (six offices) of the legal aid bureaus in existence at the time the study was conducted had ever had an advisory committee, and only about 7 percent were active. Most of the committee members enjoy a high socio-economic status and work in management as professionals or semi-professionals in social or health-oriented fields. The average annual income of members of advisory committees is \$9,705.00 while the average income of clients was \$7,134.36. Barely 52 percent of the clients were employed, while 41 percent received a form of pension or social welfare.

Members of the advisory committees generally had little knowledge of the structure, financial state, or policies of the Legal Services Commission. It is interesting to note that of the six active advisory committees, three are composed primarily of legal aid "beneficiaries" or persons who would be eligible for legal aid while the other three committees are primarily composed of representatives of local groups and local "elite." These committees have five to ten members who meet every second or third week. The most active are involved in the internal as well as the external operation of the Legal Aid Bureau. The major activity of active committees is the organization of special interest meetings to provide legal information to neighbourhood groups of tenants, divorcees and the elderly. Only two committees intervene regularly in the internal operation of the Bureau and in hiring personnel.

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<sup>70</sup> *Id.* at 20-21. This survey was conducted by the sociology section of the Expertise Education and Research Department.

<sup>71</sup> *Id.* at 24.

<sup>72</sup> *Id.* at 104.

### III. SASKATCHEWAN

In Saskatchewan, prior to 1967, all legal aid was provided on a voluntary basis, with the exception that the Attorney General would arrange payment for the defence of serious criminal cases. The only way for an accused person in less serious offences to arrange for his defence was to find a lawyer willing to act without charge. By the mid-1960s, it was apparent that private practitioners could no longer handle the work on a charitable basis and, in 1967, after several years of negotiation between the provincial Attorney General and the Law Society, the Saskatchewan Legal Aid Plan (Criminal Matters) was agreed upon.<sup>73</sup> The 1967 scheme was administered by the Law Society through local legal aid committees and relatively low fees were paid to lawyers by the provincial government. The plan worked most unsatisfactorily in rural areas due to the paucity of available lawyers with criminal expertise combined with an inadequate fee schedule that did not compensate for travelling time. In civil matters there was no legal aid and the only available assistance was the Needy Person's Certificate under the Queen's Bench Rules of Court.<sup>74</sup> The certificate provided needy persons with an exemption from court costs and from liability for costs if they should lose.

A major impetus for change in Saskatchewan was the creation of the Saskatoon Legal Assistance Clinic in 1969. Originally, the clinic operated as a voluntary scheme run from a community centre and was staffed by volunteer lawyers, faculty members of the College of Law, University of Saskatchewan, and by law students. The offices were open on a part-time basis and the law students, working under the supervision of the Bar and the faculty, were the primary deliverers of legal services.

In June, 1971 the Saskatoon Clinic was one of the four clinics in Canada which received demonstration grant funding from the Department of National Health and Welfare. At this time it was fundamentally reorganized and staff lawyers and paralegals were hired. Originally the clinic had been directed by a board composed of students and faculty of the College of Law, and three members of the Saskatoon Bar. After receiving the Health and Welfare grant, the clinic moved towards increasing community input and in 1972 a split control structure was initiated: the Legal Council of Directors had the President of the Saskatoon Bar Association as its Chairman, a professor of law as its Secretary, and two members of the Bar and three professors as directors; and a Citizens' Advisory Board was composed of representatives of community groups, clients, law students and members of the Legal Council of Directors. In 1973 these two boards were merged into one board consisting of two mem-

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<sup>73</sup> The intention of this agreement was to allow the Benchers of the Law Society to make rules for the establishment of a comprehensive legal aid plan. In fact, the scheme was only implemented on the criminal side.

<sup>74</sup> The applicant had to be indigent and demonstrate that he had reasonable likelihood of success. The legal aid certificate was granted at the discretion of a committee of Benchers of the Law Society. Applications were received by local legal aid committees composed of volunteer lawyers who appointed counsel on a rotating basis. Sask. *Saskatchewan Legal Aid Committee Report (Carter Report)*, ch. 3 at 2.

bers of the Bar, two law professors, three law students, three middle-class community people (non-lawyers) and ten representatives of community groups.

Since 1971 the clinic has handled cases for citizens living in the Saskatoon area who cannot obtain legal services from any other resource. All types of civil cases are handled; the caseload is approximately 1,500 per year.<sup>75</sup> The clinic has undertaken a number of significant test cases in the welfare law area and initiated a Citizens' Commission on Family Law. The Commission, composed of a magistrate, an unemployed member of the Citizens' Welfare Improvement Council, a United Church minister, a law professor and three members of community groups, encouraged other community groups to present briefs to the Commission regarding the impact of the legal system on family life and provided counsel to assist groups in the preparation of briefs. Active in community education, the clinic has developed a number of radio and television programmes dealing with legal topics.

In May of 1972, the same year that legal aid legislation was passed in Québec, the Saskatchewan Attorney General appointed a committee to look at legal services in Saskatchewan.<sup>76</sup> Chaired by Dean Roger Carter of the University of Saskatchewan College of Law, the committee had wide terms of reference:

- (a) To review the entire system of legal aid in order to determine the needs of legal aid for the 1970's;
- (b) To examine and make recommendations as to the extent of the need for subsidized programmes of legal assistance;
- (c) To uncover the causes of under-utilization of legal services by the poor, if the evidence suggests such under-utilization;
- (d) To articulate pre-conditions for adequate programs such as criteria of eligibility, personnel requirements and related matters; and
- (e) To compare the various systems of organization, delivery of legal aid services to those in need which are now used in other jurisdictions.<sup>77</sup>

The Saskatoon Legal Assistance Clinic presented a brief to the Saskatchewan Legal Aid Committee vigorously arguing that as a community law office it was actively engaged in fighting poverty.<sup>78</sup> The brief argued that the community, in contrast with the private law office, is a better foundation for legal aid programmes.<sup>79</sup>

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<sup>75</sup> In family law, 35 percent; in consumer law, 21 percent; in landlord and tenant law, 8 percent; in welfare law, 7 percent; and in criminal law, 9 percent.

<sup>76</sup> The Committee was chaired by Roger Carter, Q.C., Dean of the College of Law, University of Saskatchewan, and had six other members including a provincial court judge and the Director of the Saskatoon Legal Assistance Clinic. Their report is referred to hereinafter as the Carter Committee Report.

<sup>77</sup> *Final Report of the Saskatchewan Legal Aid Committee* (Regina: Saskatchewan Legal Aid Committee, 1973) (Terms of Reference).

<sup>78</sup> The brief indicates the community law office is not only engaged in fighting poverty but "in wresting from bureaucrats, landlords and law enforcement officers some basic right of citizenry in this country."

<sup>79</sup> The Saskatchewan Legal Aid Committee brief states that the committee had received materials indicating that community legal services model was a cheaper method of delivering legal services and suggests that "it is a happy coincidence that for once in our complicated society 'better' can also mean cheaper."

The Final Report of the Saskatchewan Legal Aid Committee made a number of important recommendations and indicated an evolution in the sophistication of the discussion of legal services in Canada.<sup>80</sup> The Report recommended:

- (A) A legal aid scheme must, in its administrative operation, be divorced as completely as possible from any government department or agency. The Committee saw that the poor were skeptical and, on occasion, antagonistic towards government administrative structures. The Committee also felt that it was fundamental to the traditional role of the lawyer that he must be independent of any direct or indirect governmental or community pressure<sup>81</sup> and should not be prevented from pressing claims against a government department or agency controlling the legal aid plan. As well, a legal aid program must be insulated against political pressures or patronage.
- (B) Legal aid should be regarded as a matter of right, not charity.<sup>82</sup> This attitude could best be achieved by some degree of local community involvement (by poor persons and their organizations) in the establishment and operation of the legal aid plan.
- (C) A legal aid scheme should be capable of acting as a vehicle for social change. The legal aid system, after recognizing common problems faced by poor persons, should permit the scheme to deal with these problems by lobbying at the appropriate levels of government or before the appropriate government agency for changes in the laws.<sup>83</sup> The report stresses the need for educational efforts designed to familiarize the poor with their legal rights and obligations, and the fields of law which directly concern their daily lives.<sup>84</sup>
- (D) A legal aid scheme must be comprehensive. The Committee stated that a scheme must provide legal services for any situation encountered by a poor person where it would be reasonable for him to receive the services of a lawyer. The Committee stated that "reasonable" is not to be judged by comparing the cash value of the legal services with the case value of the result. The criterion must be the seriousness of the case or problem to the particular individual. A legal aid scheme must not be limited to serving the poor person only when he has a "middle-class problem."

The Committee stressed that the northern and remote areas of the province had special needs. In particular, the need for community involvement is greater in remote areas, particularly in the native communities. The Committee recognized the fact that native people are generally hostile to existing government structures.<sup>85</sup> It concluded that the private bar or *judicare* schemes<sup>86</sup> could not provide the educational programmes, the handling of the "uneconomic case" or group approaches to poverty which the Committee regarded as necessary and fundamental to legal services. The Committee was concerned with the development of expertise on the legal problems of the poor which the

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<sup>80</sup> *Final Report*, *supra* note 77, ch. 7, General Conclusions.

<sup>81</sup> If this is not the case, then, wittingly or otherwise, he may fail properly to represent the interests of his client.

<sup>82</sup> The Committee stressed that the legal aid system should encourage the client and the professionals working in the system to adopt this attitude.

<sup>83</sup> Another approach suggested was a class action leading to a judicial solution to the problems faced by groups of poor persons.

<sup>84</sup> The Commission states that such programmes should equip poor persons to deal with their legal problems and in some cases to prevent problems from arising.

<sup>85</sup> *Supra* note 77, at 7.

<sup>86</sup> Here referring to the scheme in Ontario, or similar schemes.

private practitioner would not have the opportunity to develop in his daily practice. The Committee therefore recommended the clinic approach with some involvement of the private bar.<sup>87</sup>

The *Community Legal Services (Saskatchewan) Act, 1974*,<sup>88</sup> enacted on May 10, 1974, is an attempt to implement the recommendations of the Saskatchewan Legal Aid Committee. It incorporated the principles of community education, community development, and social change, contained in the Carter Committee Report.<sup>89</sup> The Act creates an independent Community Legal Services Commission responsible for co-ordinating the development of legal aid throughout the province by funding local legal aid clinics, providing technical back-up facilities and, if necessary, providing direct legal aid services. The composition of the Commission represented a first in Canadian legal aid programmes with its movement away from control by either the government or the legal profession.

The Commission consists of three members appointed by chairmen of local clinic boards from amongst their number, one member appointed by the provincial cabinet from members of the Law Society of Saskatchewan nominated for that purpose by the Benchers of the Society, three members appointed by the Cabinet representing the taxpayers of the province, another lawyer who is appointed by the Attorney General of Canada and the person holding the office of Provincial Director. It is significant that the Commission's composition recognizes the three elements of a legal aid system—the deliverers; the funders; and the recipients of the services. All three groups are equally represented, with the possibility that the non-lawyers could be a majority on the Commission.

*The Community Legal Services (Saskatchewan) Act, 1974*<sup>90</sup> provides that legal services are to be delivered primarily by community law offices employing full-time staff lawyers. Area boards are to be incorporated to provide the services of the plan. Twelve boards have been elected from residents of the area who join the area legal aid society and each board has opened a community law office.<sup>91</sup> Each board is empowered to advise the area staff on the legal need of the area residents, to establish committees to review financial refusals of eligibility, to negotiate area contracts with the provincial director, to establish information and counselling programmes, and to advertise the provision of legal services. To ensure that the boards are involved closely in the decision-making process, the Act abolished the position of area director which had been in the first draft of the legislation. The Saskatchewan plan represents a signi-

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<sup>87</sup> The Committee stated "the legal aid scheme which provides for some reasonable degree of healthy professional competition between salaried and non-salaried professionals is . . . desirable. This system ensures that the quality of legal services available to poor persons is kept at a high level." *Supra* note 77, at 7.

<sup>88</sup> *The Community Legal Services (Saskatchewan) Act*, S.S. 1973-74, c. 11.

<sup>89</sup> *Supra* note 76.

<sup>90</sup> *Supra* note 88.

<sup>91</sup> There is a clinic to serve Northern Saskatchewan, which does not have an area board.

ficant attempt to provide the consumer of legal aid with the power to effect the development of the structure and policies of the delivery system.

All civil cases, with the exception of cases involving conflict of interest, are handled by salaried lawyers working in clinics.<sup>92</sup> The plan offers a freedom of choice of counsel in respect of criminal matters coming under the *Criminal Code* or other federal statutes;<sup>93</sup> the choice is from among staff lawyers and solicitors who choose to put their names on panels. A solicitor on a panel, however, has the right to decline his services. In all cases the plan provides for a community legal services delivery system.

During its early years of operation, the Saskatchewan plan has developed as a predominantly staff lawyer delivery system with 86 percent of the recipients served by staff lawyers and 14 percent by private practitioners.<sup>94</sup> It is presently operating thirteen full-time offices on an annual budget of slightly over \$3 million. The plan employs thirty-nine staff lawyers and twenty-three other professionals and paraprofessionals. With a population of just under 1 million,<sup>95</sup> Saskatchewan has the third highest per capita expenditure on legal aid, of the Canadian provinces, at \$3.43 per person.<sup>96</sup>

The area boards and local clinics have become involved in educational and preventative law programmes in the areas of housing, welfare law and landlord-tenant matters. In some areas, training programmes for the community have been offered and street workers and paraprofessionals employed.

All of the thirteen local area boards except the Northern Legal Services Office are controlled by the community. The Northern Legal Services Office is administered directly by the Saskatchewan Community Legal Services Commission.

Financial eligibility for the plan is determined by several alternative requirements. If a person receives all or part of his income through social assistance, he is automatically eligible. If, however, his income is less than he would receive if he were receiving social assistance, or if paying for legal services would drastically reduce his income to such a point that he would be eligible for social assistance, a person is eligible for legal aid. The plan sets maximum income levels to determine if a person would be eligible for social assistance. These income levels are extremely low. For example, a couple with two children can have a maximum annual income of \$7,993 (\$153.71 per week) in order to qualify for legal aid. This should be compared with \$9,360 per annum (\$180 per week) in Québec.

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<sup>92</sup> Cases involving a conflicts of interest are referred to private practitioners.

<sup>93</sup> *Criminal Code*, R.S.C. 1970, c. C-34. See *supra* note 88, s. 21.

<sup>94</sup> The *Carter Committee Report* and its implementation is a Canadian version of American legal services with a limited degree of involvement of the private lawyer. The commitment of the government to adequate funding and to providing the citizen with input and the right to request preventative services provides Saskatchewan with unique opportunities.

<sup>95</sup> 945,000.

<sup>96</sup> See *supra* note 6 for a comparison with expenditures in other jurisdictions.

Not quite half the cases handled by the plan are criminal matters: in 1976-77, 43.3 percent were criminal, while 56.7 percent were civil matters, 37.3 percent of these being family matters (21 percent of the total).

The plan has weathered internal difficulties. Layoffs in 1977 led to job uncertainty and unionized staff considered the possibility of a strike. In addition, a dispute between the Saskatchewan Community Legal Services Commission and a district legal aid society arose when personnel problems caused the termination of services to prisoners in Prince Albert's three penal institutions. However, the Saskatchewan plan continues to develop and handle an effective delivery of legal services with a high degree of citizen input.

#### IV. ONTARIO

Prior to 1951, Ontario did not have a statutory scheme, with most legal aid performed on an *ad hoc* basis by members of the Bar. The Attorney General's Department provided financial assistance for legal aid services in a limited number of criminal cases. In capital offences, indigent accused were assisted by the Attorney General's Department through the payment of nominal *per diem* fees to volunteer counsel.<sup>97</sup> Although there were no enabling provisions in the Rules of Practice, it was the custom of the Ontario Court of Appeal to consider the granting of leave to appeal in criminal cases on the basis of written requests from the prisoner as essentially *in forma pauperis*.<sup>98</sup>

It was common during this period for indigents to be tried without benefit of counsel. The so-called "dock brief" said to exist in England, which involves the appointment of counsel then present in court to represent indigents, did not exist to any great extent in Ontario.<sup>99</sup> The unrepresented accused was likely prejudiced to a greater extent by pre-trial occurrences, particularly in regard to questioning, statements, inducements to plead guilty or even attempts at plea bargaining, than at the trial, where developed jurisprudence allowed the judge to assist unrepresented defendants. There was, as well, no organized civil legal aid system in Ontario before 1951, although it was undoubtedly possible for a plaintiff to find a lawyer willing to take his case if it involved the prospect of sizeable damages.

Legal services in Ontario have developed in a manner similar to that of England. In October, 1950 the British Labour government's *Legal Aid and Advice Act, 1949*,<sup>100</sup> received third reading. The government had accepted the recommendations of the Rushcliffe Committee,<sup>101</sup> and had not "socialized the

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<sup>97</sup> Ont. *Report of the Joint Committee on Legal Aid* (Toronto: Queen's Printer, 1965), tabled in the Legislative Assembly, April 14, 1965, at 9-10. Hereinafter cited as *R.J.C.L.A.*

<sup>98</sup> Disbursements in the preparation of appeals to the Ontario Court of Appeal and the Supreme Court of Canada in capital cases were also paid, but no payment of counsel fees was provided for.

<sup>99</sup> *R.J.C.L.A.*, 10.

<sup>100</sup> 12, 13 & 14 Geo. 6, c. 51 (U.K.).

<sup>101</sup> Rushcliffe Committee, *Report of the Committee on Legal Aid and Advice in England and Wales*, (Cmd. 6641, 1945).

legal profession" but rather left the control of the new legal aid plan in the hands of the Law Society. The Law Society of Upper Canada had noted with interest the English developments, and in 1948 it had appointed its own committee which recommended that a scheme similar to that proposed by the Rushcliffe Report should be instituted in Ontario. The primary responsibility for organization of legal aid was to rest with the Law Society. The Committee also stated that once the scheme was put into operation, a good case could be made for assistance from the province in the financing of the scheme.

The Ontario Legal Aid Plan was introduced in 1951 with the passing of *The Law Society Amendment Act (1951)*.<sup>102</sup> The amendment simply enabled the Benchers of the Law Society to "establish a plan to provide legal aid to persons in need thereof, to be called 'The Ontario Legal Aid Plan' and for such purpose to make such regulations as are deemed appropriate."<sup>103</sup> The Ontario Plan was different from the British plan in two respects. First, legal aid continued to be provided by volunteer lawyers as the profession remained unwilling to admit that it could not care for the legal needs of the poor without receiving a fee for service from the government. Only disbursements were paid and the funds to cover these and other administrative expenses came from the provincial government. Secondly, the financial eligibility requirements were much more stringent under the Ontario Plan, restricting eligibility for the plan to the nearly destitute.<sup>104</sup> This was in marked contrast to the British effort to ascertain the amount an applicant actually had available to pay counsel with the proviso that expenses would only be defrayed out of "disposable" income.

The Plan covered most civil cases,<sup>105</sup> but only indictable criminal matters, and was administered locally by the county and district law associations. Appeals were excluded in both civil and criminal cases except where, in the opinion of the Provincial Director, there appeared to have been a miscarriage of justice.

The voluntary plan went into effect throughout most of the province,<sup>106</sup> although relatively limited use was made of the scheme.<sup>107</sup> During the late 1950s it became apparent that the administrators of the Plan were having difficulty finding enough volunteers to handle cases and that the profession was beginning to reconsider its position on the payment of lawyers from public funds for legal aid.<sup>108</sup> By 1963, it was obvious that the volunteer plan could not satisfy the existing needs.<sup>109</sup>

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<sup>102</sup> *The Law Society Amendment Act, 1951*, S.O. 1951, c. 45.

<sup>103</sup> *Id.*

<sup>104</sup> In 1951, the plan was restricted to those persons whose annual earnings or other income was less than \$1,700.

<sup>105</sup> Matters specifically excluded from civil coverage included, *inter alia*, defamation, breach of promise of marriage, and alienation of affection.

<sup>106</sup> Between 1952 and 1963 legal aid or advice was given in only 41,420 civil and 13,465 criminal cases.

<sup>107</sup> *Supra* note 14, at vii.

<sup>108</sup> See "Some Fee Urged For Lawyers in Aid Systems," *Globe and Mail* (Toronto), Sept. 13, 1958, at 5, col. 2.

<sup>109</sup> *Supra* note 14, at vii. A series of critical articles appeared in Toronto newspapers. Ruth Worth, in "3.71 a Case: is This Legal Aid?," *Globe and Mail*, Feb. 8,

In July, 1963 a Joint Committee on Legal Aid was established to report on the existing plan and to make recommendations for the future. This Committee was chaired by the Deputy Attorney General and composed of senior and highly respected members of the profession.<sup>110</sup> After some pressure<sup>111</sup> the Committee agreed to hold public hearings for parties thought to be interested.<sup>112</sup> Its terms of reference were to inquire into and report on the existing Ontario legal aid plan and to investigate and report on legal aid and public defender schemes in other jurisdictions.

The Report of the Joint Committee on Legal Aid<sup>113</sup> was tabled in the Ontario Legislature in April, 1965. It recommended a comprehensive fee-for-services legal aid plan administered by the Law Society and subsidized by the provincial government. In October, 1965 the Attorney General requested the Law Society to appoint a Committee to draft legislation to implement the Report. This new Committee drafted the *Legal Aid Act*,<sup>114</sup> which was passed by the Legislature on June 28, 1966 and made operational on March 29, 1967, when legal aid offices were opened in each county in the province and legal aid duty counsel appeared for the first time in the criminal courts. Ontario had acquired the most advanced legal scheme then existing in Canada.

The Plan is administered through a rather elaborate system of administrative offices situated in forty-six areas which basically coincide with the counties and districts of Ontario. In each area there is an area director who is responsible for the operation of the Plan within his area. Lawyers participating in the scheme receive remuneration on the basis of 75 percent of a legal aid tariff.

An important advance in the new legislation was the creation of an Independent Advisory Committee to represent the general interests of the Bench, the Bar and the public—partial recognition that legal aid was a matter of public and not merely social concern. The 1967 Ontario legislation abandoned the previous charity keynote of the earlier scheme, while it recognized that lawyers handling legal aid cases were entitled to at least partial remuneration for professional services rendered under the Plan. The *Legal Aid Act* recog-

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1963, at 7, col. 7, remarked that "Legal Aid in Ontario is still a charity given to those who, in the discretion of the executive or local director of the Legal Aid Plan, are worthy of it." She was dismayed that the Law Society could regard \$26,000 as an adequate budget with which to handle 7,000 cases. She stated that "... of 2,000 members of the Bar who practise in Metropolitan Toronto, only 100 give legal aid on a regular basis."

<sup>110</sup> The Committee was chaired by William B. Common and was composed of members of the Law Society of Upper Canada and members of the civil service of Ontario, appointed by the Attorney General. It is interesting to note that no potential recipients were on the Committee and the only non-lawyers were the Director of Welfare Allowances of the Department of Public Welfare and the Secretary of the Treasury Board.

<sup>111</sup> Editorial, *Globe and Mail*, Jul. 22, 1964, at 6.

<sup>112</sup> The Committee travelled throughout the province and received 96 written submissions and 89 oral submissions. All but 8 of the oral submissions were made by lawyers.

<sup>113</sup> *Supra* note 97.

<sup>114</sup> *The Legal Aid Act, 1966*, S.O. 1966, c. 80 (now R.S.O. 1970, c. 239).

nized that indigents were deserving of more than charity service and acknowledged that legal services were the responsibility of government and not only the legal profession.

One of the important innovations was the introduction of duty counsel in criminal matters—a concept that had originated in Scotland. In Ontario, duty counsel are assigned to every criminal court of first instance and to some juvenile and family courts. They are present in court to advise accused, on their first appearance, of their rights to plead guilty or not guilty, to apply for bail, or to ask for an adjournment. Duty counsel will also make submissions with respect to sentence where an accused pleads guilty.

The salient feature of the Ontario plan is that it provides legal services by the private Bar at no charge or at a reduced charge to those who qualify for services by virtue of the type of service required and by their financial position. Eligibility for legal services in criminal as well as civil matters has been determined legislatively by the government of Ontario and administratively by the Law Society of Upper Canada. This represents a marked departure from the system of the United Kingdom, where eligibility for assistance in criminal matters is determined by the courts rather than by the administrators of the Plan and the respective law societies have little or no responsibility for administration on the criminal side. Reliance on the private Bar distinguishes Ontario from virtually all American states.

Financial eligibility is determined by the provincial Ministry of Community and Social Services. A major time delay results from the two to three weeks required to determine eligibility. The Ministry of Community and Social Services has devised an elaborate system of inquiries and *formulae* not available to the public.<sup>115</sup> The Osler Task Force on Legal Aid<sup>116</sup> recommended that the financial assessment procedure of the Ministry of Community and Social Services be terminated and a simplified assessment procedure be developed based on published tables of eligibility regularly made available to the public.<sup>117</sup> At the present time, each case is treated on its own merits. The basic criterion for evaluation is whether or not the applicant has any disposable income to pay for the services of a lawyer after he has met all his financial obligations according to his station in life. If determined to be financially eligible, the Area Director determines if he is legally eligible. Before a legal aid certificate can be issued in civil matters, a solicitor's opinion must be obtained.

Ontario legal aid was founded and continues on the assumption that the public can best be served by the private Bar. When an applicant has ultimately obtained a certificate, he may select a lawyer from either the civil or criminal panels and take his legal aid certificate to that lawyer. The certificate allegedly places the indigent client in the same position as a person of modest means.<sup>118</sup>

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<sup>115</sup> In 1974, the Ministry had a separate branch numbering 77 persons for the sole purpose of performing these assessments. The *Osler Report* estimated that the direct cost of legal aid assessments was approximately \$784,000 for the year ending March 31, 1974.

<sup>116</sup> See *supra* note 13.

<sup>117</sup> *Id.* at 126.

<sup>118</sup> In 1976 the Chairman of the Legal Aid Committee of the Law Society of Upper Canada stated that 67 percent of the province's Bar is listed on the legal aid panel. It is not possible to determine how many of these lawyers actually take cases.

Unfortunately, few low-income citizens are familiar with a lawyer and most do not have ready access to members of the profession. The legal aid certificate requires the recipient to choose a professional who is often unknown and generally of a different economic station.

As in England, the Ontario Legal Aid Plan is administered and governed by the Law Society through its Legal Aid Committee. The ultimate authority still rests with the Benchers of the Law Society, although the Legal Aid Committee acts as a board of directors for the Ontario Legal Aid Plan.<sup>119</sup> The Chairman of the Legal Aid Committee commented recently that:

Lay participants in legal aid are essential and most helpful although we must guard against a deification of such participation for in my view, since we are dealing with dispensing of legal services this can be done effectively, in the main, by practising lawyers.<sup>120</sup>

At present, the Legal Aid Committee is composed of nineteen lawyers, thirteen of whom are Benchers, ten lay members and one law student. The ten lay members of the Committee are primarily professionals working in related social welfare fields. Although some middle-class professionals may be necessary, the Legal Aid Committee's make-up demonstrates tacit agreement with the Chairman's opinion that direct consumer participation is not a priority. The citizens being served by the plan are excluded from setting priorities as to the type and extent of service by the professionals who willingly assume responsibility for their problems.

In addition to the provincial legal aid committee, each area has an area committee which has a minimum membership of five persons, the majority of whom must be members of the Law Society. These committees are appointed by the Law Society and used primarily to determine whether applicants for certain cases can receive legal aid. In addition they hear appeals when the Area Director has refused to grant a certificate. Area committees may also be called upon to advise the Area Director. Area committees have been utilized in an advisory capacity on a limited basis, but they are only in a position to request or recommend. They cannot implement those recommendations. The Area committees have virtually no membership from the client community and are composed primarily of lawyers and social welfare workers.

With the exception of 1976-77, the Ontario Legal Aid Plan caseload has risen on a continuing basis; 1976-77 saw a slight decrease in the number of formal applications and in the number of certificates issued.<sup>121</sup> Criminal

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<sup>119</sup> Changes to the composition of the Legal Aid Committee took place after the Task Force on Legal Aid in Ontario recommended that the control and administration of the Legal Aid Plan should be vested in a statutory non-profit corporation. *Supra* note 13, at 119. Recommendation 1.

<sup>120</sup> *Supra* note 4.

<sup>121</sup> In 1963, the last year for which data on the voluntary plan is available, the plan handled 11,956 cases. In the first year of operation of the new plan, in which lawyers were remunerated on a fee-for-services basis (1967-68), 38,860 certificates were issued and 67,204 persons were assisted by duty counsel—an increase of approximately 1,000 percent over the voluntary plan. In 1975-76, 107,193 persons made formal application for legal aid, and 86,486 certificates were issued. In 1976-77, however, 103,177 persons made formal applications (a decrease of 1.4 percent), and 76,649 certificates were granted (a decrease of 3.8 percent). 1977-78 saw a slight increase only—105,118 applications were made and 76,730 certificates were granted. Both 1976-77 and 1977-78

matters occupy approximately 50 percent of legal aid given in Ontario; approximately 30 percent of the cases are divorce and other domestic matters. The Plan is clearly litigation-oriented. Every year a sizeable number of applicants are refused legal aid certificates on the grounds that their needs are outside the scope of the Plan.<sup>122</sup> It is difficult to estimate how much greater the demand might be if the plan had neighbourhood and community offices and offered advice and representation in legal problems of the poor, i.e., social welfare and small claims.

The Ontario government responded to the rapidly rising cost of legal aid and the pressures for change by creating The Task Force on Legal Aid in December, 1973. The Task Force was chaired by the Honourable Mr. Justice John H. Osler, and there were six other members. They were to review the plan "in depth" and "determine the parameters of the future direction and development to ensure that it has the capacity to meet its objectives in the years ahead."<sup>123</sup>

The Osler Committee was the first review of legal aid in Ontario which included non-lawyers. In the process the committee attempted to reflect a number of perspectives with a varied composition: a Supreme Court judge, two Benchers of the Law Society of Upper Canada (one of whom was vice-chairman of the Legal Aid Committee), a social worker, a journalist, a former chairman of the Ontario Human Rights Commission and a law professor. There was considerable interest in the work of the committee which received 285 written submissions and 105 oral submissions in the three months of hearings in ten different centres throughout the province.

The Osler Report is a thorough and comprehensive discussion of the Ontario legal aid scheme. It is clearly a compromise document which attempted to balance the interests of the members of the committee and the competing arguments presented to it.

The Law Society is complimented, with certain reservations evident in the report:

It is enough to say that our inquiries have led us to have nothing but admiration for the founders of the Ontario Plan. We find that it had been conscientiously and

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have seen increases in the number of refusals as a percentage of applications. It is still too early to tell if the decreases in applications made and certificates granted (although there were slight increases in 1977-78, the figures are still not as high as they were in 1975-76) is significant; however, they may indicate a tightening of requirements for eligibility in the face of ever-increasing costs.

<sup>122</sup> For several years, the percentage of applications refused remained at about 28 percent of applications. In 1976-77, however, the percentage of applications refused increased to 31 percent, and in 1977-78 it increased to 32.8 percent. Thus nearly one-third of those who actually apply for legal aid certificates are refused. Figures released by the Plan for the first nine months of 1977-78 indicate that refusals were chiefly a result of failure to provide adequate financial information or failure to complete arrangements to repay the Plan (resulting in 10,527 of the 25,997 refusals). Additional reasons were that the applicant was considered able to retain his own lawyer (6,037 refusals); or that the applicant did not face a prison term or loss of means of livelihood (3,207 refusals). In addition, 1,746 applicants withdrew their applications.

<sup>123</sup> Order-in-Council, December 19, 1973.

energetically administered by The Law Society and that, particularly in the more recent years, a degree of imagination has been brought to bear upon its administration. While it is a reasonably comprehensive Plan, it is not sufficiently comprehensive for today.<sup>124</sup>

The Report made a number of important recommendations although its continuing attempt to reach a compromise deprives it of the clarity that we find in the Carter Report on Legal Aid in Saskatchewan. The Report recommends that the control and administration of the Legal Aid Plan should be vested in a statutory corporation. It was not expected by the legal profession that the Committee would recommend the plan be taken from the Law Society. The rationale for the change is explained in the carefully worded language which is characteristic of the Report:

A number of briefs were delivered and submissions made to us representing that the position of The Law Society under the present scheme involves a conflict of interest. The public good must be the sole purpose of the Legal Aid Plan, whereas The Law Society is by statute the governing body of the legal profession and must be primarily concerned with its welfare. The term "conflict of interest" may not be one appropriate in the circumstances, and we state emphatically that no suggestion was made to us at any time that The Law Society or its Legal Aid Committee has in fact permitted such a conflict to develop. Nevertheless, it is impossible to perceive the direction of the Legal Aid Plan as being sufficiently singleminded if it is left in the hands of a Committee of The Law Society, reporting to Convocation, the governing body of that Society, both groups being composed overwhelmingly of lawyers.<sup>125</sup>

The proposed solution is that the legal aid plan should be vested in a statutory corporation with nine members of the board appointed by the Law Society and nine by the provincial Attorney General. This is a most unwieldy and unsatisfactory solution to the control issue. It does not create a partnership but a board which will be independent neither of the profession nor of the government. There is, as well, no recognition of the legitimate place of the consumer of legal aid on the board. The Saskatchewan model would have provided a more reasonable compromise of consumer, professional and government interests.

A significant criticism of the Ontario fee-for-services scheme was that it perpetuates a Victorian concept of charity in that the profession continues to assist the poor by contributing 25 percent of the legal aid tariff, rather than accepting the premise that all citizens should have access to the legal system. Lawyers have been expected to receive only 75 percent of their fee as part of their professional responsibility and because of the continuing reluctance of the Law Society to accept the concept of payment for legal aid. The Osler Task Force on Legal Aid recognized this problem:

In our view the time has come for us to recognize that Legal Aid is an important right that must be available to those who need it. The existence of a charitable element is inconsistent with the principle of the Plan and compromises the dignity of the recipient. The legal profession of this province has made an enormous contribution of some \$14,260,000.00 in the first 6½ years of the operation of the

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<sup>124</sup> *Supra* note 14, at 22.

<sup>125</sup> L. Tamen, *Legal Aid in Ontario: More of the Same?* (1976), McGill L.J. 369 at 377.

Plan and it is with some regret, but with no hesitation that we recommend the termination of the policy.<sup>126</sup>

It was recommended that the 25 percent mandatory contribution be abolished. As well, the Task Force recommended that the tariff should be reduced by 10 percent to account for the fact that there are no bad debts. Although this recommendation was made in 1975, the 25 percent contribution by legal aid lawyers has remained and inflation may make it difficult to remove.

Criticism of the Ontario Plan<sup>127</sup> in the early 1970s originated with the student Legal Aid Societies, created pursuant to the *Legal Aid Act* Regulations<sup>128</sup> to handle referral for the area directors. These student societies created clinics to fill some of the more obvious gaps in the Ontario plan. Another source of pressure on the Ontario Plan was the movement towards staff lawyers and community clinics in Manitoba, Québec and Saskatchewan and within Ontario by the funding of Parkdale Community Legal Services.

Parkdale Community Legal Services was founded in 1971 and became the first legal services office in the midst of Ontario's *judicare* scheme. The crucial seed money came from the Department of National Health and Welfare, the Council for Legal Education for Professional Responsibility (a Ford Foundation subsidiary) and York University. Parkdale was initially staffed by law students working in the clinic for academic credit, an articling student, a social worker involved in community development, two secretaries, and the writer as both director of the legal services office and a professor of clinical training.<sup>129</sup>

From the outset the office involved the Parkdale community in the external and internal planning, development and administration. During the early years public meetings were held on a monthly basis to discuss and set policy. During 1973, a board was created which reflected the partnership between the Parkdale community, Osgoode Hall Law School, and the profession. The board has fourteen members of whom seven are elected by the community; two are members of the law school faculty; two are practising lawyers; one a law student; one a member of the office; and the director. The staff person has in recent years been a community legal worker who is active in the community, thus giving the community a majority on the board. The board is responsible for funding, hiring and firing personnel, community education, monitoring the quality of service, and for setting the philosophy and policies of the office.

Ontario's legal aid programme has not been static; there have been im-

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<sup>126</sup> *Supra* note 14, at 22.

<sup>127</sup> L. Taman, *supra* note 125, at 371:

It is said to be the most costly delivery model available, heavily biased in favour of litigation and against preventive services, largely incapable of the kind of outreach which is necessary to attack the unmet need for legal services, too diffused to husband limited resources by developing energy-saving strategies of test cases, and community education, and too inflexible to respond to the demands of changing circumstances.

<sup>128</sup> O. Reg. 257/69, ss. 74-77.

<sup>129</sup> Parkdale currently employs, in addition to the law students working there, four lawyers, two articling students, six community legal workers and six support staff.

portant developments in several areas and various experiments with the provision of legal services. On April 1, 1977 a pilot project was introduced which employed full-time duty counsel in Toronto's provincial courts. Six lawyers were hired to advise defendants on pleas, requests for adjournments, applications for bail, and even sentencing in the event of a guilty plea. Although the Law Society assured a concerned Bar, when the project was introduced, that it would not lead to the introduction of a public defender system in the province, Attorney General Roy McMurtry announced one year later that the government intended to investigate the public defenders' offices as a supplement to legal aid.<sup>130</sup> Another development is the recent regulation<sup>131</sup> which permits a judge to be informed of the fact that a person has a legal aid certificate, or has made application for one.

Community law clinics have had a rapid growth in the province, even though Ontario remains dedicated to the *judicare* system. The Legal Aid Committee has expressed the concern that clinical lawyers do not have sufficient freedom to represent a client fully when challenging a government agency and that clinic files cannot be protected sufficiently to guarantee a client's right to privacy.<sup>132</sup> Nevertheless, the Committee felt that clinics offer valuable services in the areas designated as "poverty law"—those areas of the law that concern welfare, unemployment insurance, workmen's compensation, landlord-tenant law, and similar areas. By Regulation 160/76, the Clinical Funding Committee was established to fund Parkdale Community Legal Services and several other projects then in existence, and to make recommendations regarding the funding of "independent community-based clinical delivery systems," defined by the regulations as "any method for the delivery of legal or para-legal services to the public other than by way of fee for service." This includes preventive law programmes and educational and training programmes that are calculated to reduce the cost of delivering legal services. The Law Society has retained control over the development of community clinics as it appoints two of the three members of the Clinical Funding Committee.

The number of clinics in Ontario has increased dramatically in the past few years. In late 1975 Ontario Legal Aid Plan provided funding for seven clinics; by the 1976-77 fiscal year this had grown to twelve, and by 1977-78 to twenty-seven. As of April, 1978 there were thirty-three clinics being funded, with the expectation that a further eight to ten clinics will receive funding during 1978-79. In 1975-76, \$295,597 was provided through OLAP for community legal services groups; this amount grew to \$915,112 in 1976-77 and to \$1,643,076 in 1977-78.

Along with the growth in the number of clinics there has also been an increased specialization in the services performed. While over one-third of the clinics provide general "poverty law" assistance, others now specialize in one area such as workmen's compensation, environmental law, research and edu-

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<sup>130</sup> See *Maclean's*, Jun. 12, 1978, at 64b, 64c.

<sup>131</sup> O. Reg. 536/76 s. 137. Apparently this is intended to prevent counsel from abusing the system and prolonging the trial so as to gain maximum fees.

<sup>132</sup> See Law Society of Upper Canada *Gazette*, Vol. 9, 1975, at 257.

cation, or correctional law. The majority are located in urban environments. Most are in Toronto and the others in urban areas serviced by a law school—Windsor, Ottawa, London, Kingston; or in close proximity to one—Oshawa, Hamilton. The Law Society has recognized the need for service in other areas and after prolonged discussions with area residents, announced in February, 1978 the opening of a clinic in Thunder Bay to serve the northern native community. With initial funding of \$37,000 from the Ontario Legal Aid Plan, the service will open an office in Thunder Bay and satellite offices in surrounding communities. The central office will be staffed by a lawyer, a paralegal, and support staff while the affiliated offices will be run by paralegals only.

The following is a description of some of the projects currently funded, many of which make extensive use of community legal workers.

Metro Tenants Legal Services, established in 1976 to aid tenants encountering problems with Ontario Rent Control legislation, focuses almost exclusively on the needs and rights of tenant associations. This involves representation at Rent Review hearings and County Court applications by tenants for the termination of tenancies, abatement of rent, and the return of security deposits. The Clinic is presently staffed by four full-time paralegals and a lawyer who serves as Duty Counsel, reviews files, and supervises case preparation. The staff paralegals learn in on-the-job training programs and from an instruction programme offered by Parkdale Community Legal Services.

Individual tenants with residential problems can receive assistance from Tenant Hot Line. Established initially as a telephone service the office now receives "walk-in" clients. The staff includes seven paralegals and one staff lawyer.

A more typical community clinic is Neighbourhood Legal Services which provides both summary advice and assistance as well as case service in the areas of welfare law, unemployment insurance, landlord and tenant matters, and housing standards. The clinic is staffed by two lawyers and six community legal workers of whom four are former clients of the office.

Injured Workers Consultants is a clinic that provides legal assistance to injured workers pursuing claims before the Workmen's Compensation Board and other administrative tribunals. Staffed entirely by community legal workers, the clinic places priority on hiring staff who can speak a second language since a large proportion of its clientele does not speak English. In the last nine months of 1977, for instance, of 95 new cases opened, only 34 were for English-speaking clients, while 32 were Italian, 10 Spanish, 8 Greek, 5 French and one each were for members of the Chinese, German, Czechoslovakian and Yugoslavian communities.

In conjunction with these clinics, the legal aid plan also helps to fund a number of "Duty Counsel Clinics." These are not permanent clinics but rather are duty counsel who rotate to a number of specific locations and who give summary legal advice and take legal aid applications. These clinics are often associated with local social service agencies and operate out of neighbourhood centres, shopping centres, community colleges, hospitals and libraries.

Legal aid's progress in recent years has been both puzzling and hearten-

ing. The statistical data for 1976-77 and 1977-78 indicate a levelling off of demand for legal aid and a tightening up of the system with a rising number of refusals. Officials contacted at the legal aid offices could offer no explanation for either phenomenon.

Ontario has witnessed an increase in the volume of criminal legal aid from 47 percent of the certificates of eligibility issued in the first two years of the plan's operation to 53.7 percent and 54 percent in the last two years.<sup>133</sup> Criminal costs have similarly risen from \$1,444,926 in 1967-68 to \$12,738,782 in the 1976-77 fiscal year when the Ontario Legal Aid Plan paid for 37,712 completed criminal cases.<sup>134</sup>

In the face of the growing costs of criminal legal aid, and the allegations from some litigation counsel and judges with respect to the deterioration in the quality of defence work being offered by some lawyers under the Legal Aid Plan, The Attorney General of Ontario, Roy McMurtry, announced in April, 1978<sup>135</sup> that his department was undertaking a study of the public defender system presently operating in Montréal and Washington, D.C. If Ontario adopted a public defender or staff lawyer system for criminal legal aid it would be initiated in Metropolitan Toronto. An accused person could lose the freedom of choice aspect of the present Ontario scheme and rather would be assigned a salaried defence lawyer for certain offences. The Attorney General claims that "the rising cost of the legal aid plan is not in itself a factor"<sup>136</sup> in his decision to study the public defender system but is rather concerned as to whether the Ontario taxpayer is well served by legal aid expenditures.

There is no doubt that the over \$1 million expended on criminal legal aid for Metropolitan Toronto's criminal caseload, which is approximately 50 percent of the cost of criminal legal aid in Ontario, catches the bureaucrat's attention. Despite the high cost of legal aid for York County (primarily Metropolitan Toronto) during 1976-77, 17,100 criminal cases received certificates for legal aid<sup>137</sup> as compared to 21,679 criminal cases receiving assistance in the City of Montréal.<sup>138</sup> The average cost for a criminal case in York County was \$387.17 in contrast to \$299.38 for the rest of Ontario.<sup>139</sup> There are no comparable figures available for Québec where the vast majority of criminal cases in Montréal are handled by the public defender's office (18,057 out of 21,769 cases). Although there seems to be little doubt that the cost per case of the public defender scheme is much lower than that of the judicare system, we have not had an effective evaluation undertaken as yet of the strengths and weaknesses of each scheme. There are allegations

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<sup>133</sup> Law Society of Upper Canada, *Ontario Legal Aid Plan, Annual Report 1969* (Toronto: Law Society of Upper Canada, 1970) at 17; *Ontario Legal Aid Plan Annual Report 1977* (Toronto: Law Society of Upper Canada, 1978) at 27.

<sup>134</sup> *Id.*, *Annual Report 1969*, at 19 and *Annual Report 1977*, at 28.

<sup>135</sup> *Supra* note 130.

<sup>136</sup> Roy McMurtry, letter to the *Toronto Star*, Jun. 5, 1978.

<sup>137</sup> Law Society of Upper Canada, *Ontario Legal Aid Plan, Annual Report, 1977* (Toronto: Law Society of Upper Canada, 1978) at 27.

<sup>138</sup> *Supra* note 69, at 34.

<sup>139</sup> *Supra* note 137, at 28.

made that the quality of defence services being supplied by some lawyers under the legal aid plan has been deteriorating, but there is little or no evidence to verify these allegations. If anything, the evidence is to the contrary.<sup>140</sup>

Although the Ontario Legal Aid Plan remains primarily litigation-oriented, an encouraging development has been the recognition by the administration and the Legal Aid Committee that community clinics and paralegals (community legal workers) have a vital role to play in the delivery of legal services. The emphasis, however, has been on establishing clinics in urban areas, thus leaving large parts of Ontario without such assistance. The Law Society's Legal Aid Committee is beginning to grapple with the role of community clinics and seems determined to confine clinics to a rather limited definition of "practising law for poor people." Ontario is *de facto* moving more and more towards a mixed delivery system combining the strengths of both *judicare* and community legal services. However, as long as the Law Society retains control over the administration of the Plan, it would seem to be determined to keep the clinical approach subordinate to the fee-for-service concept of legal aid which has been the hallmark of the Ontario Legal Aid Plan since its inception.

## V. CONCLUSION

The evolution of legal assistance in contemporary society must be responsible to the political and social fabric of the nation or jurisdiction in which legal aid schemes are established. It is interesting to observe that developments in most Western countries bear remarkable similarities, beginning from the assumption that inequality with respect to access to justice is an outgrowth of the availability of legal services. Most schemes ignore the perhaps more relevant socio-economic distinctions between the traditional users of the justice system and the poor. It is apparent that the major Canadian developments during the last decade are basically adapted from the British *judicare* model and the American community law office. Both programmes are premised on the belief that the provision of legal services on a gratuitous basis will be of the greatest assistance to low-income citizens.

Despite heated debates and considerable rhetoric, the Canadian provincial schemes have much more in common than might seem immediately apparent. Most provinces have developed schemes using both staff lawyers and private practitioners with a varying mix of civil and criminal caseloads. The concept of the staff lawyer is still perceived as a threat to the traditional individualistic approach of the legal profession, and has generally been opposed by the organized Bar.

Legal services remain a low priority in the budgets both of the provinces and the federal government. The last decade witnessed a growth of commitment of public funds coincident with a period of high government spending and general economic buoyancy. As governments are defeated or change their

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<sup>140</sup> J. Wilkins, *Legal Aid in the Criminal Courts* (Toronto: University of Toronto Press) at 136.

budgetary priorities, we have witnessed a cut-back or "holding-the-line attitude."

Canada requires a critical and reflective assessment of the development of legal aid at this time. The era of expanding budgets is ending, and the demand will become increasingly strong to examine both the cost effectiveness and the impact of legal aid expenditures in the civil and criminal areas. But the difficult question remains: who is to determine what is in the public interest and whether the private lawyer, the staff lawyer or the community legal worker is the most effective method of delivery of legal services? We need to have the provincial plans coordinate their record keeping and statistical information so that the legal researcher can compare the cost of legal aid in each province on a case-by-case basis, can compare the cost of the private practitioner with that of the public defender, and, based on documented information, make recommendations about the future of legal services.

Cost effectiveness is not a term to be used only by government evaluators, law professors or legal aid administrators. The effectiveness of legal services must be measured in terms of their impact on over one-quarter of Canada's population—of the clients of legal aid. It is essential, before new funds are expended, to ascertain what impact, if any, developments to date have had on the low-income community and the institutions of bureaucracies that were created to serve them. Provincial law societies and governments have allegedly pressed for public funding of legal services in a variety of models in the belief that "access" would improve the lot of the poor person and perhaps alleviate, if not eradicate, the effect of poverty. It becomes apparent, however, that provincial governments are not prepared to invest sufficient amounts of public funds to provide legal counsel for the multitude of legal and social problems confronted by the low-income citizen. Ultimately, the role of the legal researcher will be to integrate statistical information regarding cost effectiveness, to compare the social and economic impact of various models of delivery of legal services and to recommend to government the best means of responding to the needs of the recipients of legal aid. The willingness of Canadian provincial and federal governments to respond to the changing perspectives of legal services may foster the development of legal aid schemes which allow the poor access both to legal services and, ultimately, to a substantial degree of social justice.

