

1990

# Making the Justice System Balance: Beyond the Zuber Report

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## Recommended Citation

Zemans, Frederick H. "Making the Justice System Balance: Beyond the Zuber Report." in Hutchinson, Allan C., ed. *Access to Civil Justice*. Toronto, ON: Carswell, 1990. ISBN: 0459348515

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# ACCESS TO CIVIL JUSTICE

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OSGOODE HALL LAW SCHOOL,  
YORK UNIVERSITY

CARSWELL

Toronto • Calgary • Vancouver

1990

## Canadian Cataloguing in Publication Data

Main entry under title:

Access to civil justice

Includes one essay in French.

Papers presented at the Conference on Access to Civil Justice held in Toronto, June 20-22, 1988.

Includes bibliographical references.

ISBN 0-459-34851-5

1. Justice, Administration of — Canada — Congresses.
2. Justice, Administration of — Congresses.
- I. Hutchinson, Allan C. II. Conference on Access to Civil Justice (1988 : Toronto, Ont.).

KE8200.A66 1990 347.71 C90-095230-X  
KF8764.ZA2A22 1990

## Preface

This collection of essays on Access to Civil Justice had its origins in a conference, organised and funded by the Ontario Ministry of the Attorney-General, in June, 1988. This was part of a larger project begun and inspired by the Honourable Ian Scott. The conference was attended by a host of individuals and organisations from all over Canada and elsewhere, including lawyers, politicians, bureaucrats, academics and citizens. Generous additional funding was provided by The Law Foundation of Ontario. Most of the essays were originally completed for publication in 1989.

Many people contributed their hard work and dedication to ensuring that the conference was a success. Especial thanks must go to Lorraine Graham, Beth Boswell, John Gregory and Patrick Monahan. The completion of this volume was made possible by the supportive efforts of Jonathan Anshell, Corinne Doan, Richard Epstein and Carole Trussler.

October, 1990

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AEK 6599

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## Making The Justice System Balance: Beyond The Zuber Report

Frederick H. Zemans

### 1. INTRODUCTION

The civil and criminal justice systems rely on a highly individualized dispute resolution process in which each litigant must both prosecute and present his or her own case with limited intervention by the court system and no direct involvement by the judiciary. Neil Brooks has noted that the adversarial system reflects the "political and economic ideology of classic English liberalism in three ways: by its emphasis upon self-interest and individual initiative; by its apparent distrust of the state; and, by the significance it attaches to the participation of the parties."<sup>1</sup> Much of the current discussion of access to justice is concerned with the inequities that flow from the adversarial system along with a growing recognition that participation of parties poses particular and difficult problems. Parties with limited resources and with small or diffuse claims face the greatest difficulties, especially when they are litigating against large organizations, be they trade unions, corporations, or an arm of government.

### 2. THE ACCESS MOVEMENT

It is worth emphasizing that the adversarial system reflects an individualistic, liberal view of society and grows out of the prevalent social and political philosophy of Western society. Indeed, most lawyers would argue that the foremost concern of the common law and the adversarial

<sup>1</sup> Brooks, "The Judge and the Adversary System," in Linden, ed., *The Canadian Judiciary* (1976) at 98-99.

system is the protection of individual rights.<sup>2</sup> Litigation is considered as a means of determining disputes between two individuals or perhaps between two business entities. Despite the generous expansion of contemporary rules of procedure with respect both to joinder of parties and to claims, judges and lawyers alike tend to perceive civil litigation in terms of individuals and their individual causes of action. Thus, we find opposition to reform of the law of civil procedure as it relates to bringing class actions, despite various law reform studies that have been undertaken, notably in this province.<sup>3</sup> These studies have recommended the liberalization of the possibilities for groups to litigate collectively, a more activist role for the bench, the introduction of contingency fees, and the abolition of the punitive provision that costs follow the cause in class actions.

In framing the question of how to balance the justice system, we acknowledge the implicit suggestion that there is in fact a justice "system" and that it is in a state of imbalance. A recognition of the individualism that underlies the adversarial system and the problems it creates can be found in the federal government's recent review of the justice system, the Neilson Report, which questions the coherence of the administration of justice in Canada. The Report notes that, in addition to the disjointed and individualistic nature of Canada's justice system, there are two important, related issues:

The first has to do with the extent to which the participants in the system as a whole are interested in, or capable of, viewing their interaction in systemic terms. The common law tradition discourages systemic rationalization, and this appears to have extended to not thinking about why relationships within the system are as they are, or how they could be improved.

The second related issue is that historically there has been very little empirical data about what is actually happening within the justice system.<sup>4</sup>

2 *Ibid.*, at 98. Brooks quotes from the editorial page of a bar association journal to illustrate this argument:

If you believe in the Anglo-Saxon common law tradition, that the individual is the important unit of our society, and the state exists to serve him, then it seems that the adversary system is preferable. If you hold a corporate view of society, that is to say, that the community is the important unit, and that the citizen must be primarily considered as a part of the corporate unit, then it seems you should champion the inquisitorial system.

3 See Ontario Law Reform Commission, *Report on Class Actions* (1982).

4 Minister of Supply and Services Canada, *The Justice System—Improved Program Delivery: A Study Team Report to the Neilson Task Force on Program Review* (1986) at 12 and 13-15. In discussing the justice system, the writers note that the linkages within the justice system are "of a somewhat tenuous character. Indeed, the adversarial, individualistic and discretionary character of the legal profession might at times be thought to insinuate itself into the disjointed relationships of the institutions, public and private, that compose the structure of the system."

To what extent are reforms appropriate? And will such reforms advance values that we wish to codify and incorporate into the justice system?<sup>5</sup> Should the state encourage class actions, and what are the appropriate goals of such litigation? An analysis of the administration of justice must evaluate the premises and philosophical underpinnings of legal aid, contingency fees, and pre-paid legal services.<sup>6</sup>

I do not believe that we can embark upon a discussion of law, substantive or procedural, as if legal issues could be considered in a political vacuum. Richard Abel believes that much of the writing on legal aid (as well as other areas of the common law and, in particular, procedural discourse) is flawed by the insistence on divorcing law from politics. He writes:

The prevailing ideology of advanced capitalism—liberal legalism—is grounded on that very premise. The institution of legal aid itself attempts to fulfill the promises of liberal legalism without first effecting any change in fundamental political relationships.<sup>7</sup>

Though I do not intend to undertake an analysis of the political philosophy underlying the Canadian civil justice system, I urge that we confront the fact that in each area of decision-making—class actions, legal aid, and the independence of both the judiciary and the legal profession—the determination of the approach or role to be assumed by a lawyer or a judge is often a political, and seldom a value-free, decision.

The belated introduction in Canada of a state-funded legal aid scheme is an historic example. The political reality is that neither the legal profession nor any of the partners in Canadian federalism exhibited any significant concern with respect to "access to justice" prior to 1967, when the Ontario Legal Aid Plan was introduced. We can either criticize or praise the "judicare" model of the mid-1960s, but despite the introduction of a legal services model in the U.S., we opted for a combination of the English and Scottish models of legal aid. The more fundamental issue is that, until 1967, there was no political will to attempt to rectify the most egregious wrongs within the adversarial system. Instead, in the best interests of the

5 Brooks, note 1, above, at 98. Brooks makes the point that it is only recently that we have come to recognize that procedure is not value free. He refers to the writings of Cappelletti and Damaska. We can no longer attempt to right a system without attempting to understand the roots and origins of that system.

6 Note 4, above, at 13. The Federal Study Team on *The Justice System* acknowledges that there is a justice system but with very weak interrelationships between the participants. "This is because there is no tradition of doing so, nor is there a generally held perception that more systemic thinking and better information about how one part of the structure affects others would be helpful." *Id.*

7 Abel, "Law Without Politics: Legal Aid Under Advanced Capitalism" (1985) 32 U.C.L.A. L. Rev. 474 at 476-485.

dominant elements in Canadian society, the myth was perpetuated that all citizens have a right to have their disputes dealt with by their court system.

Lawyers, as well as law students, were as aware in the 1960s as we are today that our court system is slow, that it is expensive, and that courts are not where the average citizen has his or her disputes or conflicts resolved. In the 1960s, our country was coming of age. We recognized that we had the opportunity to develop certain unique aspects of the social contract—particularly medical care—but there was little or no concern on the part of the public or its elected representatives for legal care. Going to law was not equated with going to the hospital. Health care was considered to be a basic human necessity, while legal care was considered to be a luxury to be enjoyed, or rather endured, only when absolutely necessary, for example, in the context of a divorce or perhaps a motor vehicle accident claim.

Are Canadians today interested in analyzing the systemic problems of the administration of justice? *The Report of the Ontario Courts Inquiry*,<sup>8</sup> written in 1987, gives a qualified but important “yes” and offers a significant analysis of the justice system as a whole, in addition to its well-publicized recommendations as to court jurisdiction and court administration. In his analysis of the justice system, Mr. Justice Thomas Zuber accepts the challenge of addressing the administration of justice as a coherent whole. His report sets out the general principles to be applied in assessing the justice system and recommending reform.<sup>9</sup> Perhaps the most significant element of this report is its strong articulation of the responsibility that the court system and the administration of justice owe to the Canadian public. Zuber states that the “court exists to serve the public. Lawyers, judges, court registrars and court clerks all serve the justice system,” which in turn, according to the author, exists for the benefit of the public:

This Inquiry would go a step further and state emphatically that not only counsel should be cast in a social service role, but that the entire court system has a purpose only to the extent that it serves the community.<sup>10</sup>

8 Zuber, *Report of the Ontario Courts Inquiry* (1987).

9 *Ibid.*, at 66-70. Courts grew out of the social necessity to provide a way of resolving disputes that did not threaten the fabric of society. The courts continue to exist because, despite their problems, the people have confidence in the integrity and wisdom of the court, and they continue in times of stress to turn to the court for the vindication of their rights.

10 *Ibid.*, at 66-70. The Report adopts the approach of the noted American proceduralist, Arthur T. Vanderbilt, and asserts the right of every litigant to a prompt and efficient trial at a reasonable cost and to representation by competent lawyers.

Committed to the vindication of the rights of individuals, the classic liberal values embodied in the Canadian adversarial system are perceived, with some legitimacy, as being opposed to community or communitarian values. In the chapter entitled “General Principles Underlying Court Reform,” Zuber affirms the responsibility of the justice system to the community, taking our discussion well beyond the traditional “access to justice” concerns of economic accessibility and delay. By articulating the straightforward premise that the justice system exists not only for the benefit of lawyers or judges or for individual litigants, but for the public benefit, the report has offered Canadians a unique analysis of the provision of civil justice.<sup>11</sup> The Zuber Report challenges its readers to develop models of analysis that broaden our understanding of how the justice system affects the various socio-economic communities that make up contemporary Canadian society. In acknowledging that the courts and the administration of justice must serve the community, Zuber’s report raises a clear challenge: the important requirement is to understand the needs of the communities that the justice system is serving.

This paper accepts the major findings of the Zuber Report, that is, the inefficiency, the costliness, and the lengthy delays of the administration of justice. In considering these concerns and Zuber’s recommendations, I analyze in some detail two approaches—one private and one public—to these issues. Similar analysis would be beneficial when considering the implications of contingency fees, lawyers’ advertising, and the use of paralegals and non-lawyers in providing traditional, case-by-case, legal services and more broadly-based community education and development. The challenge remains for Canadian sociologists of law to study and analyze the extent to which the administration of justice has fulfilled its obligation as articulated by the Zuber Report of serving and responding to the diverse needs of our community.

Access to justice is a concept that has only recently come of age in Canada. It is, in many ways, surprising that law and particularly the justice system was so belatedly perceived as a legitimate social service.

11 An holistic approach, which attempts to approach civil justice issues from the perspective of a social service that responds to the needs of its community, will require a new framework for analysis. If the fundamental values of the justice system are moved from an individualistic approach to a more collectivistic approach, the role of judges and lawyers in the administration of justice—courts and legal services—must be reconsidered. Certainly, the significant involvement of citizens’ groups in the administration and “control” of legal services for all classes of society would seem appropriate. As well, the opportunity for non-lawyers to participate in the justice system as the “deliverers” of the service, such as community legal workers within our clinic system or advocates and conveyancers in the private sector, would have to be reconsidered from the perspective of the funders of the social service and, more importantly, the needs of the public.



The history of the access movement and particularly of legal aid has yet to be written, but it is generally agreed that public awareness of the need for legal aid services dates only to 1951.<sup>12</sup> The Ontario Legal Aid Plan was introduced to assist indigent persons with defence representation in serious criminal matters on a voluntary basis. But, as indicated, the social policy commitment to legal aid had to await the Attorney General of Ontario's Task Force on Legal Aid, which in 1965 recommended that the English *judicare* and the Scottish *duty counsel* systems be introduced to Ontario under the administration of the Law Society of Upper Canada and funded by the province.<sup>13</sup>

Writing in the introduction to *Access to Justice and the Welfare State*, Mauro Cappelletti and Bryant Garth reiterate the concern that has been expressed by many scholars who have studied and written about recent attempts to develop justice systems that are responsive to the needs of particular local and national societies:

"Access to justice" implies continuing social development, involving a constant debate about how much access to provide and how much and what kind of justice should result.<sup>14</sup>

Formal, rule-oriented attempts to provide equality of access have generally been found inadequate. In practice, they have amounted to denials of effective entry to, and use of, the court system, rather than providing more preventative legal services. It is likewise true that access to traditional models of dispute resolution—particularly the court system—is obtainable only at a relatively high cost. This is particularly the case if such access reforms are confined, as has been the case in Canada, to subsidizing lawyers and to using traditional judicial approaches. The pressure of costs for legal aid, judicial appointments, new court houses, and for the administration of justice generally, especially in times of strained governmental budgets, militate in favour of "wholesale justice,"<sup>15</sup> which may in turn come only at the expense of the quality of justice. Two contemporary attempts to overcome the inequities of the Canadian justice

12 The Ontario Legal Aid Plan was introduced in 1951 with the passing of The Law Society Amendment Act, S.O. 1951, c. 45, which enabled the Law Society of Upper Canada to establish a voluntary scheme to provide legal aid.

13 See *Report of Joint Committee on Legal Aid* (1965).

14 Cappelletti & Garth, "Access to Justice and the Welfare State: An Introduction," in Cappelletti, ed., *Access to Justice and the Welfare State* (1981) at 2.

15 *Ibid.*, at 1; Calabresi, "Access to Justice and Substantive Law Reform: Legal Aid for the Lower Middle Class," in Cappelletti & Garth, eds., *Access to Justice: Emerging Issues and Perspectives*, vol. 3 (1979) at 169.

system will be discussed in this article: pre-paid legal services, and legal aid services. Both innovations await a more detailed and systematic analysis.

### 3. PRE-PAID LEGAL SERVICES

Pre-paid legal service is perhaps the most significant comprehensive alternative to fee-for-services to develop in Canada during the 1980s. By paying a fixed premium, either personally or in concert with his or her employer, a subscriber, generally a middle-income earner, is entitled to certain legal services free of charge when required.<sup>16</sup> As with any insurance scheme, all participants pay a premium that is fixed on the presumption that only a limited number of subscribers will require legal services.

Pre-paid legal services schemes have existed in the United States for nearly two decades but have only begun to be developed in Canada during the last few years. By the early 1980s, pre-paid services were becoming popular with American workers and were being requested as a fringe benefit by their unions, the most extensive being developed by the United Auto Workers (U.A.W.) for employees of General Motors, American Motors, and Chrysler. As well, one of the major American chains of private legal clinics (Hyatt Legal Services) began to provide pre-paid legal insurance to a union around the same time but was not initially prepared to provide pre-paid legal services to the general public as it was not considered economically viable.<sup>17</sup> I underline that legal services plans in the United States have grown both in numbers of subscribers and in services provided. They are being marketed by a large number of the major insurance companies as well as by direct mail organizations such as Diners Club, Visa, and Mastercard.<sup>18</sup> The growth in both the market and models of

16 Wydrzynski, "The Development of Prepaid Legal Services in Canada," in Evans & Trebilcock, eds., *Lawyers and the Consumer Interest: Regulating the Market for Legal Services* (1982). Legal services plans are designed to create a risk and cost-sharing or cost-spreading arrangement on the premise of "collective acquisition of legal services to benefit the whole." See also Wydrzynski, "Access to Legal Services: Prepaid Legal Services" (unpublished paper presented to the Conference of Canadian Law and Society Assn., Hamilton, 1987).

17 Winter, "More Workers Gaining Prepaid Legal Insurance" (1982) 68 Am. Bar Assn. J. 1559. In September 1982, Hyatt Legal Services agreed to provide pre-paid legal insurance to the Sheet Metal Workers International Assn. covering over 6,000 sheet metal workers and their families.

18 Taub, "New Customers for the Law" (1984) 4 Calif. Lawyer 9 at 16.

legal services is being generated by employee groups and, it would seem, by the public as well.<sup>19</sup>

The first private Canadian legal services plan was created in 1978; it was a prepaid, open-panel scheme through the United Grain Growers Services of Winnipeg. In the same year, the Prepaid Legal Services Program of Canada, a resource centre to provide information and to conduct research on pre-paid legal services in Canada, was established in Windsor. In spite of these early developments, growth of pre-paid programs in Canada has not kept pace with their growth in the United States. The reasons are clear: provincial law societies have not encouraged (and in some instances have discouraged) pre-paid legal services, the federal and provincial governments have not exhibited any commitment, and consumers do not seem to have perceived a need. In 1980, the Canadian Labour Congress condemned the schemes as "make-work" plans solely for the benefit of lawyers.<sup>20</sup>

Though pre-paid and legal insurance had been discussed for more than a decade, it was not until the United Auto Workers' (now Canadian Auto Workers (C.A.W.)) 1984 agreement with General Motors that a large work-force was brought within a private legal services plan in Canada. When the C.A.W. included the same provisions in its contracts with Ford, Chrysler, and Navistar (formerly International Harvester), it became apparent that with over 75,000 union members in Ontario and Quebec, each receiving approximately \$60 per year from his or her employer, approximately 4.5 million new dollars were about to be expended annually on such legal services. Although these funds are small in comparison to federal and provincial expenditures on legal aid, they are nonetheless significant and were recognized by the organized legal profession to be the tip of the legal insurance iceberg.

Confrontation and eventual litigation between The Law Society of Upper Canada and the C.A.W. Plan did not arise out of consideration of the needs of union members. Rather, the dispute arose because the governing body was concerned about whether the Plan would be closed,

<sup>19</sup> *Ibid.*, at 16. Taub further suggests that one of the reasons that there has been such a significant increase in the growth of legal services plans in the U.S. is that "they might create a better public image and more business for the increasing numbers of American lawyers."

Not long ago, you had to be a member of a major labour union to be eligible for a prepaid legal services plan. In recent years, however, the number of available plans has increased significantly, and another major expansion is imminent. Those who market legal services plans are going after the individual consumer—and if their plans sell, attorneys may gain not only more business, but also a better public image.

<sup>20</sup> Wydrzynski, "Access to Legal Services: Prepaid Legal Services," note 16, above, at 3.

using "salaried" lawyers, or open, offering freedom of choice to use private practitioners as well as staff lawyers. The Law Society opposed the requirement that all private lawyers who accept work for plan members must agree to become co-operating lawyers and be paid at the proposed fee schedule of \$60 per hour.<sup>21</sup> In some respects, the confrontation between Ontario's Law Society and the C.A.W. Legal Services Plan was similar to that which arose 15 years earlier from attempts by the Ontario Legal Aid Plan to thwart salaried clinic lawyers, and specifically Osgoode Hall Law School's Parkdale clinic. In both instances, while the issues were couched in terms of the right of consumers of legal services to freedom of choice, the heart of the matter was a concern by the profession to preserve the private, individualized model of legal services that had characterized lawyers' services for the better part of two centuries. New funding of legal services was encouraged by the professional leadership as long as the private practitioner remained the model of delivery and control rested with the profession.<sup>22</sup>

As with salaried legal aid lawyers, the profession ultimately recognized that the C.A.W. plan should continue to operate<sup>23</sup> using salaried staff lawyers and either co-operating lawyers in private practice who had agreed to the \$60 hourly fee or non-co-operating lawyers who could extra-bill the Plan member. This model was accepted by the representatives of the C.A.W. Plan to avoid litigation and to allow the Plan to grow. As with the medical profession, the question of extra-billing of professional fees rather than the quality or type of service was the source of tension.

Although there is limited statistical data, the C.A.W. Legal Services Plan appears to have been successful in encouraging use of the plan by union members and their families and by retirees. There is a usage rate

<sup>21</sup> It is significant that by November 1985, the Treasurer of the Law Society of Upper Canada wrote to the originators of the C.A.W. plan and to the legal profession stating that participation in the plan might constitute unprofessional conduct. See letter from Pierre Genest to U.A.W. Canadian Legal Services Plan, November 1, 1985, which was circulated to all lawyers on the rolls of the Law Society of Upper Canada. A press report, later in 1985, noted that lawyers could be "suspended or disbarred from practice where such conduct is found." See *Inside Business* (28 December 1985).

<sup>22</sup> The Legal Aid Committee of The Law Society of Upper Canada, *Community Legal Services* (1972).

<sup>23</sup> Litigation ceased after an agreement between the C.A.W. and the Law Society of Upper Canada was reached in May of 1987. The agreement allows the plan to operate so as to offer union members the opportunity to choose from either staff lawyers or outside lawyers. However, those members who select an outside lawyer that does not limit his or her fees in accordance with the plan will only be reimbursed to the amount set out in the plan's fee schedule. See *Canadian Press Newstex* (14 May 1987).

of 44.8% in 1987, and 43.0% in 1988.<sup>24</sup> Of interest is the comparative use of staff and private lawyers during the Plan's early years:

	1986		1987		1st Quarter 1988	
	Cases	%	Cases	%	Cases	%
Staff	17,873	51.2	18,014	51.8	5,659	56.0
Co-operating	9,806	25.2	8,447	24.3	2,305	22.8
Non-co-operating	7,960	22.8	8,027	23.0	2,058	20.4
Notary	278	.8	301	.9	77	.8
Total	34,917	100	34,789	100	10,099	100

The division of lawyer use has remained equal between the staff lawyers and the co-operating and non-co-operating lawyers, with some indication that there may be a gradual increase in staff lawyer use. The distribution of work between co-operating and non-co-operating lawyers remains unclear at this early stage of the Plan's development.<sup>25</sup> The Plan's caseload is divided between wills and estates (33%); real estate, including real estate litigation (37%); family law (15%); and other litigation, such as landlord and tenant, motor vehicle, consumer, administrative law and criminal (15%). Whether the Plan's members are using legal services for the first time or to a greater extent remains to be examined. The initial data from the C.A.W. Plan indicates a higher rate of use than in the United States U.A.W. Plan, which currently averages a user rate of 38%. The relative newness of the Canadian plan and limited available data does not allow us to determine the extent to which the plan is providing "advice only" or actually

24 This data was received in correspondence from the Executive Director of C.A.W. Legal Services Plan to the writer, dated 7 June 1988. Usage is calculated as follows:  $100/1 \times (\text{number of active employees} + \text{number of retirees})/\text{number of cases opened per year} = \text{usage \%}$ .

25 Although the caseload is higher during the first quarter of 1988, as is the use of staff lawyers, the figures are similar to those of the first quarter of 1987, when staff lawyers received 54.3% of the cases and non-co-operating lawyers 21.7%. Similarly, usage rates were higher during the first quarter of 1987, at 49.2%, as compared to 50.1% for 1988. The significance of the increased use during the first months of the year as well as the choice of staff lawyers with increased case loads awaits further research and analysis.

C.A.W. Legal Services Plan is operating seven staff offices, with six in Ontario, and one in Quebec. As of June 1988, there was a total of 109 employees, 30 of whom were lawyers. Only two lawyers are involved with administration at the head office, while 28 lawyers are located in the seven staff offices.

handling and completing matters.<sup>26</sup> The high percentage of wills may suggest that many users of the Canadian Plan are using necessary legal services that had previously been considered too expensive.

In response to the considerable publicity and interest in the C.A.W.'s plan, three insurance companies in Ontario announced in 1986 that they were preparing legal insurance schemes, and one offered a truncated form of legal insurance that provided all-hours legal advice by phone to policy holders.<sup>27</sup> As well, the Law Society of Upper Canada, in conjunction with the Ontario branch of the Canadian Bar Association, was investigating the possibility of making available its own plan, which was intended to provide broader coverage than the C.A.W.'s plan.<sup>28</sup>

The principal benefit of pre-paid plans is the increased access to the justice system that they offer through some degree of equalization of the availability of professional services. Citizens who would not seek legal services have the opportunity, through the limited, fixed individual costs, to consult a lawyer. Thus the decision to consult a lawyer is made on perceived needs and professional advice rather than the client's ability to purchase legal services. The extent to which the pre-paid model will deliver reasonably-priced legal services in Canada remains unclear, but we have confirmed that salaried legal aid service is generally less expensive than that provided by private lawyers delivering comparable services.<sup>29</sup> With the services becoming routine, economies of scale, the use of paraprofessionals, computerized practices, and lower overheads, it may be safe to predict that pre-paid will also be a less expensive delivery model than the private bar. As Wydrzynski has written,

prepaid legal service plans do not provide coverage for every conceivable legal problem which could arise. Control of costs is critical to plan survival and benefits must be geared to the financial reality of the plan. While the benefits must correspond to the members' needs, extravagant legal service must necessarily be excluded. Thus, most plans provide coverage for routine legal services only: those needs which are most likely to be encountered by the middle-class consumer (e.g. purchase and sale of real property, drafting of a will, family law matters, etc.) Benefits are tailored to the members' perceived needs, and then usually only those services which are capable of cost control.<sup>30</sup>

26 During the first 15 months of its operation, 52,000 files were opened, and more than half of all eligible employees used the services of the plan. The average annual usage has been greater than that for similar plans for auto workers in the United States, which currently averages about 38%.

27 Crawford, "Break Out in Upper Canada" (1986) 10 Can. Lawyer 4 at 22.

28 *Ibid.*, at 19.

29 See Canadian Bar Assn. National Legal Aid Liaison Committee, *Legal Aid Delivery Models: A Discussion Paper* (1987).

30 Wydrzynski, "Access to Legal Services: Prepaid Legal Services," note 16, above, at 5.

Pre-paid schemes embody a relatively straightforward concept of risk-sharing. By spreading the cost of individual legal services across a broad cross-section of society, legal costs become more affordable for the majority of Canadians. As the plans are privately funded by employer, and sometimes by employee contributions, or by insurance companies, various designs with various services can be developed and marketed. Although the organized legal profession remains committed to monitoring and, perhaps, in some instances, to controlling pre-paid developments, both the confrontation between proponents of the C.A.W. Plan and the Law Society of Upper Canada and the resolution of this confrontation indicate that attitudes are changing. With appropriate endorsement by government and a commitment by pre-paid plans to provide legal services at a reasonable cost, the organized legal profession has accepted the inevitability and the utility of pre-paid group legal plans. Although the legal profession may attempt to thwart new access models on the grounds of limited choice of counsel or on the basis that fees offered to private practitioners are considered too low, such opposition is futile and counter-productive in the face of the growing success of the C.A.W. Plan and the recent endorsement of pre-paid plans by the federal government.<sup>31</sup> Diana Majury wrote in 1981 that

The most valuable tool for public education in this area will be the existence of successful legal service plans, responding to the presently unmet legal needs of middle and lower income Canadians. Once one or two major plans are operational in Canada, the advantages of this new delivery system will be more readily apparent.<sup>32</sup>

I suggest that, by the mid-1990s, group pre-paid and insurance plans will be a recognized and well-established element in the panoply of legal services offered in Canada. The extent to which these plans will assist in providing less costly legal services to middle-income consumers is unclear, but undoubtedly they will provide an affordable vehicle for the purchase of legal advice and assistance with respect to certain "typical" legal problems.

#### 4. LEGAL AID SERVICES

Much has been written about the phenomenal growth of legal aid

<sup>31</sup> Note 4, above, at 202, where, in a discussion of the federal government's responsibilities with respect to legal aid, the authors of the study write:

In the case of the working poor, consideration should be given to whether a form of government-subsidized pre-paid legal services might be adapted to meet their legal needs.

<sup>32</sup> Majury, "Into the Era of Prepaid Legal Services" (1981) 5 Can. Community L. J. 45 at 46.

services in Canada and much of the Western world during the last several decades. The governing bodies and the professional organizations of Canadian lawyers have exhibited a growing interest in legal aid matters since the creation of the Ontario Legal Aid Plan in 1967. The provincial law societies have attempted to administer the legal aid plans through committees generally composed of lawyers. In provinces where such direct control has been opposed by the provincial government, the law societies have nevertheless sought, and have generally obtained, a significant and dominant voice in the administration of legal aid plans while simultaneously asserting their members' claims to adequate payment for legal assistance.

The organized legal profession's intentions and attitudes toward the various provincial legal aid plans have often been unclear. It has been, and remains, my opinion that the Canadian legal profession's positive response to government-funded legal aid grew out of the stimulation of employment and the provision of a significant source of income for the growing number of young lawyers. As well, the system's attractiveness was increased by the profession's enhanced public image in providing funded legal aid assistance to some of the country's impoverished. Although it is rather late in arriving, the support of the legal profession can no longer be doubted. The Canadian Bar Association, in the report of its National Legal Aid Liaison Committee, is forthrightly assertive in its advocacy on behalf of legal aid services in this country:

Legal aid is not an expensive social experiment, affordable only in times of economic growth. Rather, it is the expression of the basic, democratic principle of the protection of the rights of individuals against the overwhelming power of the state. As such, legal aid is essential in order to ensure equal access to justice in our society. Justice is indivisible; if it is not accessible to everyone then it does not exist.<sup>33</sup>

The commitment of the organized profession to legal aid services cannot be underestimated in terms of its impact on the development of similar funding commitments by the federal and provincial governments to enhanced funding. Nonetheless, the Canadian legal profession remains wary of salaried lawyers and continues to perpetuate a rather narrow perspective on legal aid services as confined to individualized claims handled as far as possible by lawyers in a similar fashion to those of their private clientele. Two recent studies, one by the federal government and one by the Canadian Bar Association, have acknowledged that legal aid has become a component of the social services network in Canada and that such services

<sup>33</sup> Canadian Bar Association National Legal Aid Liaison Committee, *The Provision of Legal Aid Services in Canada* (1985) at 1.

are provided by the public sector as well as the private sector and generally at a lesser cost. The analysis of federally-funded services by the Neilson Task Force creates a cost-effectiveness back-drop to contemporary discussions of legal services. While recognizing the commitment of federal resources to legal aid, the Report is written in the minor key of "restraint":

The justice system is at a turning point for a wide variety of reasons. Principally these have to do with the stresses inherent in operating overburdened, costly institutions in times of restraint, and the advances that have been made in making the law and the institutions that give effect to it more reflective of the principle of social equity.<sup>34</sup>

I will return to the question of restraint and its impact on legal aid services, but let us briefly examine the legal aid structure that has been erected by the provinces with considerable financial assistance from the federal government during the last two decades. In 1984-85, \$182.1 million, or \$7.22 per capita, was expended on legal aid. On an inflation-adjusted basis, the national per capita expenditure on legal aid declined slightly in 1984-85, following minimal increases in the two previous years.<sup>35</sup> Per capita expenditures on legal aid vary significantly from province to province, with Quebec at \$9.17 having the highest provincial per capita expenditure, and Prince Edward Island having the lowest, with a per capita expenditure of \$1.55.<sup>36</sup> As well, the fluctuation in provincial legal aid expenditures varies from year to year. The national per capita expenditures decreased by 3% during 1984-85 on an inflation-adjusted basis; the most notable decreases were reported in New Brunswick (down 14%), Ontario and Manitoba (both down 6%), and British Columbia (down 10%).

Although the provinces are charged with responsibility for the administration of justice—a fact that has allowed a diversity of legal aid plans to develop in Canada—the federal government has a growing financial investment in legal aid plans. Commencing in the early 1970s, the federal government agreed to fund approximately 50% of criminal legal

34 Note 4, above, at 11.

35 Statistics Canada, *Legal Aid in Canada* (1985) Figure 4, at 129. In constant dollars, per capita expenditures on legal aid rose from \$7.19 in 1981-82, to \$7.36 in 1982-83, to \$7.43 in 1983-84, to fall back to \$7.22 in 1984-85.

36 *Ibid.* Figure 3, at 129. 1984-85 per capita expenditures on legal aid ranged from Eastern provincial lows of: P.E.I., at \$1.55; Newfoundland, at \$2.43; New Brunswick, at \$2.81; and Nova Scotia, at \$4.12; to Central Canada, above the national average, with Quebec, at \$9.17; Ontario, at \$7.77 and Manitoba, at \$7.79; and the Prairie Provinces slightly below the national average with Saskatchewan, at \$5.85; Alberta, at \$4.90 and British Columbia, at \$5.76.

expenditures.<sup>37</sup> As the cost of legal aid has escalated, the provinces have expressed dissatisfaction with the criminal legal aid cost-sharing formula, which has seen the federal contribution fall to approximately 46% of national criminal legal aid costs.<sup>38</sup>

The costs of civil legal aid are shared under the Canada Assistance Plan (C.A.P.) as an "item of special need," provided to persons defined as "needy" under the "assistance" provisions of the scheme. C.A.P. has become a vehicle for underwriting the cost of provincial legal aid programs on an open-ended basis, resulting in substantial financial advantages to participating provinces.<sup>39</sup> The funding of civil legal aid under C.A.P. was approximately \$22 million in 1985.

The tension over funding and the rising costs of legal aid may have temporarily abated pending renegotiation of the federal-provincial cost-sharing agreement in 1990, as well as the reduced emphasis on "cost per case" by the federal government. But the current arrangements remain in conflict with each other. The federal-provincial agreement with respect to criminal legal aid attempts to impose minimum standards concerning representation in criminal matters and has been criticized for its ineffectiveness in this regard and for setting ceilings on the federal contribution. The Canada Assistance Plan's funding of civil legal aid was established by the Federal Department of Health and Welfare and has been criticized for having no ceiling and no minimum standards.<sup>40</sup> The

37 Note 4, above, at 198-200. Federal-provincial agreements respecting the provision of criminal legal aid have been in place since 1972-73. Essentially, the agreements require the "provincial agency" to provide legal aid to eligible applicants in all serious criminal cases, that is, in all indictable offenses or in summary conviction matters where there is likelihood of imprisonment or loss of means of earning a livelihood. Criminal legal aid costs delivered by the provinces have grown from \$11 million in 1973-74, to approximately \$90 million in 1985-86.

38 The provinces seek 50/50, open-ended cost-sharing in all areas of legal aid on the view that the federal government should "share the risk" in meeting the demand for legal aid services created by the mandatory coverage requirements in the federal-provincial agreement.

39 Note 33, above, at 20. The Report notes the open-ended basis of the C.A.P. funding of civil legal aid and expresses concern about the open-ended funding of provincial civil legal aid without any significant increase in service.

40 *Ibid.*, at 20. The Report underlines that there are currently three standing legal aid cost-sharing arrangements between the provincial and federal governments: the adult criminal and Young Offenders Act agreement negotiated by the Federal Justice Department with the Provincial Ministries of the Attorney General; the Canada Assistance Plan (C.A.P.), under which the Federal Department of Health and Welfare has agreed to share the cost of civil legal aid provided to those qualifying under provincial social welfare eligibility criteria.

legal profession has queried whether, in responding to the federal funding priorities, the provincial legal aid schemes have set their priorities based on federal funding rather than on quality of services or community needs:

In responding to this confusion, some provinces have had to cut corners, limit coverage and distort priorities in order to enhance or protect federal recoveries. If services are to be cut, they will tend to be where there are no minimum standards; if services are to be added, they will tend to be where there are no payment ceilings.<sup>41</sup>

The recent study of the National Legal Aid Liaison Committee of the Canadian Bar Association, *Legal Aid Delivery Models: A Discussion Paper*, attempts to clarify the ongoing debate in Canada concerning the cost of legal aid. The paper's authors are critical of those studies that compare provincial schemes on a "straight-cost" basis. Concern is expressed that a straight-cost analysis of judicare or staff lawyer models ignores the significant question of quality:

The flip side of cost is quality. Without holding quality constant across cases, cost differences reflect little more than differences in quality. For example, in a staff lawyer model, one can crank up the caseload per lawyer, with an attendant drop in quality, and produce lower costs per case. Equally, in a judicare model, one can depress the tariff, thereby reducing costs and likely also quality.<sup>42</sup>

As with most legal aid systems in industrialized states, provincial legal aid services in Canada are oriented toward representing clients involved with the courts, and an attempt is made by most plans to compare the legal aid recipient with the fee-paying client in determining whether services should be given. In fact, legal aid schemes have continued to ignore the differences between recipients of legal aid services and more typical users of the legal system and have refused to acknowledge that "poor people are not just like rich people without money" and that their socio-legal problems are distinct.<sup>43</sup>

In two provinces, New Brunswick and Alberta, legal aid is delivered exclusively by the judicare model, where all criminal and civil legal aid services are delivered by private lawyers and the plans are administered by a committee or board reporting to the provincial law society. In contrast, Saskatchewan, Nova Scotia, and Prince Edward Island are at the other

41 *Ibid.*, at 20-21.

42 Note 29, above, at 33.

43 See Wexler, "Practicing Law For Poor People" (1970) 79 Yale L.J. 1049.

end of the legal aid spectrum, with virtually all legal aid provided by salaried lawyers.<sup>44</sup>

In the other provinces, various forms of the mixed delivery system have developed. These models of legal aid have become known as "the Canadian compromise" because of their mixing of the English judicare with the American community-based salaried lawyer system. Judicare is the dominant aspect of the mixed delivery model in Manitoba and British Columbia, while in Quebec and Newfoundland, the proportions are reversed with 60 to 70% of legal aid cases handled by staff lawyers.<sup>45</sup> Ontario has a successful mixed delivery system, combining the judicare and clinic models of service. Although it initially opposed community-based clinics with salaried lawyers and a more broadly based welfare rights agenda, the profession in Ontario has gradually come to accept the concept. There are over 60 clinics in Ontario, operating with many of the features of the original American welfare rights model of legal services. Some of these clinics provide specialized legal services or serve specific constituencies such as the elderly, tenants, or younger people. Community-elected boards of directors have some authority to set both case criteria and eligibility standards for their clinics, allowing the clinics to move beyond a totally service-dominated program and to attempt to achieve a more reform-oriented approach to the provision of legal services. As an auxiliary to the established judicare scheme, the Ontario clinics have generally developed a more strategic approach to legal services, and in many instances have moved beyond a service model to become involved to some extent in community education, community development, and some significant law reform litigation.

44 In these provinces, private lawyer participation is generally restricted to mandated choice of counsel required in capital cases and occasionally in conflict situations. Saskatchewan and Nova Scotia have plans administered under a public legal aid commission, dominated by government appointees, whereas P.E.I.'s plan is administered through its Department of Justice.

45 In Manitoba and British Columbia, a mixed delivery system of judicare and staff lawyers exists, with 70 to 75% of the cases handled by private lawyers. The B.C. model reflects its historical and structural origins in a carefully balanced merger of the Legal Aid Society and the Legal Services Society of British Columbia. The Manitoba scheme has evolved in response to the changing political scenery of the province. The Legal Services Commission of British Columbia is evenly balanced between Law Society and government nominees, whereas Manitoba's plan, under the N.D.P. provincial government, had government nominees predominate.

Quebec's mixture of cases handled by salaried and private lawyers is an outgrowth of the plan's emphasis on salaried lawyers working in local and regional bureaux. Newfoundland's mixture appears to have resulted from financial factors. See *Legal Aid Delivery Models: A Discussion Paper*, note 29, above, at 16-18.

Much of the recent academic literature as well as professional and government analysis has focused on a comparison of the various models of legal services. Much of this literature has tended to be defensive or argumentative, and very little sophisticated analysis has emerged. Yet it is possible to state that a consensus seems to be emerging in favour of the mixed delivery model. The 1985 Canadian Bar Association National Legal Aid Liaison Committee Report, "Patterns in Legal Aid," noted that "in equivalent cases, staff lawyers generally provide similar services for less." This has been confirmed by provincial studies in Nova Scotia, Quebec, and British Columbia.<sup>46</sup>

A recent evaluation study of Manitoba legal aid found that, on average, for most family cases, *judicare* lawyers take 50% longer. In criminal cases, private practitioners take as much as 200% longer than their staff lawyer counterparts.<sup>47</sup> The disparities are particularly noticeable in the first quartile of case costs, with the staff lawyers' average being approximately one-quarter of the cost of the private bar, which fact provoked the evaluator to recommend changing the tariff structure to minimize the incentive to maximize time.<sup>48</sup> It should be noted that the Manitoba study deals

46 The British Columbia Study, *Burnaby Evaluation, Report III* (1981), analyzed the cost of delivering criminal legal services under a salaried public defender system and concluded that there is little difference in per unit cost of services whether provided by salaried lawyers or through fee-for-service using lawyers in private practice. In contrast, The Quebec study, *Evaluation de l'Aide Juridique* (1982), confirmed the cost-effectiveness of the salaried model, which handled over two-thirds of the case load.

*The Nova Scotia Legal Aid Evaluation Report* (1983) at 277, found that the average cost per case during 1981-82 was 143% higher for cases referred to the private bar than for those taken by staff lawyers. This example, however, illustrates some of the problems that arise from this kind of comparison. For one thing, it gives no indication of what kind of cases were referred, which could have a significant impact on the actual case cost. Furthermore, only 2% of the cases were referred to private lawyers, thus rendering the two models virtually incomparable. See *Legal Aid Delivery Models: A Discussion Paper*, note 29, above, at 35.

47 Sloan, *Legal Aid in Manitoba: An Evaluation Report* (1987) at 211-219 and 82-86. Manitoba's evaluation found that clients who were self-described "winners" rate private Bar lawyers more highly than staff lawyers on quality-of-service indicators, while "losers" were less critical generally of their staff lawyers than they were of their private Bar counterparts.

48 This differential was evaluated, *ibid.*, at 202, by referring to the different attitude of private lawyers who were perceived to have a tendency to "hand-hold" their clients, taking care of even their non-legal needs, thus engaging in "strategic billing" by treating the tariff as a minimum bill:

In the consultation phase, lawyers indicated that appeasing clients and keeping them calm resulted both in satisfaction on the part of the client and in a better representation. ... [I]t is being suggested here that "babysitting" or "hand holding" of clients is an inherent ingredient in private practice, but is a less common feature of the practices of staff lawyers.

exclusively with high-volume cases, comprising 55% of the total caseload. The differential for low-volume cases appears to be more modest.<sup>49</sup>

Recent legal aid evaluations have begun to grapple with the question of the quality of legal aid services, recognizing that the cost-effectiveness debate becomes a digression from the crucial discussion of the democratization of legal services and the provision of appropriate legal services to respond to the socio-economic needs of underprivileged and low-income persons. Mary Jane Mossman wrote several years ago that,

To an extent, the focus on the cost-effectiveness has distracted from, rather than contributed to a better understanding of legal aid objectives. Thus, rather than questioning decisions about equality objectives or the appropriate approaches to providing legal aid services, most legal aid efforts have been directed to assessing models of delivering such services; and because both salaried and private practice lawyers provide essentially similar services, the focus on cost-effectiveness has been directed very narrowly indeed.<sup>50</sup>

There is no doubt that the quality and models of legal services remain significant issues for the funders and providers of legal services. An holistic analysis of legal aid services would obviously attempt to ascertain the attitude of the public and the communities served with respect to these issues. Such analysis is only currently beginning to develop.<sup>51</sup>

## 5. CONCLUSION

In examining the significant recent developments in Canada with respect to access to justice, it becomes clear that issues of quantity and quality are inevitably in tension and that similar tensions have been carried forward to the more recent development of pre-paid legal services. We find limited evidence that concern for community needs or the principles articulated for the justice system by the Zuber Report have permeated

49 Note 29, above, at 46-47. It is particularly in high-volume cases that the staff lawyer has an opportunity to take advantage of the economics of specialization. The average experience for staff lawyers in Manitoba is nine years in practice, thus giving ample opportunity to develop specialized knowledge and experience. This advantage is magnified by the fact that staff casework is divided by department into areas of expertise.

50 Mossman, "Legal Aid in Canada" (unpublished paper presented to the 7th International Congress on Procedural Law at Würzburg, 1983) at 56.

51 The proposed evaluation of the Ontario Legal Aid Plan should give considerable insight into the *judicare* side of the plan. Unfortunately, very little research is being conducted in the first evaluation of the Ontario plan to allow for real comparison between the clinics and private bar.

The author is currently conducting a qualitative study of four Ontario community-based legal clinics that analyzes the clinics' case work, law reform, and community development work in terms of their impact on their particular community.

the Canadian legal profession. The uneasy partnership that has existed between government and the legal profession with respect to legal aid and other new models of legal services continues. Though committed to expanding government-funded legal aid, the profession provides only limited *pro bono* services in an organized fashion, with British Columbia being the exception to this generalization.

Despite concerns expressed about motivation, the ongoing support of legal aid services by the Canadian legal profession has stimulated the growth of federal and provincial funding. Today, the profession is active in virtually all aspects of the development and administration of legal aid. Within *judicare* jurisdictions, most regions have area committees that are composed primarily of volunteer members, generally lawyers, who set policy and deal with appeals. The provincial base of legal aid and the active involvement of the provincial law societies has meant that the profession has been vigilant about government's attempts to restrict funding or to re-organize legal aid services. Canadian lawyers are committed to the various models of legal aid that are subsidized by government and would tolerate neither an attempt to dismantle the existing programs nor a massive reduction of government funding, as was seen in the United States in the early 1980s. Questions regarding the services that should be handled by the developing access to justice schemes and the appropriate model or models of legal services are far from settled. Debate as to whether we should encourage private practitioners to provide the legal services for previously unserved members of Canadian society or whether we should opt rather for the staff-and-clinic model of legal services continues in light of government concern about escalating costs. Although some balance appears to be developing between these extremes, tensions remain between the goals of individual clients and a broad social justice agenda. As we move forward into the era of the Charter and the implications of its provisions, the issues of communal justice and social inequality cry to be addressed. Canadians must clarify the role of a responsive, fully funded, and expeditious justice system that is accountable to the Canadian public within the contemporary welfare state.