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# Can Ontario Sustain Cadillac Legal Services?

Frederick H. Zemans  
& Lewis T. Smith\*

## I. INTRODUCTION

Recently described in the *American Lawyer* as Canada's Cadillac legal services,<sup>1</sup> the Ontario legal aid scheme—Canada's first and today its most costly—is in serious need of repair.<sup>2</sup> This paper, which grows out of a presentation made by Robert Holden, Director of the Ontario Legal Aid Plan, describes both the introduction of legal aid services in Ontario and the evolution of the original pro bono scheme into a government-funded *judicare* scheme.<sup>3</sup>

It is not surprising that in 1952, when contemporary legal aid was introduced into Canada, both the bar and government of Ontario looked to the United Kingdom for direction. In fact, Canadian legal culture was still dominated by British jurisprudence, legal institutions, practice, and legislation.<sup>4</sup> It is much more

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The writers wish to express their appreciation to Robert Holden who spoke on this topic at a conference on Legal Services to the Poor in Other Countries—A Comparative Review, held at the University of Maryland School of Law on April 14, 1993. The opinions and conclusion in this article are solely those of the authors.

<sup>1</sup> William W. Horne, *Canada's Cadillac*, *AM. LAW.*, Jan.-Feb. 1993, at 62.

<sup>2</sup> The Quebec legal aid plan was recently described as a slightly rusty Cadillac. Julie Latour, *L'aid juridique au Quebec: une Cadillac un peu rouille* . . . , *NATIONAL*, Aug.-Sept. 1994, at 27.

<sup>3</sup> We have drawn on both Mr. Holden's research as well as a recent evaluation study of OLAP which was funded by the Federal and Ontario governments. Unlike Quebec, Ontario has provided limited comparative data which would allow for an effective analysis of the two models of legal aid developed within Ontario.

<sup>4</sup> Appeals to the Privy Council in London from the Supreme Court of Canada were not abolished until 1949.

surprising that when in the 1960s, Ontario re-examined legal aid, the fascination with British models, specifically English legal aid endured, and Ontario chose to emulate the British *judicare* system providing “eligible” citizens with legal aid certificates which they could present to private practitioners to represent them in civil or criminal matters. (The Scottish duty counsel system was also included in Ontario’s model criminal legal aid scheme.) Clearly and conspicuously ignored were developments much closer to home—the American storefront legal clinics.

After an overview of the various legal services systems in Canadian provinces, this paper discusses briefly the development of the clinic movement in Ontario and examines the profession’s continued opposition to both salaried lawyers and client and community involvement in administering legal aid, focusing on developments in legal aid services and funding in the late 1980s and early 1990s. It also discusses the control exercised by the Ontario legal profession and the profession’s commitment to private sector legal services in the face of significant government intervention in Canadian medical services. We conclude with a call for a thorough analysis of the Ontario mixed delivery system and for an independent assessment of which model of legal aid services would best serve Ontario’s citizens in the 1990s.

## II. THE CANADIAN LANDSCAPE

Canada is a federal nation divided into ten provinces and two territories. The governments of these jurisdictions share power with a central government in accordance with a written constitution that assigns specific powers to each level of government. The constitution allocates power over “The Administration of Justice” to the provincial governments.<sup>5</sup> That power extends to the provision of legal aid services.<sup>6</sup> Thus, the constitutional authority for legal aid plans is based upon a view of legal aid as an element of the justice system rather than as a social benefit. Although higher courts have not ruled on the issue, there is no suggestion in Canadian case law that there is any constitutional right to state-provided legal representation in civil matters for those who could not otherwise afford to retain a lawyer.<sup>7</sup>

As a result of provincial jurisdiction over legal aid, Canada’s twelve distinct legal aid systems offer an ideal situation in which to study the relative merits of various

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<sup>5</sup> Constitution Act, 1867, 30 & 31 Vict., ch. 3, § 92(14) (Can.).

<sup>6</sup> *See* *R. v. Happeney*, 2 N.B.R.2d 699, 12 D.L.R.3d 538 (S.C.A.D. 1970).

<sup>7</sup> *Cf. Mireau v. Canada*, 96 Sask. R. 197, 30 A.C.W.S.3d 981 (Q.B. 1991) (denying applicant government-funded counsel of his choice to pursue an appeal).

approaches to the delivery of legal services. The major distinction in Canadian delivery models is whether services are provided by lawyers in private practice or by salaried lawyers. Salaried lawyers may practice in legal clinics or as staff of a provincial legal aid plan. The twelve different systems in Canada provide examples of civil legal aid systems which rely on pure private lawyer models, pure staff models, mixed private lawyer/staff models, and mixed private lawyer/clinic models.

The provinces of Alberta and New Brunswick use the private lawyer model exclusively. Private lawyers provide both civil and criminal services under plans administered by bodies reporting to the provincial law societies.<sup>8</sup> In 1991-92, Alberta's legal aid expenditures totalled \$26 million, or \$10.23 per capita.<sup>9</sup> The corresponding figures for New Brunswick were \$4.2 million and \$5.81.<sup>10</sup> The Yukon Territory, which uses a similar private lawyer delivery model, spent \$999 thousand, or \$36.74 per capita.<sup>11</sup>

In Saskatchewan, Nova Scotia, and Prince Edward Island, the staff model is used. Salaried lawyers employed by the provincial legal aid plans provide all legal services except in certain serious criminal cases and in conflict of interest situations.<sup>12</sup> The Saskatchewan and Nova Scotia plans are operated by public commissions, while Prince Edward Island's plan is operated by the provincial Department of Justice. In 1991-92, Saskatchewan's total legal aid expenditure was \$7.6 million, or \$7.71 per capita; Nova Scotia spent \$10.7 million, or \$11.86 per capita;<sup>13</sup> and Prince Edward Island spent \$488 thousand, or \$3.77 per capita.<sup>14</sup>

Manitoba, British Columbia, Quebec, and Newfoundland use a mixed model which combines the staff and private lawyer methods of service delivery. In Manitoba and British Columbia, seventy to seventy-five percent of cases are dealt

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<sup>8</sup> See NATIONAL LEGAL AID LIAISON COMMITTEE, CANADIAN BAR ASSOCIATION, LEGAL AID DELIVERY MODELS: A DISCUSSION PAPER 16 (1987) [hereinafter DELIVERY MODELS].

<sup>9</sup> CANADIAN CENTRE FOR JUSTICE STATISTICS, STATISTICS CANADA, RESOURCE AND CASELOAD STATISTICS FOR LEGAL AID IN CANADA, 1991-1992, tbl. 4 at 38-41 (1993) [hereinafter RESOURCE AND CASELOAD STATISTICS].

All figures are in current Canadian dollars. In the fall of 1994, the exchange rate was \$1 U.S. to approximately \$1.37 Canadian.

<sup>10</sup> *Id.* at 38.

<sup>11</sup> *Id.* at 40, 44. The Yukon Territory is one of Canada's two northern territories (the Northwest Territories is the other). The high per capita expenditure in these territories is due, in part, to the expense of providing services to a small population spread throughout a large, mainly roadless, geographic area.

<sup>12</sup> DELIVERY MODELS, *supra* note 8, at 16.

<sup>13</sup> RESOURCE AND CASELOAD STATISTICS, *supra* note 9, at 38.

<sup>14</sup> *Id.*

with by private lawyers.<sup>15</sup> Total legal aid expenditures in 1991-92 were \$14.9 million, or \$13.62 per capita in Manitoba<sup>16</sup> and \$65.5 million, or \$20.14 per capita in British Columbia.<sup>17</sup> In Newfoundland and Quebec, sixty to seventy percent of cases are handled by the staff system.<sup>18</sup> In Newfoundland, total legal aid expenditures in 1991-92 were \$5.8 million, or \$10.10 per capita.<sup>19</sup> Quebec's total legal aid expenditures in 1991-92 were \$105.3 million, or \$15.32 per capita.<sup>20</sup>

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<sup>15</sup> DELIVERY MODELS, *supra* note 8, at 16-17.

<sup>16</sup> RESOURCE AND CASELOAD STATISTICS, *supra* note 9, at 39.

<sup>17</sup> *Id.* at 40.

<sup>18</sup> DELIVERY MODELS, *supra* note 8, at 16-17.

<sup>19</sup> RESOURCE AND CASELOAD STATISTICS, *supra* note 9, at 38.

<sup>20</sup> *Id.* at 39.

While the bulk of this paper focuses on Ontario, some comments about Quebec's mixed staff and private lawyer plan are useful for comparison. Quebec's staff plan is organized on a decentralized basis in which regional legal aid corporations function as relatively autonomous entities with some support and supervision from the Commission des services juridiques, a provincially-appointed body. See Legal Aid Act, R.S.Q., ch. A-14 (1977) (Can.). Each regional corporation is overseen by a board of directors and is administered by a general manager. *Id.* at §§ 35, 46-47. Lawyers and notaries are employed on a full-time basis by the regional corporations to determine the eligibility of applicants and to provide legal services, both advice and litigation. Total expenditures were \$105.3 million with a combined civil and criminal caseload of just under 299 thousand in 1991-92. See Jacques Frémont, Reassessing the Mixed Legal Aid Model in Quebec (Apr. 1994) (unpublished manuscript, presented at the International Conference on Legal Aid, The Hague and Amsterdam, the Netherlands, on file with authors). Generally, the same services are available from both the staff and private components of the plan.

Since its establishment, Quebec's legal aid system has slowly changed from a staff system supplemented by private lawyers to a system divided more or less evenly between staff and private lawyers. In the early years, the staff component handled more than 70% of civil and criminal legal aid cases. In the 1980s, the percentage of legal aid cases handled by private practitioners grew to nearly 40%, and by the 1992-93 fiscal year, private practitioners accounted for 45% of all legal aid cases. During the economic downturn between 1990 and 1993, the overall legal aid caseload increased by 14.5%, or 35,000 cases; almost all of that increase was dealt with by the private sector.

There is a clear trend, beginning in the mid-1980s, of an increasing number of Quebec lawyers deriving a substantial portion of their incomes from legal aid work, which indicates that a specialized private sector legal aid bar has developed in the province. Frémont writes:

An examination of the revenues generated by private practitioners from legal aid sources is also revealing. . . . while for the vast majority of professionals accepting legal aid mandates, revenues count for little, one can notice a trend, since the mid-eighties, of a growing number of lawyers deriving an important or very important part of their professional revenues from legal aid sources. In 1992-93, for instance, 15% of the participating private practitioners earned more than \$25,000 from legal aid sources; two lawyers earned more than \$300,000 while nine other made between \$200,000 and \$300,000!

These figures suggest the emergence, in the last ten years, of a legal aid-dependent bar amongst the legal profession in Quebec, despite the fact that most lawyers consider the fee schedule under which they are paid as ridiculously low and that more than a few simply refuse to accept legal aid mandates for that very reason.

Frémont, *supra*, at 7.

The varying mixtures in service delivery are the result of different historical, political, financial, and policy factors of the four provinces.<sup>21</sup>

Ontario and the Northwest Territories use a mixed model which combines private lawyer and clinic delivery methods. In both cases, the clinic component, which uses salaried lawyers employed by relatively autonomous legal clinics, was added to what was initially a pure private lawyer system.<sup>22</sup> In 1991-92, Ontario spent \$267.7 million, or \$26.85 per capita on legal aid.<sup>23</sup> Figures for the Northwest Territories' expenditures were \$4.9 million, or \$89.66 per capita.<sup>24</sup> A comparison of civil legal aid expenditures by province is shown in table 1 below.

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Because of its relatively even caseload split between private and staff lawyers, and because of its lack of significant differences in the types of services provided by each sector, the Quebec legal aid system is well-suited to a comparison of cost efficiency between private and staff delivery systems. It should be emphasized that the Quebec system has remained quite inexpensive on a per file basis; 1990-91 figures show that 25% of the cases cost less than \$100 and 85% less than \$500. Merely 4.3% of the cases cost more than \$800. See DELIVERY MODELS, *supra* note 8, tbl. 16 at 179.

The average cost per file for staff lawyers was \$207 in 1990-91. This figure includes all overhead and administrative expenses except the \$55 cost of determining eligibility for legal aid. In the same period, the average cost per legal aid file in the private sector was \$285, a difference of 37%. This difference implies that significant cost savings are possible under a staff lawyer system. Unfortunately, since the province does not report specific figures for civil cases, it is impossible to make cost comparisons between civil legal services provided by private and staff lawyers and between civil legal services in Quebec and in other jurisdictions.

The Quebec legal aid system, as with most social welfare schemes, has been under closer scrutiny during the early 1990s. Although there has been little analysis of the impact of legal aid services on poverty, or for that matter on the low income citizens of Quebec, the Quebec model was closely analyzed in an access to justice report undertaken by Dean Roderick MacDonald of McGill Law School. See QUEBEC (GOVERNMENT DU) MINISTERE DE LA JUSTICE, GROUPE DE TRAVAIL SUR L'ACCESSIBILITE A LA JUSTICE (GROUPE DE TRAVAIL MACDONALD), L'ACCESSIBILITE A LA JUSTICE: JALONS POUR UNE PLUS GRANDE ACCESSIBILITE A LA JUSTICE 74 (1991) (examining the broad question of access to justice in Quebec). The study stressed that the existence of a form of competition between salaried lawyers and private practitioners was a positive factor and that the public or salaried aspect of legal aid helps to generate legal expertise in areas such as unemployment insurance, welfare, and youth law. This study also recommended that the mixed system be maintained and that clients have the freedom to choose their lawyer or notary. *Id.* at 74 recommendation 19.

<sup>21</sup> DELIVERY MODELS, *supra* note 8, at 16-17.

<sup>22</sup> *Id.* at 17.

<sup>23</sup> RESOURCE AND CASELOAD STATISTICS, *supra* note 9, at 39.

<sup>24</sup> *Id.* at 40. As mentioned *supra* note 11, the high per capita cost is a reflection of the large geographic territory with limited means of access and a small population dispersed all across the area.

Table 1. 1992 Civil Legal Aid Expenditures by Province<sup>25</sup>

Province	Civil Legal Aid Expenditure (\$ thousands)	Population (thousands)	Per Capita Expenditure (\$)
Quebec	not available	6,873.5	—
Northwest Territories	not available	55.2	—
Yukon Territory	\$184	27.2	\$6.76
Prince Edward Island	191	129.5	1.47
New Brunswick	800	726.5	1.10
Saskatchewan	2,526	992.1	2.55
Newfoundland	2,652	574.4	4.62
Nova Scotia	5,038	904.9	5.57
Alberta	5,206	2,539.3	2.05
Manitoba	6,044	1,093.8	5.53
British Columbia	27,306	3,249.4	8.40
Ontario	114,371	9,969.7	11.47
<b>CANADA TOTAL</b>	<b>\$164,318</b>	<b>27,135.5</b>	<b>\$6.06</b>

With this brief overview in mind, the following sections look closely at the history, organization, and relevant statistics of the Ontario Legal Aid Plan.

### III. ONTARIO: SOME BACKGROUND

Ontario is Canada's largest province by population, with nearly ten million residents. Traditionally, the province has been the economic engine of the country; however, its industrial base has suffered heavily during the last five years in the face of increased international competition during a period of recession and stagnant growth. Social programs have been inundated with the victims of the resulting plant closures and lay-offs. Many lawyers have suffered during this period because of reduced economic activity, especially in real estate conveyancing and corporate transactions.<sup>26</sup> However, a dramatic increase in demand for legal aid services,

<sup>25</sup> The figures in this table are for the fiscal years ending in 1992. These figures do not include the central administrative expenses of each plan. The table is based upon data from *Resource and Caseload Statistics* table 5 at 47-50 and table 4 at 38-41. Data for Quebec and the Northwest Territories civil expenditures are not included in the Canadian totals because of unavailability.

<sup>26</sup> Although lawyers in all areas of legal practice were affected by the severe recession of the early 1990s, the recession was particularly harsh on individual practitioners and lawyers in smaller law firms dependent

particularly in the immigration and family law areas, has moderated the impact of economic pressures on the legal profession. Since 1990, the province has been governed by the New Democratic Party, a party toward the left of Canada's political spectrum with, historically, strong ties to organized labor. The New Democratic Party inherited a large provincial debt and a series of budget deficits which have prevented the party from engaging in any significant social program initiatives.

The legal profession in Ontario is self-regulated through the Law Society of Upper Canada, which derives its authority from the *Law Society Act*.<sup>27</sup> The *Legal Aid Act* empowers the Law Society to establish and administer a legal aid plan and specifies the basic structure and operation of the plan.<sup>28</sup> Regulations made under the *Legal Aid Act* provide more detailed rules and prescribe fees for the provision of legal services by private lawyers.<sup>29</sup> Unlike most common law jurisdictions, Ontario and most other Canadian provinces supply both civil and criminal legal aid services through the same system. Civil services are those which do not relate to federal criminal offenses or provincial statutory offenses.

#### IV. ONTARIO LEGAL AID: A HISTORY

##### A. *The Early Years*

Until 1951, Ontario had no organized system of civil or criminal legal aid.<sup>30</sup> A portion of the "deserving" poor received services on a pro bono basis from some lawyers. As well, lawyers were periodically willing to represent an impecunious plaintiff in an action expected to yield large damages. In 1948, prompted by the report of England's Rushcliffe Committee and by the subsequent movement toward a legal aid plan in that country,<sup>31</sup> the Law Society appointed a committee to examine the creation of a legal aid plan in Ontario. The committee, chaired by R.M. Willes Chitty, concluded that Ontario should introduce a legal aid system similar to that recommended by the Rushcliffe Committee. The Ontario system would be operated by the Law Society and would use private lawyers to deliver

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on individual transactions and personal litigation. Many of these individual practitioners educated themselves in areas of legal aid practice to broaden their economic base.

<sup>27</sup> R.S.O., ch. L-8 (1990) (Can.).

<sup>28</sup> R.S.O., ch. L-9 (1990) (Can.).

<sup>29</sup> See R.R.O., Reg. 710 (1990) (Can.).

<sup>30</sup> Unless otherwise noted, the history of the Ontario legal aid plan is taken from ABT ASSOCIATES OF CANADA, COMPREHENSIVE REVIEW AND EVALUATION OF THE ONTARIO LEGAL AID PLAN: PROJECT REPORT (1992) [hereinafter OLAP REVIEW].

<sup>31</sup> The Rushcliffe Committee delivered *The Report of the Committee on Legal Aid and Advice in England and Wales* in 1945, which resulted in the Legal Aid and Advice Act, 1949, 12 & 13 Geo. 6, ch. 51 (Eng.).



services to the poor. It was hoped by the committee that once the plan was established, the province could be persuaded to fund its operation.

### *B. The First Step*

As a result of the Chitty Committee's recommendations, the provincial government passed the *Law Society Amendment Act of 1951* to establish the province's first statutory legal aid plan.<sup>32</sup> This legislation authorized 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>33</sup> Although this plan was similar to the British scheme, in that it was controlled by the legal profession, there were two significant differences. First, under the Ontario plan, services were provided by volunteer lawyers who were paid only for disbursements. The legal profession refused to concede that lawyers were unable to meet the legal needs of the poor without being paid for their services by the government. Second, the financial eligibility requirements of the Ontario plan prevented all but the most impoverished from receiving legal aid. Assistance was available for both civil and criminal matters. Most types of civil cases were covered except for defamation, breach of promise of marriage, and alienation of affection. The plan was managed at a local level by county and district law associations with funding for administrative expenses and disbursements provided by the provincial government.

### *C. The Creation of OLAP*

By the end of the 1950s the demand for legal assistance had outstripped the number of lawyers who volunteered their services to the plan. In 1963, the Ontario government appointed a committee, composed entirely of lawyers, to examine the existing legal aid system. Its report, presented in 1965, recommended the implementation of a *judicare* system modelled after the British plan and based upon the use of private lawyers paid according to a tariff schedule, administered by the Law Society and financed by the provincial government.<sup>34</sup> In 1966, the provincial legislature incorporated these recommendations in the *Legal Aid Act of 1966*,<sup>35</sup> which forms the basis of the modern Ontario Legal Aid Plan (OLAP or the Plan).

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<sup>32</sup> See R.S.O., ch. 207, § 52 (1960), *repealed by* S.O., ch. 80 (1966) (Can.).

<sup>33</sup> *Id.*

<sup>34</sup> MINISTRY OF THE ATTORNEY-GENERAL OF ONTARIO, REPORT OF THE JOINT COMMITTEE ON LEGAL AID (Mar. 1965).

<sup>35</sup> S.O., ch. 80 (1966) (Can.).

The resulting Plan was premised upon the belief that state-funded legal representation is a right of those who cannot otherwise afford a lawyer. Thus, the charitable elements of the earlier system were almost entirely abandoned. Lawyers who provided services were reimbursed according to a tariff, or prescribed schedule of fees. The actual amounts paid were reduced by twenty-five percent of the tariff as a notional contribution by the legal profession to the costs of the Plan.<sup>36</sup> OLAP was enthusiastically embraced by the profession, about one-half of which registered to participate.<sup>37</sup>

#### *D. The Clinic System*

Clinics were introduced in Canada later than in the United States.<sup>38</sup> The late introduction of community clinics into Canada was in part a reaction to the struggle in Ontario over the socialization of health care in the 1960s. The organized legal profession, after witnessing the government domination of the medical profession, resisted the introduction of community-based clinics that utilized salaried lawyers, fearing such changes would result in the usurpation of the independence of the profession. The profession remained committed to the British *judicare* scheme, which provided access to public money for their legal services without challenging the autonomy of the profession.

Despite initial opposition to community-based clinics and particularly to the concept of salaried lawyers, Ontario's experimental clinic, Parkdale Community Legal Services, flourished and the provincial Attorney-General's office looked seriously at the establishment of permanent funding for clinics.<sup>39</sup> In 1974, in

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<sup>36</sup> In 1985, a report on the tariff, prepared for the Attorney-General and the Law Society, recommended that fee levels be increased significantly and that the 25% fee reduction be abolished. The resulting tariff increases reversed a long decline in real hourly rates paid to lawyers doing certificate work. The 25% fee reduction was replaced with a 5% reduction, which ostensibly reflects the fact that lawyers will have no bad debt experience with OLAP billings. As well, the Law Society now imposes an annual levy on all lawyers which is used to finance OLAP's administrative costs.

<sup>37</sup> In recent years, a much smaller percentage of the profession actually provided legal aid services.

<sup>38</sup> Influences on the early American legal services movement include the writings of Edgar S. & Jean Camper Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970) and Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970). For more recent discussion of, and influences on, American legal services see Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474 (1985); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narratives*, 100 YALE L.J. 2107 (1991); GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Carrie Menkel-Meadow, *Legal Aid in the United States: The Professionalization and Politicalization of Legal Services in the 1980's*, 22 OSGOODE HALL L.J. 29 (1984).

<sup>39</sup> Parkdale Community Legal Services (PCLS) was established in a low income community of downtown Toronto by Osgoode Hall Law School in partnership with the Parkdale Coalition in July

response to pressures to fund the growing number of community clinics, the Attorney-General appointed the Task Force on Legal Aid to consider both the utility of community-based clinics and to evaluate legal aid generally. This Task Force prepared the *Osler Report*. There were seventeen community-based clinics in existence when the *Osler Report* was released. The early clinics operated entirely independently of the existing judicare plan; this meant complete financial independence from OLAP. There was an acute concern that the momentum developed since the creation of Parkdale Community Legal Services in 1971 would be lost if sustained financial support was not forthcoming from the province. The *Osler Report* vigorously supported the development of a mixed legal aid system in which the judicare model would be supplemented by community clinics. The report also recommended that OLAP cease to be administered by a committee of the Law Society.<sup>40</sup>

In 1976, a new regulation under the *Legal Aid Act*, specified that OLAP was to fund an “independent community based clinical delivery system”; this established funding for twenty-two clinics, including specialty clinics dealing with environmental law, injured workers, and residential tenants, as well as a number of general services clinics.<sup>41</sup> To be eligible for funding, the clinics had to meet two major requirements: they had to be controlled by a board of directors comprised of members elected from the community and both lawyers and community legal workers<sup>42</sup> had to work on a salaried basis.<sup>43</sup>

In 1978, another provincial inquiry into legal aid was appointed under the chair of Mr. Justice Samuel Grange. This inquiry was to examine the relationship between the clinics, OLAP, and the private bar.<sup>44</sup> The *Grange Report* resulted in the passage, in June 1979, of a new regulation on clinic funding. The regulation

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1971. PCLS was originally funded by the Federal Department of Health and Welfare. Similar demonstration clinics were created in Saskatoon, Saskatchewan; Halifax, Nova Scotia; and Montreal, Quebec through similar grants from the Federal Department of Health and Welfare.

<sup>40</sup> MINISTRY OF THE ATTORNEY-GENERAL OF ONTARIO, REPORT OF THE TASK FORCE ON LEGAL AID (1974) (Mr. Justice John Osler, Chair).

<sup>41</sup> R.R.O., Reg. 557 (1970) amended by R.O., 536 (1976) (Can.).

<sup>42</sup> In the 1970s, community legal workers were introduced into the Ontario clinics to bring both a non-professional and community perspective to the delivery of legal services. Community legal workers have become staff members of many clinics and their role differs from a paralegal who handles caseload to principally being involved in organizing low-income citizens and providing community education.

<sup>43</sup> R.O., Reg. 160, §§ 143-51 (1976) (Can.).

<sup>44</sup> MINISTRY OF THE ATTORNEY-GENERAL OF ONTARIO, REPORT OF THE COMMISSION ON CLINICAL FUNDING (1978) (Mr. Justice Samuel Grange, Commissioner) [hereinafter GRANGE COMMISSION REPORT].

provided that OLAP should fund “independent” community organizations to operate legal clinics, that the funded clinics should be accountable only “for the public funds advanced and for the legal competence of the services rendered,” and that they should be otherwise independent in terms of policy and administration.<sup>45</sup>

The new regulations that followed the *Grange Report* created the funding structure which is still in place. The Clinic Funding Committee was established, with responsibility both for setting policy and for overseeing the clinics funded by OLAP. It is composed of five members, three of whom are appointed by the Law Society and two by the Attorney-General. At least one appointee from each source must be “associated with a clinic.”<sup>46</sup>

Under the 1979 regulation, the clinics were mandated not only to provide traditional legal advocacy and casework, but also to “encourage access” to the legal system and to “provide services designed to promote the legal welfare of their communities.” The clinics’ traditional role continued to be fulfilled through the provision of legal help and representation in such areas as social benefits, workers’ compensation, employment rights, and debtor/creditor disputes. Specialty clinics provided services in such areas as landlord/tenant disputes, parole and sentencing, and environmental law, as well as serving the physically disabled, children, and the elderly.<sup>47</sup>

The philosophy of community control was incorporated in the clinic funding regulations of 1979. This was a very different premise than that which underlies the judicare scheme. By hiring specialists in the needed areas of services, working with the community, and making the clinic workers accountable to a community-based board of directors, the clinics were intended to make legal aid more responsive to the legal needs of the poor. Unfortunately, the clinic funding regulations’ provision for a board of directors drawn from the community has not had the effect of making legal aid services responsive to the needs of low-income communities. Although boards drawn from a clinic’s community are the formal agenda-setting bodies, they are influenced by a host of factors including OLAP, the Clinic Funding Committee, and the clinic staff.

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<sup>45</sup> See R.R.O., Reg. 575 (1980) (Can.).

<sup>46</sup> *Id.* § 150(2).

<sup>47</sup> See *id.*

Since clinics have been publicly funded through OLAP, there has been a shift in the staffing of the clinics. The proportion of staffing lawyers has increased, while the proportion who are community legal workers has decreased. This change has been encouraged by the funding policies of the Clinic Funding Committee as well as by the desire of community boards to emphasize individual legal services at the expense of law reform or community development.

## V. METHODS OF SERVICE DELIVERY

While private duty counsel and law schools provide assistance to a small, but significant, number of people, private lawyers and community clinics are the main methods of service delivery. Because, in general, private lawyers do not possess the poverty law expertise of clinic staff and do not serve the marginalized communities targeted by clinics, there is little overlap between the services offered by private lawyers and clinics. The resulting lack of competition between the two delivery methods may partially explain why the legal profession has tolerated the existence of the clinic system.<sup>48</sup> Nonetheless both judicare services and clinics have emphasized case by case legal services.

### A. *The Certificate System*

Ontario's certificate system is the largest element of OLAP, both in terms of caseload, which amounted to 109,436 new civil cases in fiscal year 1993, and expenditures, which amounted to \$93.8 million in the same period.<sup>49</sup> Under the certificate system, eligible applicants for legal aid are given a "certificate" entitling them to specified legal services. The certificate may be presented to any lawyer who, by becoming a member of one of the local legal aid panels, has indicated a willingness to accept legal aid work. Although a lawyer may refuse to take on a legal aid case in spite of a membership on a panel, a recent study indicates that most legal aid clients have little difficulty in finding a lawyer willing to accept their certificate.<sup>50</sup> Once the certificate is accepted by a lawyer, the lawyer provides the authorized services and bills OLAP according to the tariff when the work is complete. This bill is reviewed by OLAP staff and then payment is sent to the

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<sup>48</sup> In its report recommending expansion of the clinic system, the Grange Commission noted that the legal problems handled by clinic staff are generally peripheral to the practice of private lawyers. See GRANGE COMMISSION REPORT, *supra* note 44.

<sup>49</sup> LAW SOCIETY OF UPPER CANADA, 1993 ANNUAL REPORT OF THE ONTARIO LEGAL AID PLAN 32 (1994) [hereinafter 1993 ANNUAL REPORT]. OLAP's fiscal year ends March 31. Thus, figures for 1993 reflect the twelve month period ending March 31, 1993. The annual report for each year is typically available in the summer of the following year.

<sup>50</sup> OLAP REVIEW, *supra* note 30, at 86-87.

lawyer. In 1993, the average cost of a completed civil case, including both fees and disbursements, was \$1,189.<sup>51</sup>

For each service covered by OLAP, the civil legal aid tariff prescribes either a block fee, or an hourly rate combined with a maximum or minimum number of hours for which a lawyer may be compensated.<sup>52</sup> For example, the block fee for an uncontested divorce is \$400; for an uncontested adoption where a license is required, \$500; and for attendance at a small claims court trial where the amount involved is \$200 or less, \$84. The basic hourly rate is \$67. Examples of maximum and minimum hours are: four hours maximum for preparation of pleadings to institute a legal action, one hour minimum for attendance at a pre-trial conference, one hour minimum for attendance at a trial, thirty-five hours maximum for preparation for an appeal to the Supreme Court of Canada, and two hours maximum for preparing a will. Lawyers are also paid the actual amount of reasonable disbursements.

The block and hourly fees are increased by 12.5% for lawyers with four years of experience in civil litigation and by twenty-five percent for lawyers with ten years of experience in civil and criminal litigation, including at least four years of experience in civil litigation. As noted previously, the amount payable to lawyers is reduced by five percent as a notional contribution to the administrative expenses of the Plan. Further reductions are imposed on amounts payable to lawyers whose total OLAP billings for the year exceed certain defined limits. These reductions are based on a sliding scale and range from a ten percent reduction on billings between \$275,000 and \$300,000 to a sixty percent reduction on billings over \$350,000.<sup>53</sup> The certificate hourly rates, ranging from \$67 for the least experienced lawyers to \$83.75 for the most experienced, are significantly less than those which may be charged to private clients.<sup>54</sup>

Approximately one-third of all lawyers in private practice in Ontario participate in the certificate component of OLAP.<sup>55</sup> The average number of certificates (civil and criminal) issued per participating lawyer is 21.2.<sup>56</sup> A recent survey of participating lawyers showed that for approximately forty percent of them, civil and

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<sup>51</sup> See 1993 ANNUAL REPORT, *supra* note 49, at 32.

<sup>52</sup> See R.R.O., Reg. 710, sched. 3 (1990) *as amended by* R.O., Reg. 421 (1993) (Can.).

<sup>53</sup> These reductions are based on the total of civil and criminal billings. See *id.* § 99(5).

<sup>54</sup> Ontario's lawyers' fees approximate those charged by lawyers in comparable North American cities.

<sup>55</sup> 1993 ANNUAL REPORT, *supra* note 49, at 20. This includes both civil and criminal matters.

<sup>56</sup> OLAP REVIEW, *supra* note 30, at 85.

criminal certificate work represented less than ten percent of their total workload, while for approximately twenty percent, certificate work represented more than half of their workload.<sup>57</sup> Clearly, a large number of Ontario lawyers have become dependent on legal aid as a significant component of their income.<sup>58</sup> Of the 5,459 lawyers who billed the Plan in 1992, 40.5% received \$20,000 or more and 468 lawyers received over \$100,000.<sup>59</sup> Lawyers who participate in OLAP tend to be somewhat less experienced than those who do not take certificate cases. These lawyers typically work for much smaller firms, hold more junior positions, and earn lower incomes than other lawyers.<sup>60</sup> However, it is important to note that the average participating lawyer, while less experienced than some, has been in practice for about twelve years.<sup>61</sup>

### *B Clinics*

There are seventy-one clinics throughout the province; they employ 147 support staff, 170 lawyers, and 118 paralegals.<sup>62</sup> In fiscal year 1993, these clinics delivered services to over 266,000 clients at a total cost of \$31.4 million.<sup>63</sup> As discussed above, many clinics offer a wide range of services to their community including some specialized legal services.<sup>64</sup> Other clinics direct their services to particular groups such as natives in northern Ontario and Spanish and Chinese-speaking communities in Toronto.<sup>65</sup> Whatever the specific legal services provided, most clinics attempt to incorporate strategic elements such as community legal education, community development, and law reform litigation into their activities.

### *C Duty Counsel*

OLAP uses private lawyers to supply duty counsel services in civil matters. These lawyers are paid an hourly rate, currently \$57, to provide summary advice to people

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<sup>57</sup> *Id.* at 86.

<sup>58</sup> This development is also seen in Quebec, as discussed *supra*, note 20.

<sup>59</sup> Figures include both civil and criminal billings. Fifty-three percent of those billing the Plan received \$10,000 or more. LAW SOCIETY OF UPPER CANADA, 1992 ANNUAL REPORT OF THE ONTARIO LEGAL AID PLAN 20 (1993) [hereinafter 1992 ANNUAL REPORT].

<sup>60</sup> OLAP REVIEW, *supra* note 30, at 135-37.

<sup>61</sup> *Id.* at 136.

<sup>62</sup> ONTARIO LEGAL AID PLAN & LAW SOCIETY OF UPPER CANADA, COMMUNITY LEGAL CLINICS, ANNUAL REPORT 1992-93, 3 (1993) [hereinafter 1993 CLINIC ANNUAL REPORT]; RESOURCE AND CASELOAD STATISTICS, *supra* note 9, at 69.

<sup>63</sup> 1993 CLINIC ANNUAL REPORT, *supra* note 62, at 12; 1993 ANNUAL REPORT, *supra* note 49, at 24. The caseload figure includes new files opened, summary advice provided, and referrals to other service providers.

<sup>64</sup> See *supra* part IV; 1993 ANNUAL REPORT, *supra* note 49, at 32.

<sup>65</sup> 1993 ANNUAL REPORT, *supra* note 49, at 33.

at civil courts who have not retained counsel.<sup>66</sup> Duty counsel are also sent to all psychiatric units in the province's hospitals and to duty counsel clinics which are established in neighborhood settings. These clinics, of which there are thirty-five, are typically open for a few hours each week at scheduled times and are often located in community centers, educational institutions, and other public buildings such as libraries.<sup>67</sup>

In fiscal year 1993, the civil duty counsel program assisted 72,939 people at a total cost of \$3.3 million.<sup>68</sup> This was an increase of 9.3% from the previous year and an increase of 23.8% over the 58,935 people assisted in 1989.<sup>69</sup> The average cost per case increased from \$37.98 in fiscal year 1989 to \$45.92 in 1993.<sup>70</sup>

#### *D. Law Schools*

There are six student legal aid societies at Ontario law schools.<sup>71</sup> These societies are obligated to supply legal assistance to students for specific types of disputes and to low income citizens who cannot obtain legal representation elsewhere. Services are provided by student volunteers under the supervision of faculty members and lawyers employed by the societies. In fiscal year 1992, these societies opened files for and provided summary advice to 9,153 people.<sup>72</sup> The casework is primarily civil, including minor civil litigation, government benefits, and immigration.<sup>73</sup> The societies also engage in some community legal education. OLAP funded the work of these societies with a grant of \$1.5 million in fiscal year 1993.<sup>74</sup>

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<sup>66</sup> In Metropolitan Toronto and Oshawa, staff lawyers are also used for duty counsel services. For criminal matters, duty counsel services are provided by private lawyers.

<sup>67</sup> For a complete list, see 1993 ANNUAL REPORT, *supra* note 49, at 57-58.

<sup>68</sup> *Id.* at 33.

<sup>69</sup> See LAW SOCIETY OF UPPER CANADA, 1989 ANNUAL REPORT OF THE ONTARIO LEGAL AID PLAN 28 (1990) [hereinafter 1989 ANNUAL REPORT]. In 1992, 66,752 people were assisted. 1992 ANNUAL REPORT, *supra* note 59, at 49.

<sup>70</sup> 1993 ANNUAL REPORT, *supra* note 49, at 33. The total cost of fees and disbursements for civil duty counsel in 1989 was \$2,238,242. 1989 ANNUAL REPORT, *supra* note 69, at 30. The figure for 1992 was \$2,887,152. 1992 ANNUAL REPORT, *supra* note 59, at 49.

<sup>71</sup> These are located at Osgoode Hall Law School (York University), Queen's University, University of Ottawa, University of Toronto, University of Western Ontario, and University of Windsor.

<sup>72</sup> 1992 ANNUAL REPORT, *supra* note 59, at 36. Figures for 1993 were not published in the most recent *Annual Report*.

<sup>73</sup> However, some minor criminal matters are also handled.

<sup>74</sup> 1993 ANNUAL REPORT, *supra* note 62, at 21.



## VI. POLICY-MAKING AND MANAGEMENT STRUCTURE

### A. *Certificate System*

Although the federal government provides some funding to OLAP, it has little, if any, direct involvement in policy decisions.<sup>75</sup> Similarly, the provincial government has not traditionally set policy for the Plan. The province has normally worked on a collaborative basis with OLAP and the Law Society through regular meetings to exchange views on policy issues. Nevertheless, since OLAP derives its existence from provincial legislation, and since the majority of its funding is provided by the provincial government, the provincial government ultimately has considerable leverage over the Plan. The current funding crisis, discussed in detail below, offers a clear demonstration of this power. The government's refusal to provide additional funding to OLAP will force dramatic changes to the Plan. Moreover, the New Democratic Party government seems more inclined than its predecessors to become directly involved in setting legal aid policy.<sup>76</sup>

The *Legal Aid Act* gives the Law Society authority to operate the Plan.<sup>77</sup> This authority is exercised through a standing committee of the Law Society, the Legal Aid Committee, which oversees the administration of OLAP and sets operational policy. The Legal Aid Committee is made up of five Benchers,<sup>78</sup> five non-Bencher lawyers, five non-lawyers, and one law student. An employee of the provincial Ministry of Community and Social Services participates as an observer. A number of important functions are carried out by sub-committees. The sub-committees include the Steering Committee, which considers policy and planning issues, and the Civil Tariff Sub-Committee, which considers and recommends changes to the civil tariff.

The chief executive officer of OLAP is the Director who is appointed by the Law Society and approved by the provincial Attorney-General.<sup>79</sup> The Director is responsible to the Law Society for the proper administration of the Plan. For administrative purposes, OLAP divides the province into fifty-one areas. In each

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<sup>75</sup> Unless otherwise noted, information on policy-making and management structure is taken from OLAP REVIEW, *supra* note 30.

<sup>76</sup> For example, in 1993 the province announced, without prior consultation with the Legal Aid Committee of the Law Society, the creation of a new law clinic in Toronto to serve the needs of people of African origin.

<sup>77</sup> See R.S.O., ch. L-9, § 2 (1990) (Can.).

<sup>78</sup> Benchers are the governing members of the Law Society, chosen by election of all lawyers in good standing.

<sup>79</sup> Legal Aid Act, R.S.O., ch. L-9, § 3(1)(a) (1990) (Can.).

area, there is an area office which takes applications for assistance, conducts financial assessments, and issues legal aid certificates.<sup>80</sup> An Area Director administers each office and makes decisions on eligibility.<sup>81</sup> Area Directors, usually members of the local bar, are appointed to seven-year terms by the Law Society and the provincial Attorney-General on the recommendation of committees of local lawyers.<sup>82</sup> Most Area Directors are part-time employees of the Plan, but in some major cities they are employed full-time. There is an Area Committee in each area composed of lawyers and non-lawyers.<sup>83</sup> These committees consider appeals from applicants who have been refused assistance by the Area Director and make decisions on applications for assistance in appellate courts.<sup>84</sup>

### *B. Clinic System*

Funding and policy decisions affecting clinics are made by the Clinic Funding Committee of the Law Society (the CFC). The CFC is supported by a staff of twelve who make most initial funding decisions.<sup>85</sup> Each clinic is administered by an elected volunteer board of directors drawn from the community in which it operates and former clients are encouraged to run for these positions. Clinic boards set both financial eligibility requirements and case criteria.

In 1991, the CFC created the Clinic Resource Office (the CRO) in response to an obvious need for some central support of the individual clinics. The CRO's goals are: to provide legal research and training to clinic legal staff, to produce legal resource materials, to assist in information sharing among clinics, and to reduce duplication of effort by clinics.<sup>86</sup> Unfortunately, the CRO is incapable of meeting these goals due to a lack of resources. The office provides services to nearly 300 clinic legal workers with a staff of only four lawyers, one computer expert, and one secretary. As a result, requests for research on individual cases are overwhelming the CRO, creating unsatisfactory delays and diverting resources from the pursuit of the office's other goals.<sup>87</sup> The CRO does produce a number of important aids for clinic staff, including a social assistance practice manual and an annotation of social assistance legislation. It also distributes a regular bulletin that keeps clinic staff

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<sup>80</sup> *Id.* § 16.

<sup>81</sup> *Id.* § 13.

<sup>82</sup> *Id.* § 3(1)(b).

<sup>83</sup> *Id.* § 4.

<sup>84</sup> *Id.* §§ 14(1), 16(10).

<sup>85</sup> 1993 CLINIC ANNUAL REPORT, *supra* note 62, at 2.

<sup>86</sup> *See* OLAP REVIEW, *supra* note 30, at 52-53.

<sup>87</sup> *See id.* at 52.

informed of developments in legislation and jurisprudence and prepares standard legal memoranda on a variety of topics.<sup>88</sup> However, the CRO has identified other resources, including practice manuals and training programs in various substantive areas of poverty law, which are needed but which it cannot provide due to a lack of staff and financing.

## VII. ELIGIBILITY

There are two methods of application processing currently in use within the certificate system. Under the “one-stop” procedure, applicants visit an Area Office where both the financial and non-financial components of their entire application are processed. Under the “two-stop” procedure, applicants must first visit an Area Office and then travel to a separate office for financial assessment by staff of the Ministry of Community and Social Services. Fifteen Area Offices use the two-stop procedure, which has been identified by a recent study as limiting accessibility to certificate services.<sup>89</sup> The disadvantages of the two-stop procedure include the time and money expended by applicants travelling between offices, the lack of co-ordination between OLAP and the Ministry in processing applications, and limited hours of operation of Ministry offices.

OLAP received 257,346 applications for civil and criminal certificates in fiscal year 1993, of which 220,648 or 85.7% were successful.<sup>90</sup> There are two components to the certificate eligibility test: financial and legal. Most unsuccessful applications are refused on financial grounds. Each of these components will be discussed below.

### A. *Financial Eligibility*

Financial eligibility for certificate assistance is based on a financial needs test rather than an income test.<sup>91</sup> General guidelines for financial assessment are found in the *Legal Aid Act*.<sup>92</sup> However, the detailed procedures are the responsibility of the provincial Ministry of Community and Social Services, which determines them in consultation with OLAP and the Ministry of the Attorney-General.<sup>93</sup> A financial

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<sup>88</sup> See 1993 CLINIC ANNUAL REPORT, *supra* note 62, at 5-6.

<sup>89</sup> OLAP REVIEW, *supra* note 30, ch. IV.

<sup>90</sup> 1993 ANNUAL REPORT, *supra* note 49, at 6.

<sup>91</sup> See OLAP REVIEW, *supra* note 30, at 46-50. This article discusses the procedure in place as of 1991; some details may have changed slightly since then.

<sup>92</sup> Section 16(3) of the *Legal Aid Act* requires the assessment officer to “consider the income, disposable capital, indebtedness, requirements of persons dependent on the applicant, and such other circumstances as he or she considers to be relevant . . .” R.S.O., ch. L-9, § 16(3) (1990) (Can.).

<sup>93</sup> See OLAP REVIEW, *supra* note 30, at 47.

assessment is performed on each applicant and on each person associated with an applicant who, in the opinion of the Area Director, should make some contribution to the legal costs in question.<sup>94</sup>

All applicants for civil certificates undergo a full test of assets, income, and needs,<sup>95</sup> except social assistance recipients, who undergo assets testing only. The assets test calculates the value of the applicant's equity in liquid assets by subtracting selling costs and any associated debt from the wholesale value of those assets. Any amount greater than \$1,000 is deemed to be available to pay legal costs. The income test is used to determine the net income of the applicant for certificate eligibility purposes. Net income is defined as gross income less involuntary deductions, including income tax, union dues, wage garnishments, and support payments. The needs test determines the amount of the applicant's monthly net income that is deemed to be available to pay legal expenses. This figure is calculated by subtracting from net income the lesser of the applicant's actual or allowable expenses in each of the following categories: basic needs (food, clothing, personal articles), shelter (rent, mortgage payments, utilities, maintenance), necessary transportation, repayment of debt for one automobile, repayment of consumer debt, and miscellaneous expenses such as daycare and recurring medical costs. The allowable expense levels vary in the basic needs category depending on the family size and the age of children and vary in the shelter, transportation, and consumer debt categories depending on family size alone. Costs relating to a disability are allowed in full. Area Directors have discretion to allow amounts in excess of the allowable expense levels.

Any net income remaining after subtracting allowed costs is considered to be available to pay for legal services. This amount is compared to the expected cost of the legal matter. Based on this information, the Area Director decides whether to refuse the application, provide a certificate at no cost to the applicant, or provide a certificate with a financial contribution from the applicant. Approximately ten percent of accepted applicants are required to make a financial contribution.<sup>96</sup> Clients with available monthly income must make monthly payments toward the cost of the services. Clients may also be required to make a lump sum payment.

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<sup>94</sup> See R.R.O., Reg. 710, § 78(1) (1990) (Can.).

<sup>95</sup> Criminal applicants with incomes below a specified level are exempt from needs testing. OLAP REVIEW, *supra* note 30, at 48.

<sup>96</sup> See Transcript of symposium on Legal Services to the Poor in Other Countries—A Comparative Review (Apr. 14, 1993) (address of Robert Holden) (on file with the *Maryland Journal of Contemporary Legal Issues*) [hereinafter Transcript].

Clients with assets but no liquidity may be required to grant a lien on their property to secure future payment, with interest charged until the debt is repaid.<sup>97</sup>

### *B. Legal Eligibility*

The *Legal Aid Act* requires that a certificate be issued to financially eligible applicants for any proceedings or proposed proceedings in the Ontario Court (General Division),<sup>98</sup> in the Federal Court of Canada,<sup>99</sup> or under extradition legislation.<sup>100</sup> However, a certificate cannot be issued:

- (a) in proceedings wholly or partly in respect of a defamation;
- (b) in relator actions;
- (c) in proceedings for the recovery of a penalty where the proceedings may be taken by any person and the penalty in whole or in part may be payable to the person instituting the proceedings; or
- (d) in proceedings relating to any election.<sup>101</sup>

Area Directors have discretion to issue a certificate for a variety of legal matters, including small claims court actions, hearings before administrative tribunals, bankruptcy proceedings, document drafting, settlement negotiation, and legal advice.<sup>102</sup> Area Committees have discretion to issue certificates for more serious matters, such as appeals to the Supreme Court of Canada, the Federal Court of Canada, or the Ontario Court of Appeal.<sup>103</sup> In exercising their discretion, the Area Directors and Area Committees generally use a “client of modest means” test. If a person of modest means in the applicant’s legal situation would retain a lawyer at the client’s own expense, then a certificate will be issued. The decision to issue or

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<sup>97</sup> In 1993, client contributions totalled over \$13.9 million, \$8.2 million of which resulted from liens on property. 1993 ANNUAL REPORT, *supra* note 49, at 9, 24. OLAP had 51,091 liens outstanding at the end of the 1993 fiscal year and accounts receivable from clients amounting to \$27.6 million. *Id.* at 9.

<sup>98</sup> This is the trial court of general jurisdiction in most civil matters. Courts of Justice Act, R.S.O., ch. C-43, §§ 11-17 (1990) (Can.).

<sup>99</sup> This court has jurisdiction over actions by and against the Crown, judicial review of federal administrative decisions, intellectual property claims, and admiralty claims. Federal Court Act, R.S.C., ch. F-7 (1985) (Can.).

<sup>100</sup> See Legal Aid Act, R.S.O., ch. L-9, § 12(1) (1990) (Can.).

<sup>101</sup> *Id.* § 15. For additional instances in which a certificate cannot be issued, see R.R.O., Reg. 710, § 44(1)(a) (1990) (Can.).

<sup>102</sup> Legal Aid Act § 13.

<sup>103</sup> *Id.* § 14(1).

deny a certificate rests on consultation with the lawyer retained by the applicant or with other lawyers to determine the merits of the applicant's legal situation, the likely outcome of the proceedings, and the expected cost. Applicants in some situations, such as refugee claimants from certain countries and women seeking divorces, will automatically receive a certificate.

## VIII. CASELOAD

### A. *Certificate System*

In fiscal year 1993, 109,436 new certificates were issued for civil cases and 78,889 civil cases were completed.<sup>104</sup> This represents a one-year increase of 6.2% in issued certificates and of 28.8% in completed cases.<sup>105</sup> The relatively low growth in issued certificates indicates a probable end to a period of soaring civil legal aid caseloads during which annual increases as high as 36% more than doubled the certificate issuance figures from fiscal years 1989 to 1993.<sup>106</sup> However, because of the lag between certificate issuance and case completion, the steep growth in case completion statistics is expected to continue for at least another year.

The three types of legal matters which represent the largest proportion of the certificate caseload are immigration, family law, and uncontested divorce. Immigration cases represented 32.9% of completed certificates in 1993.<sup>107</sup> The immigration caseload has grown dramatically since 1990 when the federal government introduced changes to immigration legislation that led to a large increase in the number of people seeking asylum and residence in Canada.<sup>108</sup> As a result, the number of immigration certificate cases completed has risen from 1,610 in 1989 to 25,921 in 1993.<sup>109</sup> The family law area, which accounted for 28.8% of completed certificates in 1993, has also experienced growth, albeit less dramatic

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<sup>104</sup> 1993 ANNUAL REPORT, *supra* note 49, at 6, 34. The issued and completed figures differ because certificates may be issued in one fiscal year but not completed and billed until a later fiscal year.

<sup>105</sup> In 1992, 103,051 new certificates were issued and 61,244 cases were completed. *Id.* at 14, 48.

<sup>106</sup> Certificate issuance increased from 75,759 to 103,051 between fiscal years 1990 and 1991. LAW SOCIETY OF UPPER CANADA, 1990 ANNUAL REPORT OF THE ONTARIO LEGAL AID PLAN 7 (1991); LAW SOCIETY OF UPPER CANADA, 1991 ANNUAL REPORT OF THE ONTARIO LEGAL AID PLAN 14 (1992) [hereinafter 1991 ANNUAL REPORT]. In 1989, 44,590 civil certificates were issued. 1989 ANNUAL REPORT, *supra* note 69, at 8.

<sup>107</sup> See *infra* Table 2.

<sup>108</sup> See DEPARTMENT OF CONTINUING EDUC., LAW SOCIETY OF UPPER CANADA, RECENT CHANGES TO CANADIAN IMMIGRATION LAW: THE FIVE YEAR PLAN (1990) (discussing recent legislation and its impact).

<sup>109</sup> Unfortunately, due to federal spending cutbacks and the terms of Ontario's cost-sharing agreement with the federal government for immigration cases the majority of the increased costs have been funded by the province.

than the immigration area. This growth results, in part, from ongoing reforms to provincial legislation which have yielded increased litigation and procedural complexity in family law matters.<sup>110</sup> The number of family law certificates issued rose from 11,538 in 1989 to 22,715 in 1993. The third largest component of the certificate caseload is uncontested divorces, which amounted to 11.6% of completed certificates in 1993. None of the other types of cases, which include contested divorce, property actions, child protection, tort claims, and workers' compensation, accounted for more than seven percent of completed certificates. Complete information on all categories of certificate aid is presented in table 2.

Table 2. Completed Certificate Cases in Ontario by Type of Aid<sup>111</sup>

Type of Aid	Number of 1993 Cases	1993 Cost (millions)	Number of 1989 Cases	1989 Cost (millions)
Immigration	25,921 (32.9%)	\$30.4	1,610 (4.7%)	\$1.2
Family law acts <sup>112</sup>	22,715 (28.8)	28.6	11,538 (33.6)	11.3
Uncontested				
divorce	9,184 (11.6)	8.6	7,015 (20.3)	5.0
Other domestic <sup>113</sup>	5,436 (6.9)	4.0	3,331 (9.6)	2.3
Other	4,154(5.3)	3.1	2,790 (8.1)	1.9
Contested divorce	3,776 (4.8)	8.4	3,274 (9.5)	5.2
Property actions	3,161 (4.0)	3.7	1,600 (4.6)	1.3
Child protection <sup>114</sup>	2,351 (3.0)	4.2	1,863 (5.4)	2.6
Tort claims	1,786 (2.3)	2.5	1,289 (3.7)	1.5
Workers'				
compensation	405 (0.5)	0.4	286 (0.8)	0.2
<b>TOTAL</b>	<b>78,889 (100%)</b>	<b>\$93.8</b>	<b>34,596 (100%)</b>	<b>\$32.4</b>

<sup>110</sup> During the last decade, Ontario has undertaken a radical reform of family law, particularly its matrimonial property regime, which has seen the introduction of a family property regime for both legal and common law marriages as well as extensive reform of the rights of children. These reforms have been codified in the Family Law Act, R.S.O., ch. F-3 (1990) and the Children's Law Reform Act, R.S.O., ch. C-12 (1990).

<sup>111</sup> The data in this table are taken from the 1993 ANNUAL REPORT, *supra* note 49, at 50.

<sup>112</sup> This heading presents only cases under the *Family Law Act* and the *Children's Law Reform Act*, mostly child custody and access cases.

<sup>113</sup> Separation agreements and advice make up the bulk of this category.

<sup>114</sup> Cases in which the province seeks custody of a child under the *Child and Family Services Act*, R.S.O., ch. C-11 (1990) (Can.).

## *B. Clinics*

In 1993, community legal clinics opened 36,974 new files, provided summary advice in 166,066 cases and referred 77,224 matters to other organizations.<sup>115</sup> Of the referrals, 13,767 were to the private bar, 17,501 were to other OLAP programs, 4,582 were to social agencies, and 41,374 were to other service providers.<sup>116</sup>

Clinic staff also conducted 1,989 public legal education sessions, conducted 495 legal education sessions to agencies, produced 451 legal education publications, and delivered 199 briefs and submissions to public bodies.<sup>117</sup> Landlord/tenant matters represent approximately twenty-five percent of the clinic caseload; income maintenance matters (including unemployment insurance, workers' compensation, and family benefits) account for approximately thirty-five percent of cases; and other matters account for forty percent of cases.<sup>118</sup>

## IX. FUNDING

In 1993, OLAP received funding of \$314.6 million for both criminal and civil legal services. Out of that amount, a grant of \$31.4 million was made to the clinic system.<sup>119</sup> The remaining ninety percent of Plan receipts was devoted to the certificate system.

OLAP's main sources of funds are the provincial government (\$205.1 million) and the federal government (\$66.5 million).<sup>120</sup> Other funding is received from the Law Foundation (\$18.8 million), client contributions (\$14 million), the Law Society (\$6.1 million), client recoveries (\$2.2 million), and miscellaneous sources (\$1.9 million).<sup>121</sup> Because Ontario provides both criminal and civil services through the same system, most funding cannot be specifically connected to either type of service. However, federal funds are provided pursuant to cost-sharing agreements with the Ontario government that relate specifically to criminal, civil, or refugee services.

Under the Canada Assistance Plan, the federal Department of Health and Welfare pays one-half of the civil legal aid costs of individual recipients who meet its

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115 1993 CLINIC ANNUAL REPORT, *supra* note 62, at 12.

116 *Id.*

117 *Id.*

118 *See* Transcript, *supra* note 96 (address of Robert Holden).

119 1993 ANNUAL REPORT, *supra* note 49, at 24.

120 *Id.*

121 *Id.*



financial eligibility criteria.<sup>122</sup> Because the Department of Health and Welfare eligibility standards are not identical to the OLAP eligibility standards, the federal funding of \$18 million in 1993 was much less than one-half OLAP's civil legal service expenditures.<sup>123</sup> Between 1990 and 1993, the federal government also provided full funding for legal representation in the first stage of the refugee determination process,<sup>124</sup> which amounted to \$7 million in 1993.<sup>125</sup> Thus, in 1993, the total federal contribution to civil legal aid services was \$25 million.

Client recoveries, which are funds recovered by the Plan in costs awards, judgements, and settlements in civil cases, amounted to \$2.2 million in the 1992-93 fiscal year.<sup>126</sup> Since these recoveries resulted only from civil cases, they can be considered to be funding for the civil side of the system. None of the other funding is directed specifically to either the civil or criminal components of the Plan. However, approximate contributions to civil legal services can be calculated based on the relative contributions from various sources and the proportion of civil expenditures to overall legal services expenditures.<sup>127</sup> Thus, \$98.4 million of the provincial government's OLAP funding can be considered to be directed to civil legal services. Similarly, the Law Foundation's contribution, which is derived from interest on lawyers' mixed trust accounts,<sup>128</sup> amounted to \$9 million in 1993. Client contributions, discussed above, represented \$6.7 million. Law Society funding, derived from a \$240 levy on each practicing lawyer in the province, accounted for \$2.9 million. Miscellaneous sources accounted for \$900 thousand. These figures are presented in table 3.

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122 OLAP REVIEW, *supra* note 30, at 36-37.

123 See 1993 ANNUAL REPORT, *supra* note 49, at 24.

124 However, the federal government provided no funding for the costs of the second stage or for appeals. See 1992 ANNUAL REPORT, *supra* note 59, at 18. This funding program was discontinued as a result of changes to federal immigration legislation on January 31, 1993.

125 1993 ANNUAL REPORT, *supra* note 49, at 24.

126 *Id.*

127 In 1992, 48% of direct legal services expenditures by OLAP were in respect to civil matters. RESOURCE AND CASELOAD STATISTICS, *supra* note 9, tbl. 5 at 48. This statistic is not yet available for the 1992-93 fiscal year.

128 All interest on mixed trust accounts is paid to the Law Foundation, which must pass at least 75% of that amount on to OLAP. See Legal Aid Act, R.S.O., ch. L-9, §§ 53, 55 (1990) (Can.).

Table 3. Estimated Civil Legal Aid Funding by Source<sup>129</sup>

Source	1993 Funding (\$ millions)	% of Total Funding	1989 Funding (\$ millions)	% of Total Funding
Province of Ontario	\$98.4	75.8%	\$28.2	47.9%
Federal government	25.0	19.3	14.4	24.5
Law Foundation	9.0	6.9	10.2	17.3
Client contributions	6.7	5.2	3.4	5.8
Law Society	2.9	2.2	1.6	2.7
Client recoveries	2.2	1.7	0.7	1.2
Miscellaneous	0.9	0.7	0.4	0.7
<b>TOTAL</b>	<b>\$145.1</b>	<b>100.0%</b>	<b>\$58.9</b>	<b>100.0%</b>

## X. FUNDING: THE CURRENT CHALLENGE

In the 1993-94 fiscal year, the certificate segment of OLAP experienced the first deficit in its twenty-six year history. In the absence of some dramatic event, that deficit, amounting to \$38 million, is projected to climb to \$65 million by the end of the 1994-95 fiscal year.<sup>130</sup> As a result of this deficit, the Plan is unable to pay about 40,000 outstanding accounts to lawyers who have performed legal aid services, thus creating cash flow problems that have had a severe impact on many sole practitioners and small firms.<sup>131</sup>

Much of the OLAP deficit can be attributed to a massive increase in costs and caseload in the criminal component of the Plan.<sup>132</sup> However, there are also factors attributable to the civil component that have contributed to the crisis. Those factors can be divided into three major groups: increases in demand for legal services, increases in costs, and decreases in funding.

The recent recession is undoubtedly responsible for general growth in demand as the poor are subjected to greater economic stresses and as more citizens are forced

<sup>129</sup> All figures are estimated by the authors, except for those relating to the federal government and client recoveries.

<sup>130</sup> See John Beaufoy, *Legal Aid Contemplating Radical Cuts to Services to Stem Massive Deficit*, LAW TIMES, May 16-22, 1994, at 1.

<sup>131</sup> It is ironic that the five percent reduction in the tariff is justified by the claim that lawyers will not experience precisely these type of collection problems with the Plan.

<sup>132</sup> The criminal certificate caseload grew from 64,297 in the 1989-90 fiscal year to 104,235 in the 1992-93 fiscal year. Criminal certificate fees and disbursements increased over the same period from \$71.2 million to \$115.8 million. 1991 ANNUAL REPORT, *supra* note 106, at 36; 1993 ANNUAL REPORT, *supra* note 49, at 32.

into poverty. Moreover, as discussed above, federal and provincial legislative reforms have led to increased caseloads in the immigration and family law areas, respectively. The average cost per completed civil certificate case has risen dramatically in recent years, from \$990 in the 1989-90 fiscal year to \$1,189 in the 1992-93 fiscal year.<sup>133</sup> This represents a significant real increase, since Canada experienced low inflation over this period. At the same time that costs and caseload rose dramatically, OLAP suffered from federal spending cutbacks. Although provincial civil legal aid funding increased from \$28.2 million in the 1988-89 fiscal year to \$98.4 million in the 1992-93 fiscal year,<sup>134</sup> federal funding in the same period rose from \$14.4 million to only \$25 million. As a result, the federal share of the civil OLAP budget is now only 19.3%, versus 24.5% five years earlier. All other funding sources have remained stable, or increased slightly. Had federal receipts kept pace with provincial receipts, the Plan would have been able to handle the recent increase in costs and caseload.

OLAP's deficit problem may be solved by increased funding or reduced expenditures. The profession, in an attempt to avoid cutbacks in its legal aid revenues, has argued that the provincial government has a legal responsibility to the public to make up the shortfall in the Plan's budget.<sup>135</sup> While conceding that some services may need to be limited or eliminated, the profession's primary concern seems to be to avoid increases in the annual legal aid levy imposed on all lawyers in the province. Such an increase could cause hardship for many practitioners already suffering from delayed payments for completed certificate work and dramatic increases in professional liability insurance premiums.

In the spring and early summer of 1994, OLAP and the Law Society's Legal Aid Committee undertook extensive efforts to formulate a response to the Plan's financial crisis. OLAP worked with four sub-committees of the Legal Aid Committee to determine which, if any, of its services could be reduced, eliminated, or suspended.<sup>136</sup> The proposals considered on the civil side of the Plan included: a moratorium on "poverty law" certificates (social assistance, landlord/tenant, and workers' compensation),<sup>137</sup> introducing more stringent financial eligibility

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133 1993 ANNUAL REPORT, *supra* note 49, at 6-7.

134 *See supra* Table 3.

135 *See* Letter from D. Kevin Carroll, President of the Canadian Bar Association, Ontario, to Premier Bob Rae *in* BRIEFLY SPEAKING, June 1994, at 1.

136 Beaufoy, *supra* note 118.

137 The intention was that the service shortfall would eventually be made up by an expansion of the clinic system.

requirements, and imposing a limit on the number of certificates allowed for each lawyer per year.<sup>138</sup> Revenue enhancing options were also considered, including: a one-time increase in the annual legal aid levy, a reduction in the tariff, and diverting a larger portion of Law Foundation revenues to OLAP.<sup>139</sup> Both the expenditure reduction and revenue enhancement options were analyzed on the basis of their financial impact in the current fiscal year and subsequent fiscal years, their impact on the public, and their impact on the legal profession.<sup>140</sup> Based on this analysis, the Legal Aid Committee presented a set of deficit reduction recommendations to the governing body of the Law Society. These recommendations were rejected, presumably in the hope that the provincial government will increase its funding commitment and allow the OLAP certificate program to remain in its present form. As a result, it seems that the Plan will continue to grant certificates for which it cannot afford to pay until either the Law Society or the province takes action.

## XI. CONCLUSION

Any comprehensive examination of legal aid in Ontario must acknowledge the accomplishments of the Ontario Legal Aid Plan since its inception in 1967. If OLAP's performance is evaluated against its fundamental objective, adopted by the leadership of the Ontario legal profession—the Law Society of Upper Canada—to facilitate equality of access to justice for those who are unable to finance legal services from their own resources, that goal has undeniably been accomplished. Legal aid in Ontario is exceptional in the breadth of its coverage, the variety of its delivery methods, the volume of its caseload, and the magnitude of its expenditures.<sup>141</sup> Its accomplishments have transformed both the income patterns of the legal profession and the representation of low income clients, although they have had only a limited impact on the distribution of power and wealth. Today,

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<sup>138</sup> Interview with Robert Holden, Director of the Ontario Legal Aid Plan, in Toronto, Can. (June 1994).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> A recent study reported that OLAP, at least until the late 1980s, offered generally accessible legal services on a consistent basis throughout the province. The study found “[t]he Plan is operating a service that is reasonably accessible to most Ontarians. The only area of concern in this regard was the limited awareness among referral sources and potential applicants regarding the Plan’s coverage criteria.” OLAP REVIEW, *supra* note 30, at 327. With respect to quality of service this review found:

The Plan is generally succeeding in its attempts to encourage lawyers, representative of the profession at large, to do certificate work. There is, however, some unease within the profession regarding the competence of these lawyers (in general) and the quality of their work (relative to work done for private fee-paying clients). The data

however, the Plan is imperilled by economic pressures and soaring demand. Moreover, the diminishing economic commitment of the Canadian federal system to social welfare services and specifically to legal aid is stimulating a reassessment of the validity of OLAP's essential structure and its objectives.

Despite its success, however, we argue that Ontario's legal aid system has not truly achieved its original objectives. Though the system is often described as "mixed," an examination of caseload statistics and expenditures reveals that OLAP remains primarily a private sector provider of legal aid services through the dominance of *judicare*. The Plan's commitment to legal clinics is relatively limited. Originally intended to focus on strategic services, such as community development and education, law reform, and test case litigation, with the aim of contributing to a more equitable society, in fact, the clinic system has generally focused on the provision of advice and serving individual clients. The emphasis on services to individuals is the result of deeply entrenched structural factors, including the funding policies of the Clinic Funding Committee, the need of clinic staff to be perceived as effective legal actors, and the control exerted by the legal profession over the clinic system through its role as provider of funds. Ironically, perhaps the greatest problem is that the clinic system is dominated, at all levels, by lawyers who tend to conceptualize problems in terms of individual legal services rather than community development and law reform.

Twenty years ago, the *Osler Report* recommended the administration of OLAP be vested in an independent body, yet the Law Society continues to control the Plan. Since the anti-poverty goals of the legal aid movement represent a challenge to the social and political institutions from which lawyers derive their privileged status, lawyers have created a system which, rather than threatening their position, has actually benefitted the growing number of lawyers in Ontario.<sup>142</sup> There has been no attempt, for example, to develop a franchise or more cost effective system for the provision of legal services through the clinic model.

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collected for this review suggested the need to establish more formal quality control procedures for both the Plan's application processing, and for legal services provided on certificates.

*Id.*

<sup>142</sup> Of the \$268 million expended by OLAP in its 1992 fiscal year, \$198.6 million was paid in legal aid fees and disbursements to lawyers participating in the *judicare* component of the Plan. See 1992 ANNUAL REPORT, *supra* note 59.

The history of the Ontario Legal Aid Plan is marked by the commitment of an expensive private-sector model of legal aid services and an unwillingness to support the growth of the number of salaried lawyers for either criminal or civil legal services. Compared with other Canadian jurisdictions, Ontario's is an extremely expensive scheme. The national per capita legal aid expenditure per completed application in 1991-92 was \$18.95; in Ontario, the per capita expenditure per completed application was \$26.85—forty-nine percent above the national average. The considerable variation is a direct result of Ontario's heavy reliance on the *judicare* delivery model. The Ontario legal profession's resistance to alternative methods of delivery is understandable when OLAP's estimated average hourly compensation in criminal matters is compared with that of Quebec which relies heavily on staff lawyers. The respective figures are \$130 and \$55. During the recent recession, OLAP provided a major source of income for the legal profession: expenditures on private lawyers increased dramatically, gobbling up a growing percentage of legal aid resources. This emphasis on *judicare* has had an adverse impact on both the quality and quantity of legal services available to the province's poor, as scarce funds are diverted to the less efficient private practitioner.

There are signs that, after years of successful opposition by the profession to any change in service delivery methods, OLAP is finally moving towards a more truly mixed system. In March 1994, the Plan opened an experimental office in Toronto to provide legal assistance to qualified refugee claimants.<sup>143</sup> Four offices staffed by salaried lawyers are being opened across the province to provide family law services. In both cases, these offices were approved by the Legal Aid Committee and the Law Society only when it became obvious that low income citizens were clearly not being well-served by the existing *judicare* services.

Unfortunately, Ontario has been unprepared to allow a full analysis of the mixed delivery system or to allow a comparison of either the relative costs and the accomplishment of the clinic and *judicare* aspects of the scheme. In the major evaluation of OLAP that took place from 1989 to 1992, only the *judicare* side of the scheme was analyzed. The evaluation team was not allowed to examine the clinic system or to compare the two principal delivery models of OLAP. Within OLAP, the clinic system continues to operate under a "separate and unequal" regime. Unlike Quebec, the annual reports of OLAP provide little or no analysis of

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<sup>143</sup> This office has been created on an experimental basis with a strong evaluative component to assess its impact as well as the quality of legal services provided.

the comparative costs and services of the Plan's clinic and judicare programs and there appears to be professional resistance to both comparative analysis and the recognition that salaried lawyers handling realistic caseloads may be both economical and more effective than a large number of private practitioners handling smaller numbers of legal aid cases.

The basic problem with legal aid in Ontario is that the current system has been designed to ameliorate rather than to address the symptoms of poverty. The abused spouse who enters an OLAP office seeking a divorce will generally receive legal representation of an acceptable standard. However, the judicare system makes no attempt to address the fundamental issues confronting this all-too-typical client. The private family law lawyer who accepts a legal aid certificate to process a divorce for an abused spouse makes no effort to combat the social and economic forces that compelled the client to live with fear and danger for many years before ending the marriage. Even more disappointing is the fact that the staff or clinic lawyer faced with the same client will all too often be unable to make any such effort.<sup>144</sup>

Ontario requires a full re-examination of its legal aid plan by a public body that is not dominated, or for that matter, even headed by lawyers or judges. The current economic crisis confronting social services in Ontario should be utilized as an opportunity to recognize the need for a full reassessment of legal aid services. Ontario can no longer afford its current model of legal services, from either a financial or social perspective. What is required is a more strategic model of legal services that addresses both the need for appropriate criminal and civil representation as well as legal services to both address and ameliorate poverty issues. Such a fundamental rethinking of legal aid services will have to begin by a recognition that merely tinkering with Ontario's current plan is no longer effective or fiscally responsible.

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<sup>144</sup> An exception to this is the Barbara Schlifer Commemorative Clinic in Toronto which specializes in spousal abuse cases. For more information about this clinic, see generally Caroline Blackman, *Clinic Gives Help to Female Victims of Violence*, CANADIAN JEWISH NEWS, Nov. 28, 1985; Jane Sonmore, *Victims Find Hope in Clinic*, TORONTO SUN, Jan. 21, 1986.