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Exploring the Importance of Criminal Legal Aid: A Canadian Perspective

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There is a growing global recognition that, in order to address the current access to justice crisis, more research, together with a better understanding of data, is needed. This article, through an examination of existing legal aid research primarily in the area of criminal law, explores some of what we know and do not know about the relative benefits and costs of providing different kinds of criminal legal aid services. Although not a comprehensive review of all available research, this article identifies data strengths and gaps and the need for further research and reforms.

Pour remédier à la crise actuelle qui touche l'accès à la justice, on reconnaît de plus en plus au niveau mondial la nécessité d'intensifier la recherche et de mieux comprendre les données. Cet article, à l'aide d'un examen des recherches existantes sur l'aide juridique, principalement dans le domaine du droit pénal, explore certains points connus et inconnus concernant les avantages et les coûts liés à la prestation de différents types de services d'aide juridique en matière pénale. Sans constituer un examen exhaustif de toutes les recherches disponibles, cet article relève les forces et les faiblesses des données, ainsi que le besoin d'approfondir les recherches et de poursuivre les réformes.

1. INTRODUCTION

This article is about criminal legal aid. In particular, by looking at some existing legal aid research primarily in the area of criminal law, we explore some of what we know and do not know about the relative benefits and costs of providing different kinds of criminal legal aid services. The article does not purport to provide a comprehensive treatment of all available research. Rather, based on an overview of some leading and promising studies, we look to identify data gaps and the need for further research and reforms. This article is organized into seven sections. Following this first introductory section, part 2 of the article identifies the current access to justice crisis and briefly discusses legal aid, rights to criminal legal assistance, government funding issues and challenges, and current systemic inequities. Part 3 briefly explores the issue of establishing the value of criminal legal aid. Part 4 focusses on research aimed at understanding legal needs. Part 5 looks at research focussed on expanded and enhanced duty counsel services. Part 6 looks at research assessing costs and criminal legal aid outcomes. Part 7 of the article provides some concluding remarks and calls for further research.

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II. ACCESS TO JUSTICE AND LEGAL AID

A. Global Access to Justice Crisis

A growing shift in thinking and awareness about access to justice has been happening around the globe.¹ A worldwide wave of everyday legal needs research² has further shifted our focus primarily toward to the needs and experiences of the users of justice – the public.³ A rise in the number of self-represented litigants is further focussing this awareness and shift.⁴ Generally, there is now an acknowledgment of the growing global access to justice crisis: approximately two-thirds of the world’s population (5.1 billion people) lack meaningful access to justice.⁵ In recognition of this crisis, the United Nations’ Sustainable Development Goal 16 calls on all nations to work toward the goal of equal access to justice by 2030.⁶

B. Access to Justice Research

Building on the everyday legal needs movement and this global access to justice landscape, a shift in research focus has also been happening. For example, a significant body of research from various jurisdictions across different justice sectors makes a compelling business case⁷ for the importance of

¹ Trevor CW Farrow, “Ten Steps Forward on the Way to Justice for All” (New York: Pathfinders for Peaceful, Just & Inclusive Societies, 20 October 2020); Trevor CW Farrow & Lesley A Jacobs, “Taking Meaningful Access to Justice in Canada Seriously” in Trevor CW Farrow & Lesley A Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2021) at Introduction.

² See Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (Oxford: Hart, 1999). See generally OECD/Open Society Foundations, *Legal Needs Surveys and Access to Justice* (Paris: OECD Publishing, 2019); Pascoe Pleasence, ‘Legal Need’ and *Legal Needs Surveys: A Background Paper* (Open Society, June 2016). For a general survey, see Nicole Aylwin & Mandi Gray, *Selected Annotated Bibliography of National and Regional Legal Needs Surveys* (Toronto: Canadian Forum on Civil Justice, 2015).

³ In Canada, see Ab Currie, “The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians” (Ottawa: Department of Justice Canada, 2009); Trevor CW Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto: Canadian Forum on Civil Justice, 2016) [Farrow et al, *Everyday Legal Problems*]; Laura Savage & Susan McDonald, *Experiences of Serious Problems or Disputes in the Canadian Provinces, 2021* (Ottawa: Statistics Canada, 18 January 2022).

⁴ See e.g. National Self-Represented Litigants Project, online: <<https://representingyourselfcanada.com/>>.

⁵ Task Force on Justice, *Justice for All – The Report of the Task Force on Justice* (New York: Center on International Cooperation, 2019) at 18.

⁶ United Nations, Department of Economic and Social Affairs, Sustainable Development Goals, online: UN <<https://sdgs.un.org/goals>>. SDG 16 provides: “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels” (see *ibid*). For a recent paper, see Kelechi Achinonu et al, *From Justice for the Few to Justice for All, A Model for High-Ambition Action to Deliver the SDGs* (United Nations Foundation, 23 May 2023).

⁷ See e.g. Organisation for Economic Co-operation and Development, “Building a Business Case for Access to Justice”, An OECD White Paper in collaboration with the World Justice Project (Paris, 2019); Martin Gramaticov et al, *A Handbook for Measuring the Costs and Quality of Access to Justice* (Maklu & Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems, 2009); World Bank & International Bar Association Access to Justice and Legal Aid Committee, *A Tool for Justice: The Cost-Benefit Analysis of Legal Aid* (2019) online: World Bank <<https://documents1.worldbank.org/curated/en/592901569218028553/pdf/A-Tool-for-Justice-The-Cost-Benefit-Analysis-of-Legal-Aid.pdf>>.

investments in justice,⁸ in terms of acknowledging the significant personal and financial costs of justice on individuals and for governments,⁹ and demonstrating significant positive returns on investment.¹⁰ Efforts are now looking to explore the long-term benefits of receiving legal aid service interventions.¹¹

C. Legal Aid in Canada

Although the primary source of funding comes through the form of transfer payments from the Federal Government, legal aid in Canada is largely administered and organized through separate provincial and territorial legal aid plans across the country.¹²

D. Criminal Legal Aid

Establishing the value of criminal legal aid services in Canada does not seem to be a matter that should be subject to much public dispute. Unlike other areas of law that are funded by legal aid, the *Canadian Charter of Rights and Freedoms*¹³ provides some constitutional rights to persons who are charged with a criminal offence but cannot afford counsel. According to one recent report:

There is no specific legal right to legal aid in Canada. Citizens and residents of Canada have a right to a fair trial under the legal rights provisions of the *Charter* (ss 7, 8, 9, 10) and under s 15(1) of the equality rights provision of the *Charter*. These *Charter* rights form the basis for a right to legal representation to assure a fair trial. The right to counsel to assure a fair hearing had been part of the Canadian Bill of Rights (1960). However, it was considered by judges as more interpretive in nature than the provisions of the *Charter*.¹⁴

⁸ Lisa Moore & Trevor CW Farrow, *Investing in Justice: A Literature Review in Support of the Case for Improved Access* (Toronto: Canadian Forum on Civil Justice, 2019).

⁹ See e.g. Farrow et al, *Everyday Legal Problems*, *supra* note 3.

¹⁰ See e.g. Moore & Farrow, *supra* note 8. In the context of community based justice research, see recently Trevor CW Farrow & Ab Currie, *Exploring Community-Based Services, Costs and Benefits for People-Centered Justice*, CBJR Final Report Including Research from Sierra Leone, Kenya, South Africa and Canada (Toronto: Canadian Forum on Civil Justice, 2023); Felix Marco Conteh et al, *The Costs and Benefits of Community-based Justice in Sierra Leone* (Sierra Leone: Center for Alternative Policy Research and Innovation, January 2022); Jill Cottrell Ghai, ed, *Alternative Approaches to Access to Justice in Kenya: A Cost Benefit Analysis* (Nairobi: Katiba Institute & University of Nairobi, 15 November 2021); Winnie Martins, Sophia Mukorera & Carol Friedman, *Scaling Access to Justice Research Collaboration, Final Technical Report* (Scottsville, Pietermaritzburg: Centre for Community Justice and Development, 2022); PricewaterhouseCoopers Consulting (Australia) Pty Ltd, *The benefits of providing access to justice*, a report prepared for National Legal Aid (Australia: PwC, January 2023).

¹¹ See e.g. Canadian Forum on Civil Justice, “Measuring the Impact of Legal Service Interventions”, online: <<https://cfcj-fcjc.org/our-projects/measuring-legal-service-interventions/>>.

¹² For a general discussion of justice in Canada, specifically including legal aid, see Trevor CW Farrow, Ab Currie & Melina Buckley, “Canada: National Access to Justice Report” in Alan Paterson et al, eds, *The Global Access to Justice Project* (Global Access to Justice Project, 2022) at sec 5, online: <https://globalaccesstojustice.com/global-overview-canada/#_ftnref1>.

¹³ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

¹⁴ Farrow, Currie & Buckley, *supra* note 14 at sec 5.1.2. See further Canadian Bar Association, *Making the Case: The Right to Publicly-Funded Legal Representation in Canada* (Ottawa: Canadian Bar Association, February 2002).

To buttress these constitutionally based protections, there are several high-level reports pointing to the potential of legal aid services to produce “socio-economic, health and legal benefits.”¹⁵ As a result, they have recommended expanded investments in legal aid, including criminal law services, to take advantage of those savings.¹⁶

In addition, these same reports have pointed to the benefits that publicly funded representation can have on the efficiency and effectiveness of the criminal justice system itself.¹⁷ A report from the federal Department of Justice on legal aid in Canada concluded that legal aid contributes to an “efficient justice system”, and without it, the system would likely have more unrepresented individuals and delays.¹⁸ In turn, Canadian courts have recognized that legal aid plans must be part of any solution to address what the Supreme Court of Canada has viewed as the “culture of complacency” towards delay in the Canadian criminal justice system.¹⁹

To date, however, the existing data has not sufficiently persuaded government decision-makers to adequately and consistently fund legal aid services in Canada, including criminal legal aid. For example, a recent report has documented several significant legal aid budget cuts over the past several decades:

In Ontario, the provincial contribution to legal aid was reduced from \$194.8 million in 1990-2000 to \$171.1 million in 2001-2002. In British Columbia, the provincial contribution to legal aid was reduced from \$83.8 million in 2001-2002 to \$57.5 million in 2002-2003. The British Columbia cut resulted in the elimination of a major part of the legal aid delivery system, community clinics known as Community Legal Offices and Native Community Legal Offices. The federal government capped the contribution for criminal legal aid at the 1989-90 level.²⁰

More recently, while legal aid funding was recently increased in British Columbia, Alberta and Québec, a major budget cut occurred in Ontario in 2019 with a 35% (\$133 million) reduction in the province’s contribution to legal aid.²¹ Legal Aid plan revenues have generally decreased since 2018-2019.²²

¹⁵ Legal Aid Directorate, *Report of the Deputy Minister Advisory Panel on Criminal Legal Aid* (Ottawa: Department of Justice Canada, 2014) at 21.

¹⁶ Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada Final Report* (Ottawa: Standing Senate Committee on Legal and Constitutional Affairs, 2017) [Senate Committee, *Delaying Justice*]; Standing Committee on Justice and Human Rights, *Access to Justice - Part 2: Legal Aid* (Ottawa: Report of the Standing Committee on Justice and Human Rights, 2017) [Senate Committee, *Access to Justice*]; Moore & Farrow, *supra* note 8.

¹⁷ See Senate Committee, *Delaying Justice*, *supra* note 16.

¹⁸ Department of Justice, *Legal Aid Program Evaluation Final Report* (2021) (Ottawa: Evaluation Branch Internal Audit and Evaluation Sector, 2021) at 10, 19.

¹⁹ *R v Jordan*, 2016 SCC 27 at para 29.

²⁰ Farrow, Currie & Buckley, *supra* note 12 at sec 5.4.5.

²¹ See Ministry of Attorney General of BC, “Province commits funding for Legal Aid BC” (Victoria: Government of BC, 22 March 2022); Legal Aid BC, Notice to Counsel, “Increased Tariff Rates Pursuant to Agreement between the Province, Legal Aid BC and the Association of Legal Aid Lawyers” (23 December 2022); Aryn Toombs, “Alberta government announces increase of Legal Aid tariff rate” *Livewire Calgary* (21 December 2022); Luis Millán “New legal aid agreement ‘gives us hope for the future,’ says Quebec criminal lawyer” *Law360 Canada* (6 September 2022); Farrow, Currie & Buckley, *supra* note 12 at sec 5.4.5. See further Lisa Moore & Mitchell Perlmutter, “Public Spending on Access to Justice: Where Do We Go from Here?” in Farrow & Jacobs, *supra* note 1 at 73.

²² See e.g. Department of Justice Canada, Research and Statistics Division and Legal Aid Directorate, *Legal Aid in Canada, 2021-2022* (Ottawa, Government of Canada, 2023) at 28, Table 1.

Today, despite some increases, legal aid funding in Canada remains highly precarious and largely inadequate, and has not kept adequate pace with government investments in police and prosecutorial services.²³ This comparative deficit leaves citizens with inadequate services and resources to properly defend themselves. Putting aside for a moment important social justice, moral or fairness arguments about the importance of providing meaningful legal aid, particularly for the most vulnerable, the growing body of research mentioned above²⁴ makes a compelling business case for why the current inadequate state of legal aid funding is problematic and why investing in legal aid makes economic sense – for individuals and the state.²⁵

To be clear, all of these funding challenges are taking place within the context of an overall underfunding of all aspects of justice, in terms of the specific needs of individuals as well as on a comparative basis relative to other government and social priorities.²⁶ Increased funding (supported by evidence-based decision making) is urgently needed across all aspects of the justice system.²⁷

E. Results of Restricted Government Legal Aid Funding

Current government priorities and spending trends, which do not prioritize criminal legal aid, result in limitations on criminal legal aid services that are available but also more importantly in increased inequalities and inequities that permeate the Canadian criminal justice system.

F. Limits on Eligibility Requirements

As a general matter, because of funding limitations, criminal legal aid services are only available to persons with a very low income and with very little in the way of assets.²⁸ While greater flexibility may be applied to some same-day duty counsel services, and for persons who are in-custody, in Ontario, for example, people who make over the minimum wage are in all likelihood ineligible for criminal law services.²⁹

There are also equally strict legal eligibility requirements. In Ontario, for example, only persons who are likely to be incarcerated if convicted will have access to a lawyer who can take a matter to trial.³⁰ All other accused, if financially eligible, may rely on the services of duty counsel who in general provide same day services.³¹ In addition, for matters that are brought to trial, available levels of legal aid funding are often seen as insufficient to properly provide fully effective representation.

²³ See e.g. Ontario Association of Chiefs of Police, “OACP Welcomes Investments in Public Safety” (5 May 2023), online: <<https://www.oacp.ca/en/news/oacp-welcomes-investments-in-public-safety.aspx>>.

²⁴ See e.g. *supra* notes 7-11 and accompanying text.

²⁵ See e.g. Moore & Farrow, *supra* note 8.

²⁶ See e.g. Farrow, Currie & Buckley, *supra* note 12 at sec 13.2.

²⁷ See e.g. Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) at 23; Moore & Perlmutter, *supra* note 21 at c 3.

²⁸ See e.g. Legal Aid Ontario, “Legal Aid Ontario’s financial eligibility guidelines” (Toronto: Legal Aid Ontario, 2023).

²⁹ *Ibid.*

³⁰ See e.g. Legal Aid Ontario, “Criminal legal issues” (Toronto: Legal Aid Ontario, 2023) [Legal Aid Ontario, “Criminal”].

³¹ See e.g. *ibid.*

G. Limits on Constitutional Law Remedies

Constitutional law principles around the right to a fair trial have failed to significantly elevate the access of accused persons to publicly funded counsel. Speaking broadly, all accused have the right to immediately consult with a lawyer on arrest or detention. This is known as *Brydges* duty counsel.³² The police are required to make reasonable efforts to allow people who are detained to obtain legal advice as soon as practical. Legal aid lawyers are available to provide advice by telephone.³³

There is no general right, however, for an accused person to be provided with state funded counsel if they do not have means to pay for a lawyer.³⁴ Instead, an accused person who is ineligible for legal aid may obtain a stay of proceedings if a court is satisfied that they cannot afford counsel, and that the charges are sufficiently serious and complex that they require counsel for a fair trial.³⁵ Absent exceptional circumstances, the coverage and payment provided by legal aid cannot be challenged under the *Charter*.³⁶

Systemic Inequities in the Canadian Criminal Justice System

Recently, in 2022, the Supreme Court of Canada acknowledged that a “crisis of Indigenous incarceration is undeniable”.³⁷ In terms of some specifics:

- Between April 2010 and January 2020, the Indigenous population in federal prisons increased by 43.4% and now represents over 30% of the total incarcerated population, despite representing only 5% of the total population.³⁸
- Indigenous women now account for 42% of women in federal custody.³⁹

Canadian courts have recognized that overt and systemic anti-Black racism is a reality in the criminal justice system and has a “profound and insidious impact on those who must endure it on a daily basis”.⁴⁰ Indigenous and African Canadian communities, and particularly young men from those communities, are often over-policed, profiled and too often subject to criminal prosecution, simply because of their race and Indigeneity.⁴¹

- In 2021-2022, Black persons represented 9.2% of the overall incarcerated population, despite representing about 3.5% of the Canadian population.⁴²

³² *R v Brydges*, [1990] 1 SCR 417.

³³ See Farrow, Currie & Buckley, *supra* note 12 at sec 5.1.2.

³⁴ See e.g. Legal Aid Ontario, Criminal” *supra* note 30. For comparative background in the US, see generally *Gideon v Wainwright*, 372 US 335 (1963) and subsequent jurisprudence and commentary.

³⁵ *R. v. Rowbotham (1988) CanLII 147 (ON CA)*.

³⁶ *R v Peterman (2004) CanLII 39041 at para 21 (ON CA)*.

³⁷ *R v Sharma*, 2022 SCC 39 at para 3.

³⁸ Office of the Correctional Investigator, “Indigenous People in Federal Custody Surpasses 30%, Correctional Investigator Issues Statement and Challenge” (Ottawa: Office of the Correctional Investigator, January 2020).

³⁹ *Ibid.*

⁴⁰ *R v Morris*, 2021 ONCA 680 at para 1 and *R v Anderson*, 2021 NSCA 62.

⁴¹ See discussion in *R v Le*, 2019 SCC 34 at paras 89-97.

⁴² See Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2021-2022 – Backgrounder* (Ottawa: Office of the Correctional Investigator, 2022).

The dramatic increase in the inmate population from these communities has occurred in a time when the overall number of admissions to these institutions has decreased.⁴³

People with serious mental health issues are too often treated as a criminal law problem rather than being provided with appropriate mental health supports. As a result, the prevalence of inmates with serious mental health problems far exceeds that found in the community as a whole.

- Over 70% of both federally incarcerated men and women meet the criteria for one or more current mental health disorders, while 12% of federally incarcerated men and 17% of federally incarcerated women meet the criteria for a current major mental illness.⁴⁴

In Canada, the majority of people in provincial jail have yet to be convicted of an offence and are awaiting trial.⁴⁵ In terms of some specifics:

- Despite a substantial drop in the crime severity index in the past 23 years, the proportion of Ontario's provincial custodial population on remand increased from 34% in 1998-1999 to 77% in 2020-2021.⁴⁶
- In 2020-2021, only 22% of individuals in Ontario's provincial custody were serving sentences.
- Despite comprising approximately 3% of Ontario's population, in 2020-2021 Indigenous people made up 17% of Ontario's remand admissions.⁴⁷ Black adults accounted for 14% of admissions into custody but make up 5% of Ontario's population.⁴⁸

The federal government has recently taken steps and introduced legislation to develop a proactive miscarriage of justice commission (akin to the United Kingdom's Case Review Commission). A proactive commission, which would also address false guilty pleas, was felt to be necessary to address the many wrongful convictions that have too often remained hidden and without redress.⁴⁹

⁴³ See Statistics Canada, "Adult Admissions to Correctional Services" (Ottawa: Statistics Canada, 2023) [Statistics Canada, "Adult Admissions"].

⁴⁴ See Mental Health Commission of Canada, *Who Experiences Mental Health Problems in the Criminal Justice System?* (Ottawa: Health Canada, 2020).

⁴⁵ Statistics Canada, "Adult Admissions", *supra* note 43. For a comparative perspective, see "The Commonwealth Human Rights Initiative, *Guilty Till Proven Innocent? Safeguarding the Rights of Pre-trial Detainees Across the Commonwealth* (New Delhi: The Commonwealth Human Rights Initiative, 2022).

⁴⁶ *Ibid.*

⁴⁷ Statistics Canada, "Adult Custody Admissions to Correctional Services by Indigenous Identity" (Ottawa: Statistics Canada, 2023).

⁴⁸ Justice Canada, "Overrepresentation of Black People in the Canadian Criminal Justice System" (Ottawa: Research and Statistics Division, December 2022) [Justice Canada, "Overrepresentation of Black People"].

⁴⁹ See Government of Canada, "Government of Canada takes steps to address overrepresentation of Indigenous, Black, and racialized people in the criminal justice system" (Ottawa: Government of Canada, 21 March 2023); Government of

- A report on wrongful convictions, released in February 2023, found that 18% of wrongful convictions were the result of guilty pleas by accused persons. Almost 50% of the guilty plea wrongful convictions were entered by Indigenous and racialized people; women entered 40%; and 13% were taken from accused persons who had diagnosed mental health and cognitive challenges.⁵⁰

III. ESTABLISHING THE VALUE OF CRIMINAL LEGAL AID

In making the case for enhanced legal aid funding to address these inequities, there is a shortage of empirically-based studies that directly assess the impact of legal aid on outcomes achieved in criminal cases.⁵¹ There is also a lack of adequate Canadian research on the impacts of legal representation.⁵² Professors Yvon Dandurand and Jessica Jahn in a 2018 report about the feasibility of studying the economic impact of legal aid in criminal and refugee law, came to much the same conclusion:

Some studies are prepared to assume, at least theoretically, that criminal legal aid reduces the rate of incarceration, the number of court appearances, the length of criminal proceedings, or even the rate of recidivism, but they typically lacked the outcome data to confidently attribute any such beneficial changes to legal aid assistance.⁵³

In Canada, there have been only a few empirical studies that have assessed the impact of legal aid representation in criminal cases. However, it is important to appreciate the work that has been conducted to date in understanding the value of legal aid in criminal law proceedings.

There has been significant work in identifying the unmet legal needs and particular vulnerabilities of accused persons in the criminal justice system. Included in this work is a discussion of the types of

Canada, “The proposed Miscarriage of Justice Review Commission Act (David and Joyce Milgaard’s Law)” (Ottawa: Government of Canada, 16 February 2023). See also Ministry of Attorney General of BC, “Province commits funding for Legal Aid BC” (Victoria: Government of BC, 22 March 2022). See further Legal Aid Ontario, “LAO funds Impact of Race and Culture Assessments” (Toronto: Legal Aid Ontario, 7 March 2023).

⁵⁰ Kent Roach, *Canada has a Guilty Plea Wrongful Conviction Problem: The First Report from the Canadian Registry of Wrongful Convictions* (Toronto: Canadian Registry of Wrongful Convictions, February 2023).

⁵¹ For general calls for more justice-based research, see e.g. Action Committee on Access to Justice in Civil and Family Matters, *supra* note 29 at 23; Canadian Bar Association, *Reaching Equal Justice Report: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, November 2013) [Canadian Bar Association, “Reaching Equal Justice”] at 144. See recently Moore & Farrow, *supra* note 8 at 4.

⁵² See Sarah Buller & Michelle C Korpan, “Measuring the Impacts of Representation in Legal Aid and Community Legal Services: Considerations for Canadian Research” (2019) 56:4 *Alta L Rev* 1117 at 1121. To similar effect, see Canadian Bar Association, “Reaching Equal Justice”, *supra* note 51 at 51. For a recent initiative, see Canadian Forum on Civil Justice, *supra* note 11.

⁵³ Yvon Dandurand & Jessica Jahn, *A Feasibility Study on Measuring the Economic Impact of Criminal and Immigration and Refugee Legal Aid in Canada Issues, Options and Recommendations* (Ottawa: Department of Justice, Evaluation Division, June 2018).

representation that would best meet those intersectional needs and vulnerabilities.⁵⁴ There has also been a focus on the merits on early intervention by duty counsel services. These studies have looked at the results achieved by these services, as well as the benefits to the criminal legal process as a whole.⁵⁵

The Canadian Bar Association, in its briefing note called “Making the Case for the Economic Value for Legal Aid”,⁵⁶ sought to estimate the savings to the justice system by properly funding criminal legal aid services. This note provides some useful background data and some valuable conclusions regarding the benefits of legal aid, including some cost-benefit findings that indicate a positive return on investment for legal aid spending from various jurisdictional studies. Further empirical work, which grounds assumptions about the number of unrepresented people in criminal court and their impact on proceedings in criminal law proceedings will be helpful.

A further Canadian study focused on comparing the different results that may be obtained when accused persons are represented by duty counsel, private counsel or when an accused is self-represented. This study reveals the importance as well as the methodological challenges in developing random case selection for a mixed legal aid service delivery model with different case selection criteria.⁵⁷

In the US, a randomized control group study was done in the Bronx, New York City.⁵⁸ Although the study’s methodology was built around the defense provider system in that jurisdiction (the Bronx Defenders), the results of the study, which highlighted the benefits of holistic defence work, have had a positive impact on the ways that criminal law services are delivered in Canada, at least in the province of Ontario.

IV. UNDERSTANDING LEGAL NEEDS

Two major Canadian studies in the last 20 years examined the unmet legal needs of accused persons in the criminal justice system. The most in-depth study (“Unmet Legal Needs Study”) was released in 2003.⁵⁹ The second was a survey of legal needs (“Survey of Legal Needs Study”) conducted in 2008.⁶⁰ Both studies are discussed below.

⁵⁴ Ab Currie, *The Unmet Need for Criminal Legal Aid: A Summary of Research Results* (Ottawa: Department of Justice, 2003) [Currie, *Unmet Need*]; Ab Currie, *Lives of Trouble: Criminal Offending and the Problems of Everyday Life* (Ottawa, Department of Justice, 2009) [Currie, *Lives of Trouble*].

⁵⁵ Prairie Research Associates, *Evaluation of the Expanded Criminal Duty Counsel*, Evaluation Refresh Final Report (Vancouver: Legal Services Society of British Columbia, 2017); Ab Currie & Karen Hudson, *Not Just a Substitute for Full Service: Expanded Duty Counsel in Nova Scotia* (Halifax, Legal Aid Commission of Nova Scotia, 2010); Susan Scott, *Evaluation of Legal Aid Ontario’s Youth Court Action Planning Project, Executive Summary* (Ottawa: Department of Justice Canada, 27 August 2004).

⁵⁶ Sharron Matthews, “Making the Case for the Economic Value of Legal Aid”, Briefing Note (Vancouver: Canadian Bar Association – British Columbia Branch, 2012).

⁵⁷ Albert Yoon & Michael Trebilcock, “Equality Before the Law? Evaluating Criminal Case Outcomes in Canada” (2016) 53:2 Osgoode Hall LJ 587.

⁵⁸ James M Anderson, Maya Buenaventura & Paul Heaton, “The Effects of Holistic Defense on Criminal Justice Outcomes” (January 2019) 132:3 Harv L Rev 819.

⁵⁹ Currie, *Unmet Need*, *supra* note 54.

⁶⁰ Currie, *Lives of Trouble*, *supra* note 54.

A. Unmet Legal Needs Study

The project consisted of four studies of a general nature,⁶¹ and four studies that addressed particularly vulnerable groups.⁶² It used a variety of research methods, including court data observation, interviews with key informants, focus group studies and literature reviews.

The *Unmet Legal Needs Study* found that legal aid plans were taking a “court-centered” approach to criminal law service eligibility and, as a result, were failing to meet the needs of many low-income Canadians who interact with the criminal justice system. A court-centered approach determines legal aid eligibility based on police, prosecutorial, and court processes, rather than client needs.⁶³

The study identified four “special” needs in particular, which were not being addressed by the provision of criminal legal aid services: disabilities; linguistic, social and cultural characteristics; overlapping legal problems; and needs related to systemic social factors.

To address these unmet needs, the study recommended a client-focused approach to determine eligibility. This approach mandated the expanded use of duty counsel services for accused persons at earlier stages in criminal proceedings. The study further recommended that these services should be accompanied by more supports for accused persons. These supports could be provided from within the criminal legal process (“horizontal integration”) by, for example, the enhanced use of support workers. Alternatively, these additional supports could come from outside the criminal process (“vertical integration”), by way of better coordination with accused persons’ non-criminal legal needs.⁶⁴

1. Impact of Representation vs Non-Representation on Case Outcome

The impact of legally aided representation on case outcomes was also addressed in the *Unmet Legal Needs Study*, although it was not a major focus of the study.

In terms of how many accused persons were unrepresented in criminal courts, the study found a wide variance in the observation data that it obtained from the nine courts under study. At bail, it was between 3% to 72%; for a plea, it was between 6% and 41%; and at final appearance it was between 6% to 46%.⁶⁵ The study also revealed that “fairly large percentages” of criminal accused are convicted without the benefit of counsel, with up to 27% of unrepresented accused persons receiving jail sentences.⁶⁶

⁶¹ These studies included: the unrepresented accused in nine courts across the country; the legal advice provided to persons arrested and detained by the police; financial eligibility guidelines for receiving legal aid; and the needs in rural and remote areas of the provinces.

⁶² These studies included: Aboriginal people; speakers of either of the two official languages (English or French) in minority situations; women and immigrants; and refugees and visible minorities.

⁶³ For recent efforts to shift global access to justice initiatives to a more people-centered approach, see e.g. Organisation for Economic Co-operation and Development, “OECD Framework and Good Practice Principles for People-Centred Justice” (Paris: OECD, 21 December 2021); Achinonu et al *supra* note 6.

⁶⁴ See Currie, *Lives of Trouble*, *supra* note 54.

⁶⁵ Currie, *Unmet Need*, *supra* note 54.

⁶⁶ These percentages of self-represented accused persons are higher than the percentages of unrepresented people in Ontario on low-level charges provided in the “Equality Before the Law: Evaluating Criminal Case Outcomes in Canada” study, Yoon & Trebilcock, *supra* note 57, which relied on required notations made by court staff on the charging “information” that is brought before the court with every appearance by an accused. As noted later in the paper, the actual percentage of unrepresented persons in Canadian criminal courts, and how that percentage might vary in different parts of the country, merits further study and analysis.

Notably, the study did not, however, consider whether there were any differences in the conviction rates and incarceration rates or ranges of sentences for people who receive counsel (duty counsel and private) vs. self-represented accused persons.

The study also addressed whether there was any impact on the court process itself, depending on whether the accused person had representation, and depending on whether that representation was provided by duty counsel or private lawyers. The study concluded that the duration of appearances and number of appearances were shorter per case in the context of unrepresented accused people when compared to private bar lawyers, but longer when accused people were represented by duty counsel.

The study, which interviewed justice system participants to learn the impact of self-representation on case outcomes, found that “it is very difficult to conclude that fairness in any basic and intuitive sense could characterize the appearance of any unrepresented person in criminal court.”⁶⁷ From this conclusion, the study recommended that all accused people should receive some form of legal assistance.⁶⁸

B. Survey of Legal Needs Study

A similar conclusion about unmet legal needs was reached in a much smaller, differently focussed national study of unmet legal needs, which was conducted in 2009.⁶⁹ This *Survey of Legal Needs Study* surveyed over 7,000 Canadians and asked them to report on the legal or justiciable problems that they may have encountered over a three-year period. The survey listed a number of problem areas for respondents to choose from, including a “police action” category. The survey asked the respondents to also provide additional demographic information including, for example, income, education, disability, and racial background.

From the group who reported “encounters with the police”, a small percentage (2.7% or 187 persons) reported that they had been arrested by the police.⁷⁰ The study found that this group of people who were arrested also reported a higher number of civil law problems than the surveyed group as whole. In addition, this group was more likely than the larger group to be of lower income, of lower education levels, living with mental health issues, racialized or Indigenous.

The conclusions from the *Survey of Legal Needs Study* were similar to the *Unmet Legal Needs Study*. The problems of people engaged with the police and the criminal justice system are often connected in other aspects of their lives, which can also involve other ongoing problems that are exacerbated by poverty, mental health issues and systemic racism. As a result, meaningful legal aid assistance in criminal law matters cannot be limited simply to legal representation on criminal charges, but also must extend to addressing the cluster of problems and legal issues affecting these people.⁷¹

⁶⁷ Currie, *Unmet Need*, *supra* note 54.

⁶⁸ *Ibid.*

⁶⁹ Currie, *Lives of Trouble*, *supra* note 54.

⁷⁰ The study acknowledged that this relatively low percentage of people arrested in the survey underestimates the number of people who are actually arrested for criminal offences in society as a whole. It pointed out that the random survey does not control for police over-surveillance and investigation of particular communities, and the overcharging of people from those communities, which increases the number of people who are arrested beyond a random survey.

⁷¹ See Currie, *Lives of Trouble*, *supra* note 54. For a Canadian legal needs study, which shows the connections and clustering between legal problems as well as the costs, see Farrow et al, *Everyday Legal Problems*. See further Savage & McDonald, *Experiences of Serious Problems or Disputes in the Canadian Provinces, 2021*, *supra* note 3.

1. Impact of Representation vs Non-Representation on Case Outcome

The *Survey of Legal Needs Study* only briefly touched on the impact of self-representation as compared to representation on case outcomes. The study found that legal representation “makes a difference”. It came to this conclusion based on the higher percentage of people who pled guilty (73.8%) without counsel as compared to the much lower percentage of people (21.2%) who plead guilty with counsel. These percentages were taken from a total number of 45 (from the approximately 7,000 surveyed) who reported in the prior three years that they had been charged and that their matter proceeded to court.⁷²

C. Summary of the Impact of these Two Influential Studies

Both of these studies⁷³ have had a significant impact over the last 20 years on how criminal legal aid services are provided in Canada. Many jurisdictions now provide the kind of problem-solving courts envisioned by this research, including mental health courts and courts focussed on issues of particular impact on Indigenous people.⁷⁴ Representation in these courts is very often, if not almost exclusively, provided by legally aided lawyers either by private lawyers acting on certificates or duty counsel. Many legal aid jurisdictions, following on the recommendations from these studies, have expanded and provide more flexible eligibility requirements for duty counsel (if they are not waived altogether).

In addition, legal aid plans, including Legal Aid Ontario, may now provide additional supports to meet the special needs of accused persons, particularly for Indigenous and racialized persons and people with mental health issues.⁷⁵ A number of legal aid plans, including Legal Aid Ontario, now collect information about the Indigeneity of people who use their services. Legal Aid Ontario has also, for the last five years, obtained information about clients’ racial background in criminal law matters.⁷⁶

At the same time, however, Legal Aid Ontario continues to experience many of the challenges identified in both of these studies in how it delivers services. For example, the resources for duty counsel to provide advice immediately on arrest or detention are still limited and do not provide the kind of integrated supports for detained people that have been recommended in these reports.

Access for full legal representation to address unmet legal needs is also still limited and generally inadequate. In Ontario, for example, full representation is on a practical level largely restricted on financial grounds to those who are either detained and without income, or out of custody and on social assistance; and on legal grounds to those who are facing a term of incarceration if convicted.⁷⁷ Notably, in Ontario,

⁷² See Currie *Lives of Trouble*, *supra* note 54.

⁷³ Currie, *Unmet Need*, *supra* note 54; Currie, *Lives of Trouble*, *supra* note 54.

⁷⁴ See e.g. Human Services and Justice Coordinating Committee, *Mental Health Courts in Ontario: A Review of the Initiation and Operation of Mental Health Courts Across the Province* (Ontario: Human Services and Justice Coordinating Committee, October 2017); Legal Aid Ontario, “What is a *Gladue* court?” (Toronto: Legal Aid Ontario, 2023).

⁷⁵ See e.g. Legal Aid Ontario, “Mental health legal issues” (Toronto: Legal Aid Ontario, 2023); Legal Aid Ontario, “Impact of Race and Culture Assessments (IRACs)” (Toronto: Legal Aid Ontario, 2023).

⁷⁶ As a result of the *Anti-Racism Act, SO 2017*, c 15, the Ontario Government has, since 2022, been collecting data with the assistance of Legal Aid Ontario on the racial and ethnic background of people in bail court. The purpose of this data collection process is to learn whether these people experience different consequences in bail court, and the criminal justice system as a whole, because of their racial and ethnic background.

⁷⁷ Currently, as a COVID emergency response, Legal Aid Ontario continues to waive financial and eligibility requirements for full representation criminal law certificates for accused persons in custody. See Legal Aid Ontario, “Temporary service changes due to COVID-19” (Toronto: Legal Aid Ontario, 5 December 2022).

efforts over the past five years to expand legal eligibility for services on a permanent basis to address the unmet needs identified in these studies have been challenged by budget restrictions and changing government funding priorities.⁷⁸

In terms of the issue of representation as compared to non-representation on case outcomes, as influential and important as the data obtained by these studies has been, their primary focus was not the impact of legally aided counsel on the outcomes that may be obtained in criminal proceedings. While they do provide some conclusions in this area, a major take-away is that more research needs to be done.

V. EXPANDED, ENHANCED DUTY COUNSEL STUDIES

In the area of duty counsel, as discussed below, subsequent reports have very much followed the major themes set out in the *Unmet Legal Needs Study* and *Survey of Legal Needs Study*.⁷⁹ Following on these themes, these subsequent reports have focused on legal aid programs that introduced “expanded” duty counsel initiatives to provide early assistance to accused persons in the criminal justice process. These programs may be characterized as “expanded” because, unlike typical duty counsel programs, they have expanded financial and legal eligibility requirements. These programs also provide enhanced services to seek resolution and are not limited to same-day services. At the same time, the programs generally meet the definition of a typical duty counsel program, as matters cannot be taken to trial by that specific duty counsel lawyer. In large part, these studies have focused on the benefits to both individual accused people and the larger justice system.

A. British Columbia Expanded Duty Counsel Pilot Project

In 2017, the province of British Columbia reported on resolution rates and time for resolutions, which were obtained in a two-year expanded duty counsel pilot study.⁸⁰ The BC study compared these results with two other similar court jurisdictions that operated a traditional duty counsel program. The BC analysis showed that the pilot resolved 86% of its cases during its first two years of operations, as compared to 64% and 70% of cases resolved in the other courts. The report also found that cases under the expanded pilot project were processed and resolved more quickly than in the other two locations.

The BC report was also able to estimate that the fewer number of appearances in the pilot location resulted in cost savings ranging from \$122,860 to \$184,290. This estimate was based on the hourly costs of all persons (judges, Crown counsel, court staff, etc.) who would have attended these additional hearings if the matters had not been resolved.⁸¹

The BC report provides very helpful quantitative data to establish the benefits of the expanded duty counsel program, including a comparison to a control group. It also identifies cost savings as a result of the pilot project. The impact of these figures could be even stronger in the future with further comparisons involving the additional costs that were incurred by the project. The pilot project provided services to 449

⁷⁸ See further Farrow, Currie & Buckley, *supra* note 12 at sec 5.4.5.

⁷⁹ For earlier studies, see e.g. Ab Currie, *The Legal Aid Manitoba Expanded Duty Counsel Project, An Evaluation* (Ottawa: Department of Justice, 1995); Ab Currie, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework* (Ottawa: Department of Justice Canada – Research and Statistics Division, 2003).

⁸⁰ See Prairie Research Associates, *supra* note 55.

⁸¹ *Ibid.*

persons (out of the 566 clients in the program) who otherwise would have been ineligible for legal aid services.⁸² In addition, as the report itself points out, the higher early resolution rates for the project, as compared to the other locations, may have been impacted by the pilot project's eligibility requirements, which sought to identify cases that were well suited to early resolution.⁸³

The project did not compare the actual case outcomes achieved in the expanded duty counsel pilot with the case outcomes from the two traditional duty counsel courts. These case outcomes would include guilty pleas, withdrawals or stays, and, if applicable, the sentence imposed and the length of any term of incarceration. As such, it is an unanswered question as to whether the early resolutions in the expanded duty counsel court resulted in better case outcomes when compared to the other two courts in terms of acquittals, withdrawals and stays, and less punitive sentences. This question is an important area for further research.⁸⁴

B. Nova Scotia Expanded Duty Counsel Program

In 2010, the province of Nova Scotia reported the results from its own expanded duty counsel program.⁸⁵ In this program, there were significant indicators of success in terms of providing early resolution: nearly 30% of in-custody matters and about 45.5% of out of custody matters received a dispositive resolution at an early stage.⁸⁶ The study concluded that this data, as well as accompanying interviews with justice system informants, showed the benefits of the program for legally aided clients, and improved efficiency for the administration of justice.⁸⁷

C. Ontario Expanded Youth Court Pilot

A 2004 Ontario Youth Court Action Planning pilot project provided both duty counsel and the private bar with additional youth court worker supports in several jurisdictions in the city of Toronto as well as elsewhere in the province.⁸⁸ The final report for the pilot project showed that these enhanced services resulted in increased diversion of youth from the criminal court process and fewer court appearances. The report came to this conclusion by comparing the low number of youth court appearances in the pilot project with the higher number of youth court appearances across the province. The report also found that young people had fewer pre-trial detentions when compared to the number of times that the prosecutor was seeking pre-trial detention; and fewer custodial dispositions when compared to the number of times the prosecutor was seeking a custodial sentence.⁸⁹

⁸² The report notes that of the 566 clients admitted in the first 22 months of the program, 78% would not have been eligible for a legal aid representation contract based on financial or coverage guidelines.

⁸³ See Prairie Research Associates, *supra* note 55.

⁸⁴ For a discussion of earlier Manitoba initiatives, see Currie, *The Legal Aid Manitoba Expanded Duty Counsel Project, An Evaluation*, *supra* note 81, which included a focus on holistic outcomes in the context of domestic violence cases.

⁸⁵ See Currie & Hudson, *Not Just a Substitute for Full Service: Expanded Duty Counsel in Nova Scotia*, *supra* note 55.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ See Scott, *Evaluation of Legal Aid Ontario's Youth Court Action Planning Project - Executive Summary*, *supra* note 555.

⁸⁹ *Ibid.*

D. Representation vs Non-Representation Case Outcomes

The studies that have looked at expanded duty counsel services show the value for accused persons who are seeking early resolutions and the benefits to the broader justice system. They do not, however, answer the question of whether that kind of representation results in better outcomes for an accused person who does not resolve their matter early but instead waits until they have private counsel, or is self-represented.

Assessing the impact of duty counsel programs that provide expanded eligibility and services for resolutions but with stricter eligibility requirements for full trial representation creates particular challenges. Providing an accused person with representation to resolve a matter but leaving that person without representation if they wish to proceed to trial risks inducing a false guilty plea. This risk is accentuated if the sentence that may be imposed at a later date if the accused is convicted is substantially greater than that which would be available by way of an early resolution.⁹⁰ As a result, an accused person may feel pressure to resolve a matter with duty counsel rather than contest the charge without representation.

As noted previously, in Canada, as in many jurisdictions, the problem of wrongful convictions does not just involve persons who have declared their innocence at trial, but also persons who have entered false guilty pleas. The risk of false guilty pleas may be most pronounced for Indigenous persons who have little trust in the criminal justice system and often feel the pressure to plead guilty to get their matter over with, without a full appreciation of the consequences of entering a guilty plea.⁹¹

VI. ASSESSING COSTS AND CRIMINAL LEGAL AID OUTCOMES

A. The Economic Value of Criminal Legal Aid

The Canadian Bar Association's briefing note, "Making the Case for the Economic Value for Legal Aid",⁹² sought to estimate the savings to the justice system if funding to criminal legal aid were enhanced so as to reduce the number of self-represented persons in the criminal justice system. The note relied on certain assumptions. First, it assumed that 40% of accused persons in British Columbia's provincial court were "unintentionally unrepresented" and secondly, it assumed cases with self-represented persons take 20% longer than cases with counsel. With these assumptions, and the data as to how many cases are in provincial court and their daily cost, the note concluded that there could be savings to the justice system of nearly \$38 million with a properly funded criminal legal aid system.

While the note points in the right direction in terms of future assessments, and while we do not have any basis to question the findings, it is important to note that the report is based on various assumptions

⁹⁰ Legal aid plans are aware of the risks of false guilty pleas, and work diligently to ensure that duty counsel meet their professional obligations in ensuring that clients who plead guilty do so voluntarily and are informed of what they are pleading guilty to, including the consequences of the plea. In *R v Wong*, 2018 SCC 25 at para 73 (in the dissenting reasons), the Supreme Court of Canada cited with approval the Legal Aid Ontario plea form, which is used by duty counsel to ensure that an accused's guilty plea meets these legal and constitutional requirements.

⁹¹ Hon Frank Iacobucci, *First Nations Representation on Ontario Juries* (Toronto: Ministry of the Attorney General, 2011) at para 215; Angela Bressan & Kyle Coady, *Guilty Pleas among Indigenous People* (Ottawa: Department of Justice, 2017) at 9.

⁹² Matthews, *supra* note 56.

that would benefit from further confirming data.⁹³ In fact, as others have commented, there is “not a lot of information available” documenting the number of unrepresented accused persons in Canadian criminal courts, and the information that is available is “largely anecdotal”.⁹⁴ A recent Canadian Senate Committee report on delays in the criminal justice system noted that this was an area, among several others, that would benefit from additional statistical information.⁹⁵

The Canadian Bar Association’s briefing note assumption of 20% inefficiency with self-represented persons is taken from an Australian study that addressed family law proceedings. The report sets out the savings if legal aid funding eliminated “unintentional unrepresented” persons, but it does not set out the full costs to achieve those results. The point of raising these concerns is not to undermine the value of the briefing note. Rather, the point is to emphasize two things: first, we can gain significant insights from studies like the Canadian Bar Association’s briefing note, which provide significant insights and findings for future thinking; and second, to support the proposition that more research in this area is needed, particularly with respect to unrepresented litigants and impacts on case outcomes and costs.

B. Assessing Case Impacts in a Mixed Model

A 2016 Canadian study – “Equality Before the Law? Evaluating Criminal Case Outcomes in Canada” – compared the results achieved in criminal prosecutions between accused people who are self-represented, represented by duty counsel, or represented by a private bar lawyer.⁹⁶ One of the key insights from the study is its description of the challenges of developing this kind of analysis within a mixed model delivery service model, which also points to the need for further research in this area.

In *Equality Before the Law*,⁹⁷ the authors obtained data as to the outcomes obtained for five different low-level offences,⁹⁸ which were prosecuted over a five-year period in criminal courts across the province of Ontario. This review resulted in outcome data for over 330,000 criminal charges. The authors then sought to determine whether these outcomes might differ depending on the gender of the accused, the geographic location of the court, and the type of representation, including self-representation that had been provided in the court.

⁹³ The figure of 40% unrepresented persons in criminal proceedings was obtained from the submissions of the Provincial Court Judges Association of British Columbia to the 2010 British Columbia Judges Compensation Commission. See Attorney General of British Columbia, *Final Report of the 2010 British Columbia Judges Compensation Commission* (Victoria: British Columbia Judges Compensation Commission, 20 September 2010) at 19. The British Columbia figure is much higher than the percentage of unrepresented accused persons identified in the study of Ontario criminal courts conducted by Yoon and Trebilcock, *supra* note 57, as discussed further below.

⁹⁴ See Senate Committee, *Delaying Justice*, *supra* note 16 at 131; Department of Justice, *Legal Aid Program Evaluation, Final Report*, *supra* note 18 at 36.

⁹⁵ Senate Committee, *Delaying Justice*, *supra* note 16 at 131.

⁹⁶ Yoon & Trebilcock, *supra* note 57.

⁹⁷ *Ibid.*

⁹⁸ Those offences included theft or robbery under \$5,000, impaired driving (DUI), common assault, and narcotics possession and trafficking.

In terms of representation, most defendants (53%) either received representation by retained counsel, privately or legally aided “certificate” counsel.⁹⁹ Duty counsel represented another 38% of defendants, with 9% of defendants proceeding without legal representation.

The study arrived at two important interrelated conclusions.¹⁰⁰ One, there was a wide variation in case outcomes across the province that cannot be easily explained by defendant characteristics or population demographics, but correlated strongly with the city in which the defendant commits the alleged offence. The study concluded that this variation in outcomes depending on geographic location raised important questions about the right of accused persons to be treated equally under the *Charter*.

The authors also found that case outcomes strongly correlate with the type of legal representation provided in the case, regardless of the type of offence or court location. The study found, for example, that defendants without legal representation are less likely to receive a jail sentence when compared with defendants with retained counsel. More specifically, between different forms of representation, the study concluded that “Defendants represented by retained counsel are more likely to receive a jail sentence and serve longer sentences than defendants represented by duty counsel or without representation.”¹⁰¹

The authors pointed out that this finding suggesting that duty counsel representation is potentially more effective than private bar representation could be particularly relevant to legal aid plans. The study noted the much higher costs per criminal case that are incurred when legal representation is provided by the private bar as opposed to duty counsel. The average expenditure for a certificate (private bar) matter exceeds \$1,000; whereas it costs less than \$100 per case for either staff lawyers or per diem duty counsel. The study acknowledged that “this difference in expenditure between the two types of counsel is consistent with the view that certificate counsel works on more complex cases, thereby generating higher legal costs”. At the same time, the authors suggest that the results of their study, which point to potential benefits of duty counsel representation over private bar representation at least on less serious charges, require further analysis to determine the most appropriate investment choices between the lower cost duty counsel services and the higher cost private bar services.

It is important to provide some caveats to these findings, as the authors of the study themselves do in their article. Because of the way representation data is compiled in Ontario (and in other jurisdictions in Canada), it is not possible to distinguish between retained counsel who are funded by legal aid and retained counsel who are funded privately.¹⁰² The study roughly estimated, however, that approximately 64% of retained counsel were funded by way of legal aid certificates.

The study does not control for the case selection criteria that is used by Legal Aid Ontario in determining whether an accused may be eligible to use the services of a certificate lawyer. An accused person is generally eligible for a certificate lawyer if there is a likelihood of incarceration if convicted.¹⁰³ Of course, an accused person is not compelled to take a certificate lawyer, and there may well be

⁹⁹ Court staff will record on a charging “information” whether the accused is unrepresented, represented by duty counsel or has a retained lawyer. They will not, nor can they, record whether the retained lawyer is privately retained or legally aided.

¹⁰⁰ See Yoon & Trebilcock, *supra* note 57 at 622.

¹⁰¹ *Ibid* at 620.

¹⁰² See further *supra* note 100 and accompanying text.

¹⁰³ The study notes that eligibility decisions are made at the local level. This might explain the geographic disparities noted in the study. More recently, Legal Aid Ontario has moved to a more standardized “risk to liberty” test that is less dependent on local decision-making.

circumstances when they elect to be represented by duty counsel, who can assist immediately in resolving the matter rather than delaying it and waiting to retain a certificate lawyer. An accused person's use of duty counsel, as opposed to a certificate lawyer, is not random, but instead may be determined by the severity of the offence or at least how the severity is viewed by the legal aid provider. In this way, the severity of the offence, and not the type of representation, may contribute to the worse case outcomes that are achieved by retained counsel as opposed to duty counsel.¹⁰⁴

The authors of the study are aware of the limitations of their study in assessing the impact of duty counsel as compared to private representation. They do point out, however, that the case selection criteria cannot explain the difference in outcomes between certain urban locations in terms of the impact of duty counsel as compared to private bar representation on outcomes. In certain locations, the difference between the lower sentence achieved by duty counsel as opposed to the private bar is much more pronounced than in others.

Ultimately, *Equality before the Law* is a call for further research in terms of assessing the impact of different forms of legal and self-representation on case outcomes. The authors suggest that such a study is critical from a public policy perspective, given the apparent stark divergence in the outcomes achieved by the different forms of representation, and the cost implications for legal aid providers.

The study notes that any further study would have to adopt a random case assignment methodology. That is, the question of whether an accused person receives duty counsel or private bar representation should not be determined by a pre-assigned case selection criteria based, for example, on the seriousness of the offence.

The challenges with developing such a random case study method within Legal Aid Ontario's mixed service delivery model was also noted by the authors of this study. In Ontario, duty counsel are generally unable to take a matter to trial, as a private bar lawyer can on a certificate. In addition, an accused person who is eligible for a certificate retains the right to choose a particular private lawyer, and, in turn, the lawyer is not required to accept the person as a client.

C. A Model for a Random Case Study

In the 2016 *Equality Before the Law* study, the authors cite a number of US studies that have sought to assess the value of different forms of legal representation in criminal law proceedings.¹⁰⁵ The subsequent *Holistic Defense* study¹⁰⁶ compared the outcomes in criminal cases where accused persons were represented by the Legal Aid Society of New York, as compared to the Bronx Defenders. The comparison is useful as the two organizations rely on different models of legal representation, while both provide representation to indigent accused in New York. In making this comparison, the *Holistic Defense* study looked at about 500,000 cases over a 10-year period.

¹⁰⁴ The same point can be made, as the authors of the study do, about why results are better for self-represented persons. Persons may choose to represent themselves because of the weakness of the prosecutorial case. The study notes that the prosecution withdraws a higher percentage of cases when the accused is self-represented.

¹⁰⁵ See Yoon & Trebilcock, *supra* note 57. See further recently Shamena Anwar, Shawn Bushway & John Engberg, "The impact of defense counsel at bail hearings" (5 May 2023) 9:18 *Science Advances*, online: *Science* <<https://www.science.org/doi/10.1126/sciadv.ade3909>>.

¹⁰⁶ Anderson, Buenaventura & Heaton, *supra* note 60.

In New York, the Legal Aid Society provides traditional advocacy with a single lawyer focused on providing representation on the specific charges faced by the accused. By way of contrast, Bronx Defenders provide a “holistic defence”, which involves an interdisciplinary team of professionals that looks beyond the charges to the underlying “non-legal” reasons for the accused person’s involvement in the criminal justice system. This approach also, in contrast to more traditional advocacy approaches, focuses on the potential collateral consequences that an accused person may face with further involvement with the criminal justice system. The holistic approach also puts the priorities of the client “front and center” by recognizing that the best outcome in the criminal process may not be the priority for the client if obtaining that outcome risks other interests such as the loss of employment, housing, or ability to provide childcare.¹⁰⁷

The *Holistic Defense* study came to a number of important and now well-known conclusions with respect to the effect of holistic representation, as opposed to more traditional advocacy, on case outcomes and overall costs to the justice system.¹⁰⁸

According to the *Holistic Defense* study, holistic defences do not impact conviction rates. A holistic defence, however, reduces the likelihood of a custodial sentence by 16% and sentence length by 24%.¹⁰⁹ The study estimated that these reductions in likelihood and length of incarceration have resulted in savings of an estimated \$165 million on inmate housing costs.¹¹⁰ The study further found that holistic defences increase the likelihood of pre-trial release, although they have no measurable impact on future involvement with the criminal justice system.¹¹¹

In its research, the *Holistic Defense* study did not face potential choice-based ethical and practical difficulties that could potentially be at play in reproducing this study in a mixed model jurisdiction such as Ontario. In the Bronx Criminal Court, cases are assigned to either of the two public defender organizations based on the day of the week. This assignment process effectively creates conditions for a random study that exist independently of the study.

As others have pointed out, the *Holistic Defense* study is a model for both how defence services should be provided, but also how the case for publicly funded criminal law services can be presented as a cost saving measure. The study seems to acknowledge that while there are additional costs associated with providing the holistic model to achieve these savings, it does not set out those additional costs.

The model of representation discussed in the *Holistic Defense* study follows much of the focus of Canadian legal aid plans in the provision of criminal law services that seek to address the everyday problems that underlie an accused person’s involvement with the criminal justice system. As such, the study has influenced Ontario in the provision of criminal law services. Legal Aid Ontario has introduced

¹⁰⁷ *Ibid* at 821-822, 825-826.

¹⁰⁸ *Ibid* at 832, 862-879.

¹⁰⁹ *Ibid* at 823, 883.

¹¹⁰ *Ibid* at 823

¹¹¹ *Ibid* at 823. The study points out (at 869-870), however, that even the “no measurable impact” on recidivism rates may itself show the value of a holistic defence as one would expect higher recidivism rates as more inmates with shorter sentences of incarceration are released sooner into the community. The study estimates, as a general matter, that a 25% decrease in sentence length should equate to roughly a 13% increase in recidivism over a three-year period. The study suggests that one explanation for not seeing a similar increase in recidivism rates, and only seeing “no measurable impact” with a holistic defence is that lawyers providing this form of representation are better able to identify to sentencing courts those accused who are not a risk of reoffending when they complete their sentence.

an embedded lawyer program in downtown Toronto.¹¹² In this program, a lawyer works out of a drop-in centre and provides onsite “holistic legal and non-legal services”. The lawyer works in partnership with mental health supports as well as other legal supports. The program’s most recent report showed cost savings of \$532,000 as a result of the withdrawal of charges involving 22 clients, as well as savings of about \$70,000 by preventing the eviction of about 11 clients.¹¹³

Building on similar kinds of holistic service models, the Ontario Government has over the last several years introduced a limited number of “Justice Centres” in different locations in the province. These centres provide both traditional court services for the prosecution of accused, while also having enhanced access to services (such as health, mental health, addictions, housing and employment supports), which can better address the underlying factors that may result in an accused person’s further involvement in the criminal justice system. To date, the Justice Centres have been placed in four locations in Ontario with particularly vulnerable populations.¹¹⁴ Legal aid duty counsel are active in these Justice Centres.

VII. CONCLUSION

The need for further empirical data in Canada on the impact of legally aided representation has been clear for some time.¹¹⁵ There are often different sources for justice data, which are generally held by different justice system players, much of which would be required to study these and other justice based issues.¹¹⁶ In Canada, legal aid plans typically have access to information such as who is legally aided. The federal government generally reports on criminal court outcomes (although the underlying data typically comes from the provinces and territories). At the same time, it is the provincial or territorial governments that have access to information that is collected by court staff as to whether an accused is represented by duty counsel, a retained lawyer (either legally aided or privately) or is self-represented. Ideally, further studies would involve coordination between these justice system players. In addition, research would have to assess how a legal aid plan’s own eligibility requirements for different kinds of representation and services might influence the different outcomes in criminal cases.¹¹⁷

¹¹² Legal Aid Ontario, *Increasing Access to LAO Services: The Embedded Lawyer Program, 2021-22 Annual Report* (Ontario: Toronto, September 2022).

¹¹³ *Ibid* at 5.

¹¹⁴ See Government of Ontario, “Justice Centres” (Toronto: Ontario, 2 March 2022), online: <<https://www.ontario.ca/page/justicecentres#:~:text=Contact,Overview,offending%20and%20improve%20community%20safety.>>.

¹¹⁵ See e.g. Peter Chapman et al, *Grasping the Justice Gap: Opportunities and Challenges for People-Centered Justice Data* (Washington, DC: World Justice Project; New York: Pathfinders for Peaceful, Just and Inclusive Societies; Paris: OECD, 2021); Moore & Farrow, *supra* note 10 at 4. See earlier Action Committee on Access to Justice in Civil and Family Matters, *supra* note 27 at 23; Canadian Bar Association, “*Reaching Equal Justice*” *supra* note 52 at 144. See also Maurits Barendrecht et al, *Delivering Justice Rigorously: A guide to people-centred justice programming*, SDG 16.3 Trend Report (The Hague: The Hague Institute for Innovation of Law, 2022).

¹¹⁶ For a related discussion, see Canadian Forum on Civil Justice, *supra* note 9.

¹¹⁷ For a similar summary of the challenges in obtaining all the necessary data to fully assess the impact of legal aid in criminal law, see Dandurand & Jahn, *supra* note 53 at 33-34.

More generally, two Canadian Parliamentary Committees, one studying delays in the criminal justice system and the other access to justice and legal aid, each recommended expanding the collection of data and statistics in these areas to allow for better informed public policy decisions.¹¹⁸

Notwithstanding these challenges, given what is at stake, and given the useful research that already exists, there is potential for important further work in this area.¹¹⁹

The federal government now has rather sophisticated interactive tools to not only learn about results and times to trial in criminal cases, but to cross-reference this information with a variety of factors, including the nature of a charge, provincial or territorial jurisdiction, and age and gender of an accused person.¹²⁰ Similar information is also publicly available with respect to the incarceration of persons in Canada, including data about remand populations, and the overrepresentation of Indigenous¹²¹ and Black persons in the Canadian criminal justice system.¹²² In Ontario, the provincial court, which hears most of the criminal law matters in the province, publishes regular reports on criminal prosecutions, including data on the number of received cases as compared to disposed cases.¹²³

Legal aid plans are increasingly engaged in receiving data about clients and outcomes in legally aided matters. For example, in Ontario, for over 10 years private bar certificate lawyers have been required to report on the outcomes in any case that has been resolved without a trial and that can be billed as a “block fee”. These block fee cases represent the majority of cases that are taken by private bar lawyers. As of May 2023, Legal Aid Ontario expanded these reporting requirements to all criminal cases, and now also requires reports on the outcome in bail proceedings. In addition, many legal aid plans ask clients about their Indigeneity. Legal Aid Ontario also asks clients to self-identify as to their racial background.¹²⁴

All of this data will be very useful in further understanding the kinds of cases that are handled by legal aid plans, whether accused people are unrepresented or represented by counsel (and if so, by what kind of counsel), what kinds of results are achieved in various different contexts, at what comparative costs those different results are achieved, and – perhaps most important – what impacts those results ultimately have on peoples’ lives.¹²⁵

We now have a much clearer understanding of the global access to justice crisis,¹²⁶ and in particular, who has access to justice and who is typically left out.¹²⁷ We are starting to get a better sense of the

¹¹⁸ Senate Committee, *Delaying Justice*, *supra* note 16 at 31; Senate Committee, *Access to Justice*, *supra* note 16 at 23.

¹¹⁹ For proposals for “discrete” studies to assess the impact of the availability, type and level of legally aided assistance at different stages of the criminal trial process, and their cost implications, see Dandurand & Jahn, *supra* note 53 at 34-36.

¹²⁰ See Statistics Canada, *Integrated Criminal Court Survey: Interactive Dashboard on Annual Key Indicators* (Ottawa, Statistics Canada, 27 September 2022). The dashboard provides an overview of the annual data on criminal court programs in Canada. It features statistics on the complexity, the processing time and the outcome of cases in youth courts and adult criminal courts.

¹²¹ See Statistics Canada, *Correctional services statistics: Interactive dashboard* (Ottawa, Statistics Canada, 23 February 2023).

¹²² See Justice Canada, “Overrepresentation of Black People”, *supra* note 48.

¹²³ See Ontario Court of Justice, “Court Statistics” (Toronto: Ontario Court of Justice, 2023).

¹²⁴ See e.g. Legal Aid Ontario, “Data set: Race-based data for legal aid certificates” (Toronto: Legal Aid Ontario, 2023).

¹²⁵ In terms of recent Canadian efforts to measure the impacts of legal services on peoples’ lives, see Canadian Forum on Civil Justice, *supra* note 11.

¹²⁶ See e.g. Task Force on Justice, *Justice for All – The Report of the Task Force on Justice* (New York: Center on International Cooperation, 2019).

¹²⁷ See e.g. Trevor CW Farrow, “What is Access to Justice?” (2014) 51:3 Osgoode Hall LJ 957.

different kinds of services that might positively impact more people, particularly the most vulnerable. However, we still have an inadequate understanding of the relative costs and savings related to these services, although a growing body of research is confirming the positive return on investment that comes with adequately supporting and investing in justice.¹²⁸

Justice service providers have long known that their services typically make a significant difference in peoples' lives, particularly for the most vulnerable. Ultimately, however, to fully persuade policy makers that adequate justice funding is required, we need to provide further empirical evidence that providing access to justice improves peoples' lives and wellbeing¹²⁹ (although anecdotal and empirical evidence to-date suggests that it does). Adequate funding and support for criminal legal aid, together with further evidence-based research, are important aspects of these overall access to justice goals.

¹²⁸ See e.g. Organisation for Economic Co-operation and Development, *supra* note 7; Gramaticov et al, *supra* note 7; World Bank & International Bar Association Access to Justice and Legal Aid Committee, *supra* note 7; Moore & Farrow, *supra* note 9.

¹²⁹ See e.g. Canadian Forum on Civil Justice, *supra* note 11.