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# A Current Assessment of Legal Aid in Ontario

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## A Current Assessment of Legal Aid in Ontario

FREDERICK ZEMANS & JUSTIN AMARAL\*

Cet article porte sur l'évolution des services d'aide juridique en Ontario ces deux dernières décennies. En tenant compte de l'inflation, les auteurs ont constaté le déclin à long terme des dépenses par personne consacrées aux services d'aide juridique du gouvernement fédéral (malgré quelques remontées cycliques), ce qui a des répercussions négatives sur l'accès à la justice des personnes ayant besoin d'aide juridique. Depuis les coupures effectuées au milieu des années 1990, les lignes directrices sur l'admissibilité demeurent en décalage à l'échelle provinciale par rapport aux vraies façons de mesurer la pauvreté, comme les seuils de faible revenu de Statistique Canada. De plus, le financement par personne commence tout juste à augmenter. Dans la province, la gamme de fournisseurs de services d'aide juridique est composée de moins d'avocat.e.s acceptant des certificats d'aide juridique et d'avocat.e.s de service rémunérés à la journée qu'auparavant. L'arrivée récente de nouveaux fournisseurs de service et d'innovations technologiques, motivée par un désir de réduire les coûts et d'améliorer les services offerts à la clientèle, a donné certains résultats positifs. Toutefois, les recherches n'ont pas encore établi si les nouveaux fournisseurs de service et les nouvelles technologies viennent simplement maintenir les niveaux de services antérieurs plutôt que les bonifier. Les auteurs concluent que les évolutions qu'ils décrivent nécessitent davantage de recherche, tout comme la façon dont les services d'aide juridique peuvent être améliorés et élargis à l'avenir.

This article explores the development of legal aid services in Ontario over the past two decades. The authors find that per capita inflation-adjusted spending on legal aid services by the federal government has been in long-term decline (albeit with periodic upturns) with resulting negative impacts on access to justice for those in need of legal assistance. At the provincial level, since cuts made in the mid-1990s, financial eligibility guidelines have remained out of line with real measures of poverty, such as Statistics Canada's low-income cut-offs, and per capita funding has only recently increased. The mix of legal aid service providers in the province consists of fewer certificate lawyers and per-diem duty counsel than in the past. The recent introduction of new service providers and technological innovations—driven by a desire to both reduce costs and improve client services—may have produced some positive outcomes, however, research has not yet established whether new service providers and new technologies are simply backstopping, rather than augmenting, prior levels of service. The authors conclude that there is a need for more research on the developments they describe and on how legal aid services can be enhanced and expanded in the future.

LEGAL AID SYSTEMS IN CANADA, as we now know them, date from the mid-to-late 1960s. Their early years have been chronicled elsewhere.<sup>1</sup> This article deals primarily with current

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trends in Ontario's legal aid system and its evolution over the past two decades. In the early years, intense debates focused on whether practising law for the poor was a different enterprise from traditional lawyering and how best to meet the legal needs of the poor.<sup>2</sup> A consensus gradually emerged on the need for legal aid in some form. More recent discussions—no less intense—have focussed primarily on how to deliver cost-effective legal services for those who cannot afford them.<sup>3</sup>

The convergence of two developments forms the context for the discussion that follows: on the one hand, the adoption of the *Charter of Rights and Freedoms*, which symbolically and juridically emphasized the importance of legal advice and representation; and on the other, the increasing reluctance of Canadians and their governments to sustain the postwar welfare state, of which legal aid was a prominent feature. Stagnant and declining spending on legal aid per capita, particularly declining per capita contributions from the federal government, has resulted in financial eligibility guidelines for legal aid services that are out of line with commonly accepted measures of poverty, such as Statistics Canada's low-income cut-offs (LICOs).<sup>4</sup> While provincial funding has been increased recently,<sup>5</sup> it continues to be well below levels achieved when funding

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<sup>1</sup> Mary Jane Mossman, Karen Schucher & Claudia Schmeing, "Comparing and Understanding Legal Aid Priorities: a Paper Prepared for Legal Aid Ontario" (2010) 29 Windsor Rev Legal Soc Issues 149, online: <ssrn.com/abstract=1640533> [perma.cc/K8WF-DECE] [Mossman et al, "Comparing"]; Harry W Arthurs, Richard Weisman, & Frederick H Zemans, "Canadian Lawyers: A Peculiar Professionalism" in *Lawyers in Society: The Common Law World*, ed by Richard L Abel & Philip S C Lewis (Los Angeles: University of California Press, 1988) vol 1 at 161-163; Frederick H Zemans, "The Dream is Still Alive: Twenty-Five Years of Parkdale Community Legal Services and the Osgoode Hall Law School Intensive Program in Poverty Law" (1997) 35:3 Osgoode Hall LJ 499.

<sup>2</sup> As some authors have pointed out, the *judicare* model, which is the dominant model of legal aid, has typically embraced—rather than challenged—traditional lawyering. Conversely, community legal clinics, particularly in Ontario, have more readily recognized that, "poor people are not just like rich people without money" and therefore legal aid services need to be conceptualized as more than merely providing "access to law" by having government bear the cost of legal aid services. See Mossman et al, "Comparing," *supra* note 1. See generally Stephen Wexler, "Practicing Law for Poor People" (1970) 79:5 Yale LJ 1049.

<sup>3</sup> See for example, The GTA Legal Clinics Transformation Project, *Vision Report* (Toronto: Public Interest Strategy & Communications, 2014) at 1, online: <gtaclinics.ca/uploads/2/0/7/8/20780132/gta\_lctp\_vision\_report\_web.pdf > [perma.cc/4UPP-LU47]. The report notes that "[w]hile the need for additional funding for community legal clinics is more obvious than ever, the community legal clinics in the GTA acknowledged that it was not the only answer. They decided it was time to examine whether they could provide services to people living in poverty more effectively and *more efficiently* if they redefined how they do their work" [emphasis added]. See also Mary Jane Mossman et al, "Why We Shouldn't End Community Legal Clinics in the GTA," *The Huffington Post* (2 October 2014), online: <huffingtonpost.ca/mary-jane-mossman/community-clinics-gta\_b\_5916900.html> [perma.cc/BWH4-HP34] noting that "[a]lthough we accept the premise of an ongoing need to assess the efficiency and effectiveness of community legal clinics and their services, we are not persuaded that the single option presented – the mega-clinic option – is appropriate" [emphasis added].

<sup>4</sup> The low-income cut-offs ("LICOs") developed by Statistics Canada are income thresholds below which a family will likely devote a larger share of its income on the necessities of food, shelter, and clothing than the average family. Statistics Canada's approach is essentially to estimate an income threshold at which families are expected to spend twenty percentage points more than the average family on food, shelter, and clothing. For more information on LICOs and how LICOs are calculated, see Statistics Canada, "Low income cut-offs" (Ottawa: Statistics Canada, 2015), online: <statcan.gc.ca/pub/75f0002m/2012002/lico-sfr-eng.htm> [perma.cc/8C9V-YBNN].

<sup>5</sup> Legal Aid Ontario, *2014/2015 Annual Report* (Toronto: Legal Aid Ontario, 2015) at 58, online: <legalaid.on.ca/en/publications/downloads/2014-15-Annual-Report-EN.pdf> [perma.cc/MWQB-7BB9] [LAO 2014/15 Annual Report].

was at its highest.<sup>6</sup> The consequence of long-term underfunding, predictably, has threatened access to certain legal aid services, and especially diminished availability in some fields of law and to a lesser extent, in some regions of the province. While funding issues continue to hamstring the full potential of legal aid in Ontario, Legal Aid Ontario (LAO) has experimented with a number of innovations in its effort to provide more and better legal aid services. There have been many developments aimed at improving Ontario's legal aid system, such as promising new service delivery models and technologies, and these may well enhance the availability and quality of legal assistance for low income clients. While this promise has yet to be confirmed through comprehensive research, such initiatives, though in their infancy, are positive signals of potential improvement in Ontario's legal aid system.

In Part I, we describe the governance, funding, and operations of Ontario's legal aid system. In Part II, we review available data and detail current trends in Ontario's legal aid services. In Part III, we provide an overview of new approaches to delivering legal aid services in Ontario, which include new service providers, new processes, and new technologies, all of which may ultimately lead to further improvement in the scope and quality of Ontario's legal aid services. And we identify a series of research questions that need to be addressed to ensure that LAO is indeed on the path to improved service. In Part IV, we conclude with a call for more funding for services and research.

## I. THE GOVERNANCE, FUNDING AND OPERATIONS OF ONTARIO'S LEGAL AID SYSTEM<sup>7</sup>

### A. FUNDING

LAO, the body that is statutorily mandated to govern the province's legal aid system, is an independent not-for-profit agency of the Ontario government, accountable to the Ministry of the Attorney General.<sup>8</sup> Similar agencies exist in all provinces and territories except for two: New Brunswick's legal aid plan is administered by the province's Law Society;<sup>9</sup> and Prince Edward Island's plan is administered directly by its Department of Justice and Public Safety.<sup>10</sup> Funding for Legal Aid Ontario comes primarily from three sources: the provincial government; the federal government pursuant to federal-provincial cost-sharing agreements;<sup>11</sup> and the Law

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<sup>6</sup> For a discussion on the state of legal aid funding after the cuts made in the 1990s, see Ab Currie, "The State of Civil Legal Aid in Canada: By the Numbers in 2011-2012" (12 May 2013), *A2J blog* (blog), online: <cfcj-fcjc.org/commentary/the-state-of-civil-legal-aid-in-canada-by-the-numbers-in-2011-2012> [perma.cc/3HYR-8NR5].

<sup>7</sup> See Allan Fineblit, "Legal Aid: Doing More With Less" in Frederick H Zemans, Patrick J Monahan & Aneurin Thomas, eds, *A New Legal Aid Plan for Ontario: Background Papers* (Toronto: York University Centre for Public Law and Public Policy, 1997) 69 at 70.

<sup>8</sup> *Legal Aid Services Act*, 1998, SO 1998, c 26, s 3 [*Legal Aid Services Act*].

<sup>9</sup> *Legal Aid Act*, RSNB 1973, c L-2, s 2.

<sup>10</sup> Prince Edward Island, Department of Justice and Public Safety, "About Us," (Charlottetown: DPS, 2016), online: <princeedwardisland.ca/en/topic/justice-and-public-safety> [perma.cc/BNK5-8F3C].

<sup>11</sup> Department of Justice, "Legal Aid Program," (Ottawa: DOJ, 2017), online: <justice.gc.ca/eng/fund-fina/gov-gouv/aid-aide.html> [perma.cc/X66C-9GR4] [Government of Canada].

Foundation of Ontario. Of these three sources, provincial government funding is the most significant.

In 2014–15, the provincial government provided LAO with approximately \$363.1 million in funding. This total included an amount of \$50.7 million representing an allocation of funds from a lump sum transfer by the federal government to Ontario in connection with criminal law, the *Youth Criminal Justice Act*, and immigration and refugee law expenditures. In the 2014 and 2015 provincial budgets, the Government of Ontario committed to providing LAO with additional funding to increase LAO’s financial eligibility threshold by 6% over four years. The first increase took place on 1 November 2014, with the next three increases effective 1 April 2015, 2016, and 2017. As a result, LAO received an increase in funding of \$6.4 million from the government of Ontario in 2014–15, and a further increase of funding of \$31.5 million in 2015–16, \$48.8 million in 2016–17, and \$67.0 million in 2017–18.<sup>12</sup>

In all provinces, including Ontario, federal legal aid funding is provided pursuant to an agreement between the federal and provincial governments.<sup>13</sup> Under this agreement, the federal government funds access to legal services for low-income individuals in the fields of criminal (including youth criminal justice), immigration, and refugee law—fields for which the federal government has constitutional responsibility.<sup>14</sup> However, the federal contribution does not cover all provincial expenditures in these areas of federal responsibility. As noted above, in 2014–15, the federal government’s lump sum transfer to Ontario totaled \$50.7 million, yet in that year LAO expenditures on criminal law certificates alone were just under \$102 million, and immigration and refugee law certificates a further \$16 million.<sup>15</sup>

The federal government does not provide direct funding for other fields where federal and provincial responsibilities overlap, such as family law. The federal government also supports civil legal aid indirectly as one of a number of “social programs” (including higher education, social services, and child care) for which block funding is provided to the provinces under the Canada Social Transfer (“CST”). The provinces may deploy CST funds at their discretion as long as they are used to support one of the designated social programs. Accordingly, some spend more and some less, to meet the costs of civil legal aid, over which they have jurisdiction by reason of their constitutional responsibility for the administration of civil justice.<sup>16</sup> The provinces are free to design service delivery strategies, set thresholds for eligibility, and assign funds to different fields of civil legal aid as they deem appropriate. As a result, civil legal aid expenditures and service models vary considerably from one province and territory to another.<sup>17</sup>

Finally, the Law Foundation of Ontario (LFO) gives LAO 75% of the interest earned on lawyers’ and paralegals’ trust fund balances, after the foundation deducts its operating expenses. The amount that the LFO provides to LAO varies from year-to-year due to changing interest

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<sup>12</sup> LAO 2014/15 Annual Report, *supra* note 5 at 58.

<sup>13</sup> Government of Canada, *supra* note 11.

<sup>14</sup> *Ibid*; see also *Constitution Act, 1867*, 30 & 31 Victoria, c 3, s 91 [*Constitution Act, 1867*].

<sup>15</sup> Ontario Treasury Board Secretariat, *Public Accounts of Ontario 2014-2015: Financial Statements of Government Organizations*, Volume 2a – Legal Aid Ontario, (Toronto: 27 May 2015), online: <[www.fin.gov.on.ca/en/budget/paccts/2015/15\\_LAO.html](http://www.fin.gov.on.ca/en/budget/paccts/2015/15_LAO.html)> [perma.cc/RHR4-4PNS].

<sup>16</sup> *Constitution Act, 1867*, *supra* note 14, s 92.

<sup>17</sup> Government of Prince Edward Island, *Environment, Labour and Justice Annual Report 2013-2014*, (Charlottetown: Department of Environment, Labour, and Justice, 2015) at 28.

rates (for instance, in 2016 LAO received \$25,211,000 in revenue from LFO, nearly \$4 million less than the year before (\$29,179,000)).<sup>18</sup>

## B. LAO SYSTEM COMPONENTS

To comprehend the unique travails of Ontario's legal aid system, a brief description of the "moving parts" of that system is necessary. The first and most important of those parts has historically been the so-called "judicare" model of service delivery. Clients in need of legal services are means-tested to determine their eligibility for legal aid. If the client is financially eligible and the matter fits within the areas of substantive law covered by LAO, the client is provided with a "certificate" that enables them to engage any lawyer who has agreed to accept legal aid assignments and to be remunerated in accordance with a fixed tariff. Certificates are available primarily in the area of criminal law (ordinarily only where there is a probability of incarceration), family law, immigration and refugee law, and in a narrow band of civil cases.<sup>19</sup>

Second, the legal aid system provides grants to a number of "clinics" that serve local communities and/or communities of interest<sup>20</sup> and specialize in specific fields of "clinic law," defined by statute to mean, "the areas of law which particularly affect low-income individuals and communities" and includes, for example, legal matters related to housing, social assistance, human rights, employment, and education.<sup>21</sup> Each community legal clinic is a non-profit legal centre, governed and operated by an independent board of directors representative of the community it serves (also known as a "community board").<sup>22</sup>

Third, LAO operates a number of "staff offices." Unlike community legal clinics, legal aid services staff offices are established and operated directly by LAO and are staffed by full- or part-time employees of LAO.<sup>23</sup> Staff offices currently provide services in family and refugee law.

Fourth, LAO funds Student Legal Aid Service Societies (SLASS'), which operate in all seven of Ontario's law schools. In SLASS clinics, services are provided by volunteer law students under the supervision of full-time lawyers. Law students provide legal information, advice, and representation in cases such as minor crimes, landlord and tenant disputes, and immigration proceedings, as well as before tribunals such as the Human Rights Commission.<sup>24</sup>

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<sup>18</sup> *Ibid* at 50.

<sup>19</sup> Legal Aid Ontario, "Am I eligible for a legal aid certificate?," online: <[www.legalaid.on.ca/en/getting/eligibility.asp](http://www.legalaid.on.ca/en/getting/eligibility.asp)> [perma.cc/R4XW-9JW4].

<sup>20</sup> See, for example, HIV & Aids Legal Clinic Ontario, "About Us," online: <[halco.org/about](http://halco.org/about)> [perma.cc/3PWJ-HFFM].

<sup>21</sup> *Legal Aid Services Act*, *supra* note 8, s 2.

<sup>22</sup> Legal Aid Ontario, "Community Legal Clinics," online: <[legalaid.on.ca/en/contact/contact.asp?type=cl](http://legalaid.on.ca/en/contact/contact.asp?type=cl)> [perma.cc/A5TS-UHM7].

<sup>23</sup> *Legal Aid Services Act*, *supra* note 8, s 14(1)(d), 19(1) & (2).

<sup>24</sup> Legal Aid Ontario, "Student Legal Aid Services Societies," online: <[legalaid.on.ca/en/contact/contact.asp?type=slass](http://legalaid.on.ca/en/contact/contact.asp?type=slass)> [perma.cc/QZJ9-47TL]. See also Community and Legal Aid Services Program, "Legal Services," online: <[osgoode.yorku.ca/community-clinics/welcome-community-legal-aid-services-programme-clasp/legal-services/](http://osgoode.yorku.ca/community-clinics/welcome-community-legal-aid-services-programme-clasp/legal-services/)> [perma.cc/39J9-GEYZ]. CLASP also provides services in the following areas: administrative law (academic offences or appeals, help for victims of a crime, human rights complaints, landlord and tenant disputes, and disability benefits), criminal law, family law, and immigration law.

The areas of service provided by the SLASSs continue to expand. For instance, LAO recently provided funds to enable SLASS clinics to provide services in the areas of family and employment law.<sup>25</sup>

Fifth, LAO provides legal services through a network of “duty counsel” who offer pre-trial advice and simple resolutions in criminal law and a wide variety of services in family law. In addition, tenant duty counsel is operated through a specialty clinic, the Advocacy Centre for Tenants Ontario.<sup>26</sup>

Sixth, LAO plays a critical role in providing Public Legal Education and Information (PLEI). Much of this is achieved through its funding of a specialty clinic, Community Legal Education Ontario (CLEO). Seventh, LAO contributes to test case litigation through the Group Applications and Test Case Committee (GATCC).<sup>27</sup>

Finally, LAO offers general information on the range of legal aid services available to eligible clients, how to apply for legal aid and who is eligible through a telephone help-centre.<sup>28</sup>

As the following narrative will demonstrate, each of these moving parts has evolved over time and their relationship to each other has changed in response to a variety of factors: financial exigencies; lessons learned through experimentation with delivery models; a better understanding of client needs; and insights gleaned and recommendations from periodic reviews of the legal aid and broader justice system.

## **II. DATA AND CURRENT TRENDS: DECLINING LEGAL AID FUNDING AND ITS IMPACT**

This section outlines trends in legal aid funding and the effects of declining per capita expenditures on legal aid. Summarily, the data shows two concerning trends: (1) federal per capita contributions to legal aid remain low and continue to decline; and (2) financial eligibility guidelines for accessing legal aid services are out of line with commonly accepted measures of poverty, such as the LICOs.

### **A. THE DECLINE IN LEGAL AID FUNDING**

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<sup>25</sup> See Legal Aid Ontario, “LAO funds six student legal aid services societies’ family law services programs” (2 September 2014), online: <legalaid.on.ca/en/news/newsarchive/1409-03\_slassprograms.asp> [perma.cc/F4YV-PXWW]. See also Legal Aid Ontario, “LAO boosts student legal aid clinics’ funding” (21 September 2015), online: <legalaid.on.ca/en/news/newsarchive/1509-21\_SLASS-funding-boost.asp> [perma.cc/L3GX-ZMN8]. LAO will increase the funding of each Student Legal Aid Services Society by \$100,000 annually.

<sup>26</sup> Advocacy Centre for Tenants Ontario, “Tenant Duty Counsel,” online: <acto.ca/our-work/tenant-duty-counsel/> [perma.cc/KA8L-MR6F].

<sup>27</sup> Nazgol Namazi, Wayne van der Meide, & Marcus Pratt, “GATCC Program Overview: Part One” (Ontario: LAO, 2013), online: <legalaid.on.ca/fr/publications/downloads/report\_GATCC\_Program\_Overview\_-\_Part\_One.pdf> [perma.cc/42YD-DYMX].

<sup>28</sup> Legal Aid Ontario, “Legal Aid Ontario’s toll-free telephone line” online: <legalaid.on.ca/en/about/fact\_tollfree.asp> [perma.cc/A6HK-B7KH].

There seems to be widespread agreement that whatever their constitutional logic, the funding arrangements described above have not yielded adequate support for existing legal aid services nor for the creation of new services.<sup>29</sup> Over the past decade, participants in legal aid systems across Canada, the Canadian Bar Association, and experts studying legal aid have all suggested that the federal government is not meeting its responsibility to bear a significant share of the “fiscal commitments required to underwrite a healthy and sustainable legal aid system.”<sup>30</sup> Using the simplest yardstick, it is clear that federal support for provincial legal aid programs has not kept pace with inflation. In Ontario, the federal contribution to legal aid shrank from \$3.98 per capita (in real, inflation-adjusted terms) in 2002–03 to \$3.22 per capita in 2014–15.<sup>31</sup>

However, as initially documented in the 1996 McCamus Task Force Report<sup>32</sup> and recounted in further detail here, reductions in federal funding are not the only reason that access

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<sup>29</sup> See for example, Jackie Sharkey, “Legal Aid Ontario withdraws threat to suspend immigration and refugee services,” *CBC News* (30 June 2017), online: <[cbc.ca/news/canada/kitchener-waterloo/legal-aid-ontario-refugee-immigration-1.4185459](http://cbc.ca/news/canada/kitchener-waterloo/legal-aid-ontario-refugee-immigration-1.4185459)> [perma.cc/S8QT-FDWR] noting that “Federal funding to Legal Aid Ontario for refugee matters is \$7 million annually — an amount that has stayed the same since 2002”; CBC News, “With more refugees pouring in, Toronto advocates ringing alarms about federal funding,” *CBC News* (3 April 2017), online: <[cbc.ca/news/canada/toronto/legal-aid-ontario-refugee-funding-1.4052426](http://cbc.ca/news/canada/toronto/legal-aid-ontario-refugee-funding-1.4052426)> [perma.cc/F2QE-R6P7] reporting “Legal Aid Ontario funding dropping from \$13.6M in 2016-2017 to \$8.9M for the next 2 years, further after that”; Canadian Bar Association Access to Justice Committee, *Study on Access to the Justice System – Legal Aid*, (Ottawa: CBA, December 2016) at 5, online: <[cba.org/CMSPages/GetFile.aspx?guid=8b0c4d64-cb3f-460f-9733-1aaff164ef6a](http://cba.org/CMSPages/GetFile.aspx?guid=8b0c4d64-cb3f-460f-9733-1aaff164ef6a)> [perma.cc/4E5H-W8H9] recounting that “[i]n 2003, we called for a separate federal *Access to Justice Transfer* to emphasize that access to justice should be seen as an essential public service and given similar recognition as health care under the *Canada Health Act*”; and David Field, “What the federal government can do to reduce delays in Canada’s criminal justice system” (11 April 2016), *Legal Aid* (blog), online: <[blog.legalaid.on.ca/2016/04/11/what-the-federal-government-can-do-to-reduce-delays-in-canadas-criminal-justice-system/](http://blog.legalaid.on.ca/2016/04/11/what-the-federal-government-can-do-to-reduce-delays-in-canadas-criminal-justice-system/)> [perma.cc/Y7UN-56QJ] arguing that “Canada needs to make effective legal aid assistance available across the country and implement innovations and best practices that help to improve the efficiency and effectiveness of the criminal justice system.”

<sup>30</sup> Michael Trebilcock, *Report of the Legal Aid Review 2008* (Toronto: Ministry of the Attorney General, 2008) at xii, online:

<[attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal\\_aid\\_report\\_2008\\_EN.pdf](http://attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf)> [perma.cc/M5L6-V4FB] [Trebilcock Report]; Ashley Joannou, “Legal aid funding ‘yet another Band-Aid,’” *Yukon News* (9 October 2013), online: <[yukon-news.com/news/legal-aid-funding-yet-another-band-aid/](http://yukon-news.com/news/legal-aid-funding-yet-another-band-aid/)> [perma.cc/BW2K-NQUR]; The Canadian Bar Association, “Legal Aid in Canada” (14 July 2015), online: <[cba.org/Sections/Legal-Aid-Liaison/Resourses/Resourses/Legal-Aid-in-Canada](http://cba.org/Sections/Legal-Aid-Liaison/Resourses/Resourses/Legal-Aid-in-Canada)> [perma.cc/5A77-WC3A].

<sup>31</sup> The per capita federal contribution figures are expressed in 2017 dollars. Note that this figure includes all federal contributions (through the Legal Aid Program and the CST). This figure does not include additional federal funding for immigration and refugee legal aid, the management of court-ordered counsel in federal prosecutions cases, and legal aid in public security and anti-terrorism cases which Statistics Canada explains are out of scope for the Legal Aid Survey and not included in the figures they report. See Statistics Canada, *Table 258-0005— Federal government contributions to provinces and territories for legal aid*, CANSIM database (Ottawa: Statistics Canada, 20 April 2016), online <[www5.statcan.gc.ca/cansim/a26?lang=eng&id=2580005](http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=2580005)> [perma.cc/E2F6-BRUZ] [Table 258-0005]. Note that to access the 2002-03 data, on the website go to the “add/remove data” tab.

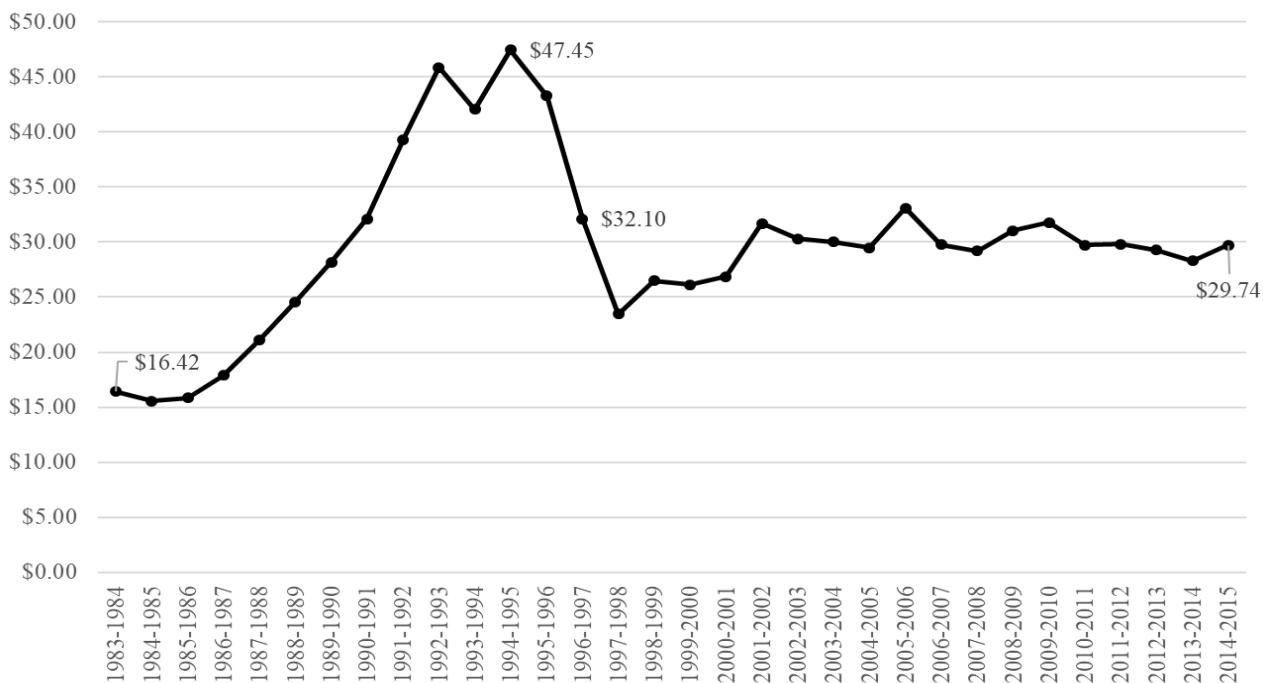
<sup>32</sup> Ontario Legal Aid Review, *A Blueprint for Publicly Funded Legal Services*, (Toronto: Ministry of the Attorney General, 1996), online: <[www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch1.php](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch1.php)> [perma.cc/N9WL-48FG] [McCamus Report]. As noted in the Report’s introduction, “the Review was established by the Attorney General of Ontario on December 13, 1996, with a mandate to undertake a thorough analysis of the various programs that comprise the current legal aid system in the province and to make recommendations regarding the future direction those programs should take;” for a summary see Legal Aid Ontario, “Historical Overview,” online: <[legalaid.on.ca/en/about/historical\\_overview.asp](http://legalaid.on.ca/en/about/historical_overview.asp)> [perma.cc/7UE7-9MJK] .



to Ontario’s legal aid system has been restricted since changes made in the 1990s. In 1994, Ontario imposed a cap on the allocation of both provincial and federal funds to the legal aid system. Over the following years, judicare services dropped significantly. In 1996–97, LAO’s predecessor, the Ontario Legal Aid Plan (OLAP), issued approximately 75,000 certificates, a reduction of more than 150,000 certificates compared to 1995–1996.<sup>33</sup> The number of hours of service available to individual clients was also cut significantly, as were the number of OLAP legal and support staff.<sup>34</sup>

The most significant result of the McCamus Report was the creation of LAO in 1999.<sup>35</sup> Unlike the OLAP, which had been governed by the legal profession, LAO is governed by an independent board. The catalyst for this change was two-fold. First, was the desire to separate the governance of legal aid from the professional and economic interests of the practising bar. In the new legislative scheme, the client, not the bar, was to be at the centre of legal aid policy-making. Second, was the desire to “professionalize” the management of legal aid services and financial stewardship.

**Figure 1a.** Per capita legal aid expenditure changes in constant 2017 dollars (Ontario)<sup>36</sup>



<sup>33</sup> *Ibid.*

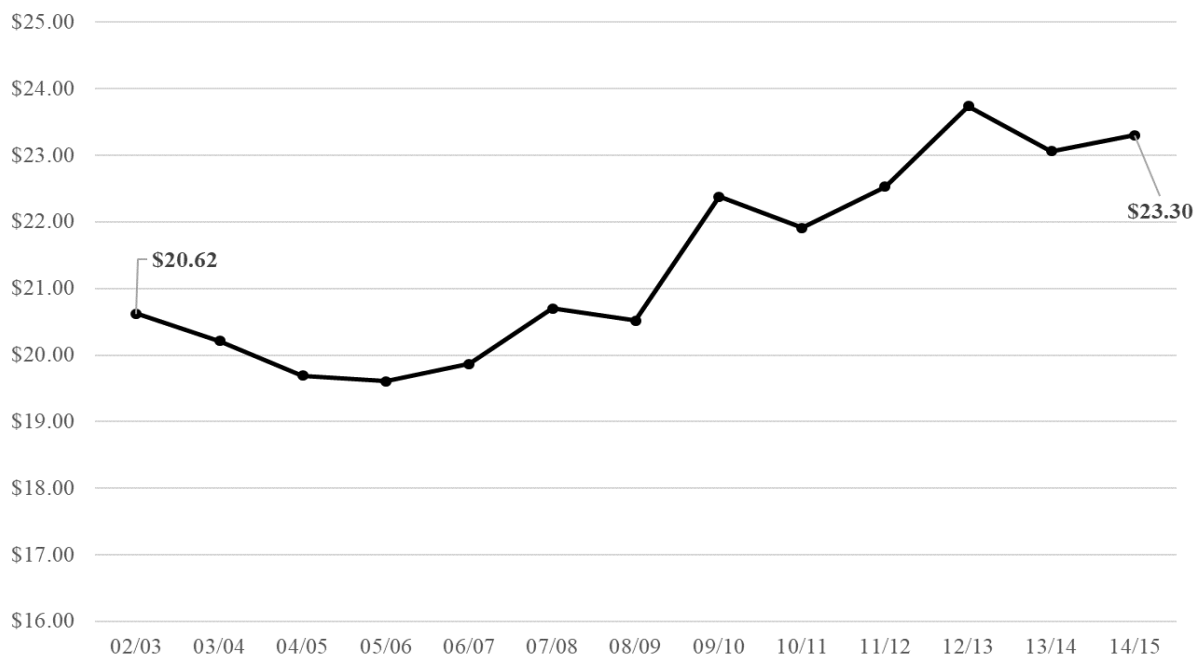
<sup>34</sup> *Ibid.*

<sup>35</sup> *Legal Aid Services Act*, *supra* note 8, s 3.

<sup>36</sup> Note the slight increase in per capita expenditure in the 2014-2015 fiscal year, the first year that Ontario’s increased funding came into effect. At the time of publication, this data was the most recent available through Statistics Canada. This figure should be updated in future research to see if Ontario’s increased funding brings per capita expenditure closer to levels prior to 1996.

In the years following the creation of LAO, the system continued to have difficulty in responding to the demand for its services. In his 2008 report on legal aid in Ontario, Michael Trebilcock found that funding for legal aid in the province, on a per capita basis (inflation-adjusted), declined by a further 9% between 1996 and 2006.<sup>37</sup> As noted above,<sup>38</sup> provincial funding has increased in recent years to yield modest improvement, but not enough to restore funding to pre-1996 levels. Total legal aid expenditure in Ontario, on a per capita basis (inflation-adjusted), declined by 7% between 1996–97 and 2014–15, from \$32.10 per capita to \$29.47 per capita.<sup>39</sup>

**Figure 1b.** Ontario provincial government’s contributions to legal aid per capita in constant 2017 dollars<sup>40</sup>

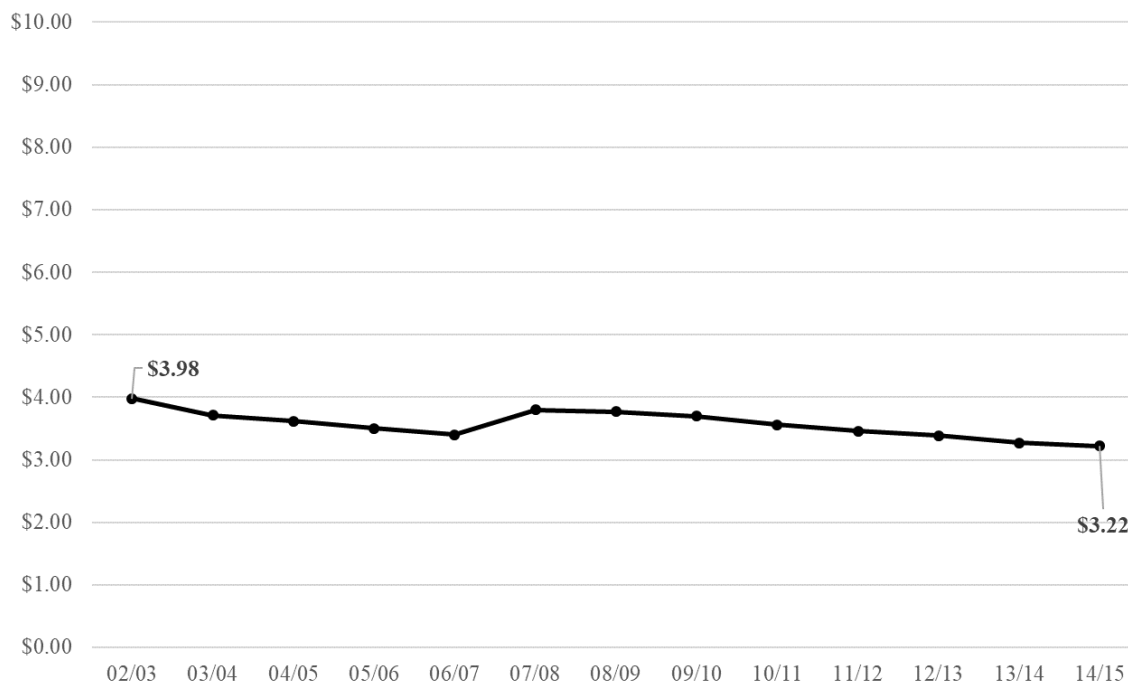


<sup>37</sup> Trebilcock Report, *supra* note 30 at 73.

<sup>38</sup> LAO 2014/15 Annual Report, *supra* note 5 at 58.

<sup>39</sup> Per capita figures are expressed in 2017 dollars. See Statistics Canada, *Table 258-0007— Legal aid plan expenditures, by type of expenditure, annual*, CANSIM database (Ottawa: Statistics Canada, 2016), online: <[www5.statcan.gc.ca/cansim/a05?lang=eng&id=2580007](http://www5.statcan.gc.ca/cansim/a05?lang=eng&id=2580007)> [perma.cc/39R6-P7ST] [Table 258-0007]; for population figures, see Statistics Canada, *Table 051-0001— Estimates of population, by age group and sex for July 1, Canada, provinces and territories*, CANSIM database (Ottawa: Statistics Canada, 27 September 2017), online: <[www5.statcan.gc.ca/cansim/a26?id=510001](http://www5.statcan.gc.ca/cansim/a26?id=510001)> [perma.cc/25SK-M5YP] [Table 051-0001].

<sup>40</sup> Per capita figures are expressed in 2017 dollars. See Statistics Canada, *Table 258-0006— Provincial and territorial government contributions to legal aid plans*, CANSIM database (Ottawa: Statistics Canada, 20 April 2016), online: <[www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2580006&&pattern=&stByVal=1&p1=1&p2=31&tabMode=dataTable&csid=>](http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2580006&&pattern=&stByVal=1&p1=1&p2=31&tabMode=dataTable&csid=>) [perma.cc/P8N5-APZ3]; for population figures, see Table 051-0001, *supra* note 39.

**Figure 1c.** Federal government's contributions to legal aid per capita in constant 2017 dollars<sup>41</sup>

## B. THE IMPACT OF DECLINING FUNDING FOR LEGAL AID

Initially, LAO responded to the funding cuts made in the 1990s by adopting cost-cutting measures, such as reducing eligibility for legal aid by freezing the financial eligibility guidelines and limiting increases in compensation to lawyers providing legal aid services. LAO also focused scarce resources on providing services to clients whose claims were either constitutionally grounded or were judged to represent the highest and most urgent client needs. The last several years have also seen a significant increase in newer forms of service delivery that LAO believes to be more cost-effective. Overall, LAO is in the process of rectifying the deficiencies in Ontario's legal aid system that emerged from the mid-1990s onwards. The concluding portion of this section of our article examines the current situation and its implications.

Although LAO has worked diligently to address the deficiencies caused by funding cuts, in December 2016 they announced that the agency would incur a \$26 million deficit for the year,

<sup>41</sup> Per capita figures are expressed in 2017 dollars. See Table 258-0005, *supra* note 31; for population figures, see Table 051-0001, *supra* note 39.

forcing LAO to cut back on services.<sup>42</sup> To assist LAO through the crisis, both the provincial government and the federal government “injected a one-off sum of \$7.72 million.”<sup>43</sup>

In the latest chapter in LAO’s struggles with chronic underfunding, in the spring of 2017, attendees at a public meeting blasted LAO’s proposal to cut refugee legal services by 40%.<sup>44</sup> The public reaction was clearly heard: following the consultations, LAO announced that it would continue immigration and refugee services at current levels.<sup>45</sup>

## 1. COST-CUTTING: REDUCING CLIENT ACCESS TO LEGAL AID

LAO’s initial response to financial challenges caused by the fiscal changes made in 1996 was to adjust its priorities for certificate services to reduce demand for service. At the same time, financial eligibility, which is controlled by the provincial government through regulation, was frozen at 1996 levels, meaning that progressively fewer low-income Ontarians were eligible for legal aid. Trebilcock noted in his 2008 report that financial eligibility criteria for legal aid had not been adjusted since the 22% reduction in 1996.<sup>46</sup> Moreover, as Trebilcock explained, inflation eroded the financial eligibility threshold by a further 23% in the ten years following the 1996 cuts. The combined effect, he calculated, was “a 45% cut in real terms from the pre-1996 criteria.”<sup>47</sup> As Table 1 below demonstrates, the 45% cut in real terms from the pre-1996 criteria has never been restored.<sup>48</sup> Even disregarding the effects of inflation, the consequences of the 22% funding cut in 1996 are still being felt, despite the announcement by the Ontario

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<sup>42</sup> See Jacques Gallant, “Deficit forcing Legal Aid Ontario to scale back dramatically,” *Toronto Star* (16 December 2016), online: <[thestar.com/news/gta/2016/12/16/deficit-forcing-legal-aid-ontario-to-scale-back-dramatically.html](http://thestar.com/news/gta/2016/12/16/deficit-forcing-legal-aid-ontario-to-scale-back-dramatically.html)> [perma.cc/66WV-VWNG].

<sup>43</sup> Nicholas Keung, “Legal Aid Ontario to suspend some refugee services July 1,” *Toronto Star* (19 May 2017), online: <[thestar.com/news/immigration/2017/05/19/legal-aid-ontario-to-suspend-some-refugee-services-july-1.html](http://thestar.com/news/immigration/2017/05/19/legal-aid-ontario-to-suspend-some-refugee-services-july-1.html)> [perma.cc/AL4G-Q48Z].

<sup>44</sup> Nicholas Keung, “Legal aid cuts for refugees blasted at public meeting,” *Toronto Star* (30 May 2017), online: <[thestar.com/news/immigration/2017/05/30/legal-aid-cuts-for-refugees-blasted-at-public-meeting.html](http://thestar.com/news/immigration/2017/05/30/legal-aid-cuts-for-refugees-blasted-at-public-meeting.html)> [perma.cc/T7MK-SS5A]. See also *ibid*, outlining three options that were under consideration to meet the proposal to cut refugee legal services by 40%: “**Suspending** all refugee and immigration services when funding runs out in August and September;” “**Restricting** the coverage to the representation of asylum-seekers in their refugee proceedings, such as filing claims and preparation for and attendance at hearings;” and “**Limiting** coverage for asylum-seekers to the preparation of the claim only, but continuing to represent clients at the refugee appeals tribunal and federal court”[emphasis in original].

<sup>45</sup> Legal Aid Ontario, “All LAO immigration and refugee services will continue after July 1, 2017” (26 June 2017), online: <[legalaid.on.ca/en/news/newsarchive/2017-06-26\\_refugee-services-will-continue.asp](http://legalaid.on.ca/en/news/newsarchive/2017-06-26_refugee-services-will-continue.asp)> [perma.cc/4SHB-CR4C]; see also Sharkey, *supra* note 29.

<sup>46</sup> Trebilcock Report, *supra* note 30 at 72.

<sup>47</sup> *Ibid*.

<sup>48</sup> This figure can be calculated by adding the percentages in the third column of Table 1 with the 22% cut from 1996 (*e.g.*, the current LAO Gross Annual Income Guideline for a 2-person household is 30% less than what the guideline would be had the guideline figures in 1996 (post-cut) kept pace with inflation. If you add the erosion of standard allowances caused by inflation with the 22% cut from 1996 this is really a 52% cut in real terms from pre-1996 criteria).

government in 2015 that it would be increasing LAO's funding by \$154 million over four years.<sup>49</sup>

**Table 1.** Financial Eligibility Guidelines for Legal Aid Certificate Services in Ontario: What the guidelines would look like if they kept pace with inflation (even after the 22% reduction in 1996) and the erosion caused by inflation.<sup>50</sup>

<b>Family Size</b>	<b>Current LAO Gross Annual Income Guideline (2017)<sup>51</sup></b>	<b>1996 Financial Eligibility Guidelines (post-22% cut) Adjusted for Inflation (2017)<sup>52</sup></b>	<b>Erosion of standard allowances caused by inflation</b> (Average Erosion = 32% Median Erosion = 31%)
<b>1</b>	\$13,635	\$21,413	36%
<b>2</b>	\$23,588	\$33,910	30%
<b>3</b>	\$26,889	\$38,759	31%
<b>4</b>	\$30,384	\$44,041	31%
<b>5+</b>	\$33,726	\$49,355	32%

One-person households were disproportionately hit by the combined effects of the 1996 cuts and subsequent inflation. The current LAO gross annual income guideline for a one-person household is 36% lower than what the guideline would be if it had kept pace with inflation after the 22% reduction to the guidelines in 1996. A single individual qualified for legal aid with an income equal to or less than \$14,604 in 1996, equivalent to \$21,413 in 2017 dollars. Today, a single individual must have an income equal to or less than \$13,635 in order to qualify.

The effects of reducing the eligibility guidelines in 1996, and the subsequent impact of inflation on the guidelines, attracted judicial censure in 2016. In *R v Moodie*, an accused person seeking legal aid was denied a certificate because he had an annual salary of \$16,000 and as such, approximately \$4,000 more than the low-income eligibility cut-off for a single person at

<sup>49</sup> Legal Aid Ontario, "Unprecedented multi-year expansion of legal eligibility for criminal, family, refugee and other matters" (8 June 2015), online: <legalaid.on.ca/en/news/newsarchive/1506-08\_eligibilityexpansion.asp> [perma.cc/BX49-3874].

<sup>50</sup> This table is designed to be an updated version of the table found in the Trebilcock Report, *supra* note 30 at 72.

<sup>51</sup> These figures are based on LAO's financial threshold for their certificate programs in 2017. LAO has separate financial eligibility criteria for duty counsel and clinic services. Note that unlike in 1996, the figures used in today's guideline are based on annual gross income figures, rather than net annual income. See Legal Aid Ontario, "Financial eligibility for Legal Aid Ontario services" (31 March 2017), online: <legalaid.on.ca/en/publications/brochures/LAO-Financial-Eligibility-for-Apr-2017-Mar-2018.pdf?t=1499366102878> [perma.cc/KEX5-2ZWF]; see also Legal Aid Ontario, "Am I eligible for a legal aid certificate," online: <legalaid.on.ca/en/getting/eligibility.asp#amountyouearn> [perma.cc/VUK6-54SA].

<sup>52</sup> Numbers were calculated by taking the Net Annual Maximum Allowances (*i.e.*, the financial eligibility criteria) from 1996–97 and updating the figures using the Bank of Canada's "Inflation Calculator." For 1996–1997 numbers, see Statistics Canada, *Legal Aid in Canada: Description of Operations*, (Ottawa: Minister of Industry, 1999) at 135, online: <statcan.gc.ca/pub/85-217-x/85-217-x1999000-eng.pdf> [perma.cc/LSW5-EWB5]. For the Bank of Canada's Inflation Calculator, see Bank of Canada, "Inflation Calculator," online: <bankofcanada.ca/rates/related/inflation-calculator/> [perma.cc/WG4N-5KU6].

the time.<sup>53</sup> Ontario Superior Court Justice Ian Nordheimer found that the costs of Moodie’s legal defence would likely exceed \$11,000; a sum he would clearly be unable to pay. Following jurisprudence established in *R v Rowbotham*, (which held that state-funded counsel may be ordered where there is a probability of imprisonment and where the case is sufficiently complex that counsel is essential to ensure that the accused receives a fair trial),<sup>54</sup> Justice Nordheimer stayed the prosecution until state-funded counsel could be provided to the accused.<sup>55</sup> Although Justice Nordheimer’s decision made it clear that denial of representation by LAO based on income levels alone would not be a sufficient basis for the court to intervene and order counsel be provided or that the matter be stayed, his comments in *obiter dicta* articulate how LAO’s eligibility guidelines are out of line with the needs of low-income Ontarians:

It should be obvious to any outside observer that the income thresholds being used by Legal Aid Ontario do not bear any reasonable relationship to what constitutes poverty in this country. As just one comparator, in a report issued last year, Statistics Canada calculated the low income cut-off, before tax, for a single person living in a metropolitan area (more than 500,000 people) for 2014 at \$24,328, or more than twice the figure that Legal Aid Ontario uses.<sup>56</sup>

LAO and Ontario’s Ministry of the Attorney General implemented a *Rowbotham* application pilot project after the *Moodie* decision was released.<sup>57</sup> This pilot is only open to pre-identified clients with counsel, and clients must meet a number of conditions to be eligible.

Overall, as a result of reductions in legal aid expenditures in Ontario, many households living below the LICOs (in other words, living in poverty), but above LAO’s financial eligibility guidelines, have gone without legal aid services. Fortunately, as noted, the provincial government has taken important steps to increase legal aid financial eligibility in recent years. This increase followed a multi-year campaign led by LAO and joined by all of the province’s major justice stakeholders. Starting on 1 November 2014, the province implemented the first of four 6% increases in all LAO financial eligibility guidelines. The latest increase was implemented on 1 April 2017.<sup>58</sup> Notwithstanding these efforts, LAO’s financial eligibility guidelines remain below both their pre-1996 levels and Statistics Canada’s LICOs.

## 2. COST-SAVING: REDUCING THE COSTS OF DELIVERING SERVICES

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<sup>53</sup> *R v Moodie*, 2016 ONSC 3469 at para 4 [*Moodie*].

<sup>54</sup> *R v Rowbotham*, 1988 CanLII 147 (Ont CA).

<sup>55</sup> *Moodie*, *supra* note 53 at para 12; for more information on so-called *Rowbotham* orders, see *ibid* and *R v Rushlow*, 2009 ONCA 461, *inter alia*.

<sup>56</sup> *Moodie*, *supra* note 53 at para 6.

<sup>57</sup> Legal Aid Ontario, “Rowbotham application pilot,” online: <legalaid.on.ca/en/info/rowbotham\_pilot.asp> [perma.cc/4DJZ-FMXN].

<sup>58</sup> See Legal Aid Ontario, “Legal aid eligibility threshold increase another six per cent” (27 March 2017), online: <legalaid.on.ca/en/news/newsarchive/2017-03-27\_eligibility-threshold-increase.asp> [perma.cc/ADB7-P3H7]; Ontario Ministry of the Attorney General, “Ontario Providing Improved Access to Legal Services: Province to Increase Legal Aid Eligibility Threshold on April 1, 2017” (27 March 2017), online: <news.ontario.ca/mag/en/2017/03/ontario-providing-improved-access-to-legal-services.html> [perma.cc/VZJ3-X5QB].

Trebilcock's 2008 report found that tariffs governing payment to lawyers representing legal aid clients on certificates had "increased only modestly over the past decade and [are] now seriously out of line with any relevant market reference points and with cost of living indices over a longer time period."<sup>59</sup> His report identified similar concerns regarding the compensation of clinic lawyers and duty counsel, observing that "modest salaries" have caused "increasingly serious problems in recruitment and retention of suitably qualified and experienced staff."<sup>60</sup> As Trebilcock notes, the base rate in 1987 was \$67/hour.<sup>61</sup> That would amount to approximately \$123 in 2017 dollars if the base rate kept pace with inflation. The base rate is currently \$109.14.<sup>62</sup>

Trebilcock's review also found that between 1999–00 and 2006–07 the number of certificate lawyers in Ontario had declined by 16%. As Table 6 below demonstrates, that trend continues. The number of clinic lawyers in the province has remained relatively unchanged—whether this means clinics are not experiencing problems recruiting and retaining suitably qualified and experienced staff because of modest salaries would require further research beyond the scope of this paper.

The pressure to increase legal aid tariffs reached a crisis in 2009 when the provincial Criminal Lawyers' Association (CLA) organized a nine-month boycott of legal aid certificates to protest low hourly tariff rates. The provincial government, LAO, and the CLA resolved the boycott with a multi-year Memorandum of Understanding that instituted a seven-year program to increase legal aid tariff rates. The agreement also created a new, higher tariff rate for "complex" criminal cases, experts' fees, and other matters.<sup>63</sup>

### 3. TRIAGE: THE DIFFERENTIAL EFFECTS OF COST-CUTTING

The impacts of LAO's cost-cutting were differentially distributed, based on household size, geographic location, and specific areas of client need. As discussed above, the impact of stagnant (or decreasing) financial guidelines had the effect of reducing access to legal aid more drastically for single persons than for households with two or more persons.

Based on LAO data provided in November 2016, some 3,374 lawyers were accepting legal aid certificates across the province.<sup>64</sup> While that number has remained relatively constant in the Greater Toronto Area Region (the GTA), there has been a slight decrease in the number of lawyers accepting legal aid certificates outside of the GTA, as depicted in Table 2. To a modest extent, access to a certificate lawyer has been curtailed more for the Southwest Region and the Central East Region of Ontario than for Torontonians, though there are fewer certificate lawyers per 100,000 in the GTA than outside the GTA. Overall, the number of certificate lawyers per 100,000 in Ontario decreased by 21% between 2005–06 and 2015–16.

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<sup>59</sup> Trebilcock Report, *supra* note 30 at 73.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid* at 121.

<sup>62</sup> Legal Aid Ontario, "Tariff & Billing," online: <[legalaid.on.ca/en/info/tariff\\_billing.asp](http://legalaid.on.ca/en/info/tariff_billing.asp)> [perma.cc/3WQ3-DEPK].

<sup>63</sup> *Ibid.*

<sup>64</sup> Data provided by LAO courtesy of Rod Strain and Ivan Yablonovsky [Strain and Yablonovsky data].

**Table 2.** Number of Certificate Lawyers by Region

<b>Fiscal Year</b>	<b>GTA Region</b>	<b>Southwest Region</b>	<b>Northern Region</b>	<b>Central East Region</b>	<b>Location Unknown</b>	<b>Total</b>
<b>2005–06</b>	1,535	875	246	752	361	3,769
<b>2015–16</b>	1,627	779	243	721	4	3,374
<b>Percentage Change</b>	<b>6%</b>	<b>-11%</b>	<b>-1%</b>	<b>-4%</b>	<b>-99%</b>	<b>-10%</b>

**Table 3.** Number of Certificate Lawyers per 100,000 people by Region

<b>Fiscal Year</b>	<b>GTA Region</b>	<b>Southwest Region</b>	<b>Northern Region</b>	<b>Central East Region</b>	<b>Total</b>
<b>2005–06</b>	29	40	85	51	38
<b>2015–16</b>	27	34	84	43	30
<b>Percentage Change</b>	<b>-9%</b>	<b>-16%</b>	<b>-1%</b>	<b>-15%</b>	<b>-21%</b>

As Table 4 demonstrates, the differential effects of cut-backs on specific areas of client need and legal practice have been much more pronounced. Thus, in recent decades, reduction in the number of lawyers providing legal aid services was particularly severe in the areas of immigration law and “other civil” areas.

**Table 4.** Number of Certificate Lawyers in Ontario, by Area of Law<sup>65</sup>

<b>Fiscal Year</b>	<b>Criminal</b>	<b>Family</b>	<b>Immigration</b>	<b>Other Civil</b>
<b>2006–07</b>	2,151	1,755	408	570
<b>2015–16</b>	2,007	1,620	304	355
<b>Percentage Change</b>	<b>-7%</b>	<b>-8%</b>	<b>-25%</b>	<b>-38%</b>

The effects were likely more dramatic than the figures shown in Table 4 when earlier reductions are added to those shown in Table 4. For example, between 1999 and 2006, the number of family lawyers taking legal aid certificates declined by 29%.<sup>66</sup>

The data in Table 5 highlights changes in the number of legal aid certificates issued in the areas of criminal, family, refugee/immigration, and other civil areas of law over the past ten years. Most significantly, the number of legal aid certificates issued for refugee and immigration services is nearly half the number issued approximately ten years ago.

<sup>65</sup> *Ibid.*

<sup>66</sup> Trebilcock Report, *supra* note 30 at 117.



**Table 5.** Number of Legal Aid Certificates Issued in Ontario by Area of Law

<b>Fiscal Year</b>	<b>Criminal</b>	<b>Family</b>	<b>Refugee/Immigration</b>	<b>Other Civil</b>
<b>2006–07</b>	65,784	26,450	11,060	5,807
<b>2014–15</b>	54,182	22,086 <sup>67</sup>	6,445	4,566
<b>Percentage Change</b>	<b>-17.6%</b>	<b>-16.4%</b>	<b>-41.7%</b>	<b>-21.3%</b>

## **C. ASSESSING THE IMPACT OF REDUCED FUNDING FOR LEGAL AID ON CLIENT ACCESS: IS LAO ON THE ROAD TO RECOVERY?**

### **1. ACCESS TO LEGAL AID SERVICES**

LAO acknowledges that the number of certificates issued has decreased, but attributes the decline to “changes in demand for legal services and the greater availability of alternative legal aid services that LAO provides.”<sup>68</sup> Table 6 reveals that LAO has significantly reduced its reliance on per diem “duty counsel.” Per diem duty counsel are private bar lawyers paid to act as duty counsel on a daily or “per diem” rate. These reductions appear to be part of a consistent effort by LAO to increase reliance on salaried staff lawyers employed by LAO to provide services, including duty counsel services. This trend is demonstrated by the table below which shows that LAO has significantly increased its complement of salaried staff lawyers. As of 2014–15, LAO has allowed the number of lawyers employed by LAO-funded clinics to remain more or less constant. Increasing the complement of staff lawyers appears to be in keeping with LAO’s mission of maintaining Ontario’s mixed system of legal aid (where services are provided through a variety of sources). As LAO has stated, it is not moving toward a public defender system and it firmly believes that Ontario’s mixed system is effective and efficient in serving client needs.<sup>69</sup> Future research should assess the effectiveness and efficiency of the mix of service providers in Ontario.

<sup>67</sup> In 2014/2015, LAO issued 3,621 more certificates than in 2013–14 (a 4% increase). This increase may be explained by the introduction of “non-litigation certificates” in July 2014. Non-litigation certificates include an independent legal advice certificate for advice on mediated agreements and a separation agreement certificate (2,446 non-litigation certificates were issued during 2014–15). See LAO 2014–15 Annual Report, *supra* note 5 at 18–19.

<sup>68</sup> Legal Aid Ontario, *2013/2014 Annual Report*, (Toronto: Legal Aid Ontario, 2014) at 20, online: <legalaid.on.ca/en/publications/downloads/2013-14-LAO-Annual-Report.pdf> [perma.cc/M2GCG-2TFG] [LAO 2013/14 Annual Report].

<sup>69</sup> Legal Aid Ontario, “Myths and Realities,” online: <www.legalaid.on.ca/en/about/mythsandrumours.asp> [perma.cc/36RX-DFP8] [LAO 2013/14 Annual Report].

**Table 6.** Number of Legal Aid Lawyers in Ontario, By Type<sup>70</sup>

<b>Fiscal Year</b>	<b>Certificate Lawyers</b>	<b>Per Diem Duty Counsel Lawyers</b>	<b>Staff Lawyers, including Duty Counsel</b>	<b>Clinic Lawyers</b>
<b>2006–07</b>	3,578	1,642	178	241
<b>2014–15</b>	3,253	1,291	280	245
<b>2015–16</b>	3,374	1,231	N/A	N/A
<b>Percentage Change</b>	<b>-6%</b>	<b>-25%</b>	<b>57%</b>	<b>2%</b>

Arguably, the decline in the number of certificates issued, referred to in Table 5, does not necessarily demonstrate that an increased number of clients are going without representation. Individuals in need of legal services are increasingly being represented by staff lawyers working directly for LAO, rather than by certificate lawyers.<sup>71</sup> In addition to the question of whether the decline in the number of certificates is in fact matched by an increase in staff lawyers, controversy remains as to whether the quality of representation provided by the former is comparable to that provided by the latter.<sup>72</sup>

As to changing demand for legal services, LAO notes that, “[t]he number of criminal cases received in Ontario’s court [sic] have [sic] decreased by 15 per cent over the past three years, and the number of criminal certificates issued by LAO have [sic] decreased by 17 per cent.”<sup>73</sup> In other words, the decline in legal aid certificates for criminal matters outpaces the decline in criminal cases by only 2%.

With respect to certificates for immigration and refugee matters, LAO states that changes to federal refugee legislation introduced on 15 December 2012 significantly reduced the number of refugee claimants in Canada and that this, “led to a 50 to 60 per cent drop in certificate applications.”<sup>74</sup> Despite the reduction in certificate applications for refugee law services, some researchers doubt whether refugee lawyers, despite their diligence and good intent, are able to do everything expected of them with the limited number of hours LAO pays for.<sup>75</sup> More resources may be needed despite the decrease in applications in order to address significant concerns

<sup>70</sup> Strain and Yablonovsky data, *supra* note 64.

<sup>71</sup> This same explanation is provided by Legal Aid Ontario with respect to the decreasing number of legal aid certificates issued year after year. See LAO 2013/14 Annual Report, *supra* note 69 at 27.

<sup>72</sup> See generally Frederick Zemans & James Stribopoulos, “Peer Review in Canada: Results from a Promising Experiment” (2008) 46:4 Osgoode Hall LJ 697.

<sup>73</sup> LAO 2014/15 Annual Report, *supra* note 5 at 21.

<sup>74</sup> *Ibid.*

<sup>75</sup> See Sean Rehaag, Julianna Beaudoin & Jennifer Danch, “No Refuge: Hungarian Romani Refugee Claimants in Canada” (2015) 52:3 Osgoode Hall LJ 705; see also Nicholas Keung, “Legal Aid vows to ‘weed out’ bad refugee lawyers,” *Toronto Star* (20 April 2015), online: <[thestar.com/news/immigration/2015/04/20/legal-aid-vows-to-weed-out-bad-refugee-lawyers.html](http://thestar.com/news/immigration/2015/04/20/legal-aid-vows-to-weed-out-bad-refugee-lawyers.html)> [perma.cc/GY57-VRQC] asserting that “[t]he other issue is: Is legal aid providing enough resources to allow counsels to provide quality services? If not, some lawyers are going to stop seeing refugee clients on legal aid.”

regarding the quality of service provided by some lawyers on the refugee panel.<sup>76</sup> At present, additional resources are desperately needed to address LAO's budget deficit and to avoid cutting immigration and refugee law services altogether, as was earlier proposed by LAO and discussed above.

Finally, LAO claims that family law services have actually been increased through the introduction of Family Law Service Centres (FLSCs) and other family law initiatives.<sup>77</sup> Future research is needed to evaluate the impact of FLSCs on legal aid family law services, a task that should be facilitated by LAO's recent move to standardize data collection for FLSC locations across the province.

LAO introduced a multi-tiered call centre in 2009–10.<sup>78</sup> Telephone applications are assessed by call centre agents who may refer clients who are ineligible for legal aid certificates to alternative LAO services. These “referrals” are tracked by LAO.<sup>79</sup> However, the extent to which these referrals actually result in applicants being provided with the services they need and are entitled to remains an open question. In addition to recording the number of referrals, data should be collected on the outcome of each referral. Absent reliable data on the point, LAO risks both underestimating demand and overstating the proportion of applicants who seek assistance. This was the experience in Britain which pioneered the use of a legal aid telephone gateway only to discover that in three types of cases—debt, discrimination, and education—fewer people were gaining access to legal aid services, not more.<sup>80</sup>

Most significantly, however, the Ontario government and LAO have begun to address the issue of the financial eligibility threshold discussed above. LAO ultimately aims to align its financial eligibility test with Statistics Canada's LICOs.<sup>81</sup>

## 2. ACCESS TO LEGAL AID SERVICES VS ACCESS TO JUSTICE

Aside from the issue of access to available legal aid services is the more pressing matter of whether the legal aid services that are available improve access to justice. In 2010, Mary Jane Mossman, Karen Schucher, and Claudia Schmeing published an article exploring the different ways that legal aid priorities have been defined.<sup>82</sup> *Inter alia*, the authors reviewed how the relationship between legal aid and access to justice has evolved over time. In the Canadian context, the goals of access to justice have been described in terms of five “waves” of reforms:<sup>83</sup>

(1) In the first wave, legal aid services were introduced.

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<sup>76</sup> *Ibid.*

<sup>77</sup> LAO 2014/15 Annual Report, *supra* note 5 at 21.

<sup>78</sup> Statistics Canada, *Table 258-0011—Refused legal aid applications, by reason for refusal, criminal and civil matters*, CANSIM database, online: <[www5.statcan.gc.ca/cansim/a26?lang=eng&id=2580011](http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=2580011)> [perma.cc/8GC2-D2YZ].

<sup>79</sup> Email from David McKillop, Vice President Policy, Research & External Relations, LAO, 28 December 2016 [McKillop email].

<sup>80</sup> House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (Eighth Report of Session 2014–15) (London: The Stationery Office Limited, 4 March 2015) at 12.

<sup>81</sup> McKillop email, *supra* note 79.

<sup>82</sup> Mossman et al, “Comparing,” *supra* note 1.

<sup>83</sup> *Ibid* at 154-159.

- (2) In the second wave, reforms were aimed at providing legal representation for “diffuse” interests, especially in relation to consumer and environmental protections.
- (3) In the third wave, more comprehensive reforms were introduced, including changes in court procedures and the structure of courts, the creation of new courts, the use of laypersons and paraprofessionals, reforms of substantive laws to avoid disputes or facilitate their resolution, and the use of private, informal dispute resolution processes.
- (4) In the fourth wave, increased efforts were put into preventative law and citizen participation in decision-making.
- (5) In the fifth wave, initiatives fostered more equal access to positions of authority within the legal system.

As Mossman, Schucher, and Schmeing argued,

Particularly in relation to the development of community legal clinics, legal aid programs in Ontario were intended to extend *beyond the provision of legal representation in the courts*, and to embrace some of the goals of “second” and “third wave” access to justice programs.<sup>84</sup>

We agree with these authors that legal aid programs in Ontario go well beyond the objectives of the first wave of access to justice. However, the two concerning trends outlined above (stagnant and declining funding for legal aid from the federal government, and financial eligibility guidelines that do not reflect accepted measures of poverty, such as the LICOs) make it more difficult for Ontario’s legal aid system to embrace the goals of the second and third waves of access to justice and to extend into the fourth and fifth waves. Legal aid services in Ontario have matured, and as explored in greater detail below, continue to mature. But without addressing chronic underfunding from both the federal and provincial governments and without updating eligibility guidelines to reflect true need, Ontario’s legal aid system risks losing its past gains and delaying its future improvement.

### **III. MOVING FORWARD: NEW APPROACHES TO DELIVERING LEGAL AID**

As our discussion of the effects of underfunding indicates, LAO is now committed to a strategy of innovation in service delivery—a response to both the well-documented access to justice crisis in Ontario and the classic challenge of “how to do more for less.” It involves a comprehensive strategy to belatedly implement many of the overarching goals that the McCamus Report identified: client-driven priority setting; a more discrete understanding of both client needs and appropriate service responses; greater development of the “mixed model” of legal aid service delivery (by increasing the complement of staff lawyers); more innovation and experimentation; and more emphasis on cost-efficiency and accountability for the use of public funds.<sup>85</sup>

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<sup>84</sup> *Ibid* at 163 [emphasis original].

<sup>85</sup> See generally McCamus Report, *supra* note 32.

## A. “ALTERNATIVE” PERSONNEL AND ORGANIZATIONAL ARRANGEMENTS

Table 7 records the sharp decline in the deployment of certificate lawyers in two areas—family law and refugee/immigration law.

**Table 7.** Number of Certificates Issued for Refugee/Immigration Law and Family Law

	2000–01	2009–10	2014–15	Percentage Change
<b>Family</b>	-	27,487	22,086	-19.6%
<b>Refugee/Immigration</b>	11,470	-	6,445	-43.8%

In the latter case (as explained above) this decline may be attributable to changes in immigration law, policy, and administration. In the former, it seems largely due to LAO’s introduction of “alternative” modes of service delivery. Examination of its new approach to family law matters may provide some more general insights into LAO’s long-term strategy.

### 1. FAMILY LAW

Since 2010, LAO has established twelve FLSCs that offer legal assistance to financially-eligible clients with family law issues.<sup>86</sup> These Centres are not independent legal aid clinics but, rather, are operated directly by LAO under the *Legal Aid Services Act*.<sup>87</sup> While each FLSC location is unique in some respects, each is staffed by a lawyer-manager, staff lawyers, and other employees supervised by lawyers.<sup>88</sup> While the certificate model simply provided clients with access to a lawyer for a fixed number of hours, FLSCs provide a broader range of services: assistance with document preparation; access to advice from both lawyers and social service agencies; and arrangements for mediation and settlement conferences. They also process applications for traditional legal aid certificates in cases involving complex legal issues, domestic violence, and/or child protection.<sup>89</sup> Some FLSC locations also offer Duty Counsel for clients whose documents it has prepared. Eligibility for most of these additional services is assessed on the financial eligibility test for Duty Counsel services, which is slightly higher than that for certificates. LAO indicates that some may settle their family dispute prior to going to court while others in particular need of professional representation receive it either from FLSC staff lawyers or from certificate lawyers to whom they have been referred.<sup>90</sup> As David McKillop explains,

<sup>86</sup> Legal Aid Ontario, *2010/2011 Annual Report*, (Toronto: Legal Aid Ontario, 2011) at 5, online: <legalaid.on.ca/en/publications/downloads/annualreport\_2011.pdf?t=1433462400041> [perma.cc/WRZ7-MHK4].

<sup>87</sup> *Legal Aid Services Act*, *supra* note 8, s 14(1)(d).

<sup>88</sup> McKillop email, *supra* note 79.

<sup>89</sup> Legal Aid Ontario, *2012/2013 Annual Report*, (Toronto: Legal Aid Ontario, 2013) at 27, online: <legalaid.on.ca/en/publications/downloads/annualreport\_2013.pdf> [perma.cc/3AKW-7CYA] [LAO 2012/13 Annual Report].

<sup>90</sup> McKillop email, *supra* note 79.

FLSCs succeed in providing clients with earlier, better, and more frequent resolutions, there have been a number of changes in family justice since 2006—7 that may account for the decrease in demand for certificates. For instance, in 2011, MAG [Ministry of the Attorney General] implemented a province-wide service expansion in family courts. Newly offered were family mediation services onsite and offsite, a Mandatory Information Program, and Dispute Resolution Officers for the first case conference in family matters.<sup>91</sup> Further, in 2014, LAO provided \$2 million in funding over three years to Ontario's (then) six student legal aid services societies (SLASS), enabling them to begin providing family law services to low-income clients, with the exception of U of T [University of Toronto], who expanded their already existing family law services. The 2013 Cromwell Report emphasized the importance of triage, early resolution, and ADR in family law, shifting the focus away from traditional contested litigation. These changes, coupled with the founding of the FLSCs, as well as any number of factors external to LAO or MAG, make it difficult to say what specifically reduced the demand for family law certificates.<sup>92</sup>

The introduction of FLSCs has undoubtedly expanded the number of clients receiving assistance in the area of family law. According to LAO, FLSC staff lawyers assisted roughly 40,000 clients in fiscal year 2012–13 and 35,111 clients in 2013–14, although LAO does not provide specifics on exactly what services these clients received.<sup>93</sup>

While the FLSCs provide a new spectrum of services, there is as yet insufficient evidence to support a reliable estimate of their effectiveness. For example, it is not known how many litigants are represented by FLSC staff lawyers rather than certificate lawyers, or whether the outcomes differ depending on the type of representation provided and, if so, why.<sup>94</sup> Nor is it clear whether the introduction of FLSC services will, over the long term, in fact lead to a reduction in the issuance of legal aid certificates in the area of family law. In the 2012–13 fiscal year, the number of family law certificate applications taken by LAO decreased by approximately 12%, which LAO attributed to the services now provided by FLSC staff.<sup>95</sup> On the other hand, from 2014–15 to 2015–2016, there was an increase of over 20% in all types of certificates issued, but an even greater increase—37%—in family law certificates many of which, presumably, originated in referrals from FLSCs.

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<sup>91</sup> Note, MAG also introduced Family Court Support Workers who provide direct support to victims of domestic violence who are involved in the family court process. See Ontario Ministry of the Attorney General, “Family Court Support Worker Program,” online: <[attorneygeneral.jus.gov.on.ca/english/ovss/family\\_court\\_support\\_worker\\_program/](http://attorneygeneral.jus.gov.on.ca/english/ovss/family_court_support_worker_program/)> [perma.cc/RD7X-ZPVW].

<sup>92</sup> *Ibid.*

<sup>93</sup> We reached out to LAO for details, however, they were unable to provide us with data on this matter because the collection of data on these matters was only standardized starting in October of 2015; see LAO 2012/13 Annual Report, *supra* note 89 at 27; LAO 2013/14 Annual Report, *supra* note 69 at 22.

<sup>94</sup> Legal Aid Ontario, “Family Law Service Centres,” online: <[legalaid.on.ca/en/contact/contact.asp?type=flsc](http://legalaid.on.ca/en/contact/contact.asp?type=flsc)> [perma.cc/H3BV-HZL4]. For a discussion of unbundled legal services and outcomes generally, see Jessica K Steinberg, “In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services” (2011) 18 Geo J on Poverty L & Pol’y 453.

<sup>95</sup> LAO 2012/13 Annual Report, *supra* note 89 at 23, 27.

## 2. IMMIGRATION AND REFUGEE LAW

LAO's Refugee Law Office (RLO), which began as an experiment in 1994, was made permanent in 2001.<sup>96</sup> RLO staff lawyers serve low-income clients primarily in Toronto, Hamilton, and Ottawa. As with the FLSCs, the introduction of the RLO program coincided with a decrease in the number of certificates issued for refugee and immigration matters. Indeed, since 2001, the number of legal aid certificates issued for refugee and immigration law matters has decreased by 43.8%. In fiscal year 2013–14 alone, LAO issued 3,122 fewer certificates than in the previous year.<sup>97</sup> On the other hand, in 2013–14 the RLO worked on only 735 files. These numbers suggest that the RLO program has not expanded to the same extent that LAO's use of certificate lawyers has declined. This situation may be explained by changes in immigration and refugee law that have significantly reduced the number of refugee claimants in Ontario, and thus the number of applicants seeking legal aid services in this area. However, as already noted above, even if demand for legal aid services in this area is declining, additional resources are likely necessary to address quality control concerns with respect to these services.

## 3. SENIOR COUNSEL

Not all “alternative” legal aid services involve a re-direction of work from the private bar to staff lawyers. Some new services complement or reinforce existing programs. One such initiative involved LAO's hiring of twelve “Senior Counsel” who are located across the province. Their role is to address the needs of clients who, in the past, were sometimes denied LAO certificates because their cases were too complex and expensive. All twelve are criminal lawyers and each has a particular sub-specialty. For instance, the Senior Counsel in Barrie and Brantford have mental health expertise and Aboriginal expertise, respectively.<sup>98</sup> The appointment of these Senior Counsel has undoubtedly enhanced LAO's capacity to deal with low-volume/high-complexity criminal cases. However, their overall impact on the system is hard to assess because of difficulties in LAO's method of measuring its response to fluctuating demand for its services.

## 4. BRYDGES DUTY COUNSEL

LAO's Brydges Duty Counsel program offers a quintessential example of the impact of the *Charter of Rights and Freedoms* on the realignment of legal aid services across Canada. Until 1990, duty counsel services across Canada—services provided prior to trial to individuals charged with criminal offences—generally required clients to meet financial eligibility criteria. However, in *R v Brydges*<sup>99</sup> the Supreme Court of Canada forced legal aid plans to alter this policy. Relying on the right to counsel guaranteed by section 10(b) of the *Canadian Charter of*

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<sup>96</sup> Legal Aid Ontario, *2001/2002 Annual Report*, (Toronto: Legal Aid Ontario, 2002) at 5, online: <legalaid.on.ca/en/publications/downloads/annualreport\_2002.pdf?t=1456107450670> [perma.cc/ZNB9-XBHY].

<sup>97</sup> LAO 2013/14 Annual Report, *supra* note 69 at 20.

<sup>98</sup> Personal communication with David McKillop, Vice-President, Policy, Research & External Relations, LAO, 3 June 2015.

<sup>99</sup> *R v Brydges*, [1990] 1 SCR 190.

*Rights and Freedoms*, the Court ruled that an individual, when arrested or detained by the police, has the right to be informed of the “existence and availability of the applicable systems of duty counsel and Legal Aid in [each Canadian] jurisdiction, in order to give the detainee a full understanding of the right to retain and instruct counsel.”<sup>100</sup> Failure by the police to provide this information at the time of arrest or detention, the Court ruled, constitutes a violation of section 10(b) of the *Charter*, and any evidence obtained as a consequence may be excluded from a subsequent trial by virtue of the exercise of the discretion that courts have been granted by section 24(2) of the *Charter*.<sup>101</sup> This ruling led to the introduction by LAO and other legal aid systems of so-called “Brydges services” which are typically provided on a temporary basis by way of 24/7 telephone access, without regard to financial eligibility criteria.<sup>102</sup>

## 5. COMMUNITY LEGAL WORKERS, PARALEGALS AND SOCIAL WORKERS

Administrators of legal aid across Canada have placed an increasing emphasis on multidisciplinary teams capable of providing holistic support to clients. Legal aid clinics in particular have formed relationships with external agencies, though formal integration of services remains an exception, rather than the rule.<sup>103</sup> Non-lawyers such as Community Legal Workers (CLWs), paralegals, and social workers have been deployed in Ontario’s community legal clinics almost from their inception, and certainly from the establishment of Parkdale Community Legal Services in the early 1970s.<sup>104</sup> They are now present in facilities operated directly by LAO and independent community legal clinics, providing support to clients on systemic, legal, and non-legal matters. These individuals complement the services provided by lawyers and in some instances, do the same work as lawyers, such as representing clients before administrative tribunals.

CLWs usually carry their own caseload at most clinics—though at others, such as Parkdale Community Legal Services, they do not. They are knowledgeable about legislation and public policies in their areas of expertise. This knowledge enables them to address issues systemically, for example, rallying tenants around housing rights issues, assisting workers encountering employment rights issues, and enhancing general public understanding of their rights in areas ranging from spousal violence to immigration. CLWs may be social workers or licensed paralegals, though not all CLWs have formal training or licensure in a particular area. Given the inevitable shortage of resources in most clinics, CLWs have become more involved in casework—often to the detriment of their community organizing and educational functions. For instance, the Canadian Bar Association’s 2010 paper on renewing legal aid found that

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<sup>100</sup> *Ibid* at 349.

<sup>101</sup> Department of Justice Canada, *A Review of Brydges Duty Counsel Services in Canada*, by Simon Verdun-Jones and Adamira Tijerino, (Ottawa: Department of Justice Canada, 2004) at 1, online: <[justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03\\_la4-rr03\\_aj4/rr03\\_la4.pdf](http://justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03_la4-rr03_aj4/rr03_la4.pdf)> [perma.cc/CFZ6-4SFM].

<sup>102</sup> *Ibid*.

<sup>103</sup> The Canadian Bar Association, *Moving Forward on Legal Aid: Research on Needs and Innovative Approaches*, by Melina Buckley, (Ottawa: The Canadian Bar Association, 2010) at 100-101 [Buckley].

<sup>104</sup> Doug Ewart, “Parkdale Community Legal Services: Community Law Office, or Law Office in a Community?” (1997) 35:3 & 4 Osgoode Hall LJ 475.



community-based clinics across Canada are often too “overwhelmed by individual casework” to focus on “eliminating the systemic causes of poverty.”<sup>105</sup>

Paralegals have also been integrated into Ontario’s legal aid plan. Their specific job duties depend on the type of facility in which they are employed. In general terms, however, they may undertake legal research, prepare legal documents, assist in completing transactions, communicate with clients, and interview witnesses. They may also act as counsel in Small Claims Court, in all matters under the *Provincial Offences Act* (including appeals) and before provincial boards, agencies, and tribunals that allow appearances by “agents.”<sup>106</sup> The potential for cost-savings is significant, if paralegals are used in substitution for staff lawyers or certificate lawyers.<sup>107</sup>

Of course, the prospect of cost-savings must not be allowed to compromise the quality of service provided. In this respect, Ontario’s legal aid plan has greater opportunities than most to both lower costs and maintain quality controls. Ontario is the only province that subjects paralegals to a full regime of regulation (by the Law Society of Upper Canada), specifies their educational requirements, assesses their competency and good character, and maintains surveillance over their conduct.<sup>108</sup> By contrast, other Canadian jurisdictions regulate paralegals relatively lightly or not at all, preferring instead to confine the scope of their activities in various ways: by allowing unsupervised paralegals to provide only specified services (and by inference not others);<sup>109</sup> by allowing them to provide a broader range of services under the general supervision of a lawyer;<sup>110</sup> or by denying them the right to provide most relevant services except when directly supervised by a licensed legal practitioner.<sup>111</sup>

Social workers and members of other “helping professions” also play an important role in the delivery of legal aid services today.<sup>112</sup> The integration of these professionals into the service delivery process reflects the conclusions of numerous studies “that poor and vulnerable

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<sup>105</sup> Buckley, *supra* note 103 at 9.

<sup>106</sup> Law Society of Upper Canada, by-law No 4, *Licensing*, (23 February 2017), s 6(2).

<sup>107</sup> In Newfoundland and Labrador, for instance, paralegals are paid less than half of what staff lawyers earn. See Newfoundland and Labrador Legal Aid Commission, *External Review of Legal Aid in Newfoundland and Labrador*, by John F Roil, vol 1 (St. John’s: Department of Justice and Public Safety, 2014) at 78.

<sup>108</sup> Ontario Minister of the Attorney General, *Report of Appointee’s Five-Year Review of Paralegal Regulation in Ontario*, by David J Morris (Ontario: MAG, November 2012) at 9, online: <[attorneygeneral.jus.gov.on.ca/english/about/pubs/paralegal\\_review/Morris\\_five\\_year\\_review-ENG.pdf](http://attorneygeneral.jus.gov.on.ca/english/about/pubs/paralegal_review/Morris_five_year_review-ENG.pdf)> [perma.cc/Q79W-JF44]; Law Society of Upper Canada, by-law No 4, *Licensing*, (23 February 2017).

<sup>109</sup> See Gloria Mendelson, “The Status of Paralegals in Manitoba” (July 2011), online: <[web.archive.org/web/20131211165054/http://www.cba.org/cba/newsletters-sections/2011/PrintHTML.aspx?DocId=45226#article4](http://web.archive.org/web/20131211165054/http://www.cba.org/cba/newsletters-sections/2011/PrintHTML.aspx?DocId=45226#article4)> [perma.cc/6N48-Y985].

<sup>110</sup> Law Society of the Yukon, “Toward a New *Legal Profession Act* Policy Paper,” (Whitehorse: Law Society of the Yukon, 18 November 2011) at 32 online: <[lawsocietyyukon.com/forms/policypapernovember2011.pdf](http://lawsocietyyukon.com/forms/policypapernovember2011.pdf)> [perma.cc/MUK6-PGGA].

<sup>111</sup> Law Society of British Columbia, “Paralegals,” online: <[lawsociety.bc.ca/support-and-resources-for-lawyers/law-office-administration/paralegals/](http://lawsociety.bc.ca/support-and-resources-for-lawyers/law-office-administration/paralegals/)> [perma.cc/9T28-337T] (lawyers can only supervise a maximum of two paralegals and regulation of the paralegals occurs by holding the supervising lawyer responsible for the conduct of the paralegals they supervise).

<sup>112</sup> See Susan Noakes, “Transformative Social Work in the Criminal Justice Field” (2014) 23 *Journal of Law and Social Policy* 175; Rose Voyvodic & Mary Medcalf, “Advancing Social Justice Through an Interdisciplinary Approach to Clinical Legal Education: The Case of Legal Assistance of Windsor” (2004) 14 *Wash UJL & Pol’y* 101.

individuals tend to experience multiple legal problems that aggregate into cluster types which co-occur with other economic, social and health problems.”<sup>113</sup> In Ontario, social workers have been successfully integrated into legal aid service systems at Parkdale Community Legal Services, le Centre francophone de Toronto, Student Legal Aid Services Societies, Aboriginal Legal Services of Toronto, and York Community Services.<sup>114</sup> In this respect, as in others, Ontario’s legal aid system has been more open than most to exploring “alternative” and complementary services provided by non-lawyers, although Calgary Legal Guidance employs social workers alongside lawyers,<sup>115</sup> and Legal Aid Nova Scotia has hired several Mi’kmaq social workers.<sup>116</sup>

## 6. MEDIATORS

Mediators are playing an increasingly important role in legal aid systems across Canada. In 2010, Ontario’s Attorney General launched a pilot project with LAO involving automatic referrals to mediation. The project, known as “Mediate393,” was introduced in several courts across the province and was aimed particularly at family law clients who qualified for legal aid. By 2011, it had been extended to all family court locations in Ontario. The program has four components, two of which involve mediation:<sup>117</sup>

- (1) A two-hour on-site mediation service is available at Ontario’s family courts five days a week, with no income restrictions; cases are accepted on a first-come first-serve basis.
- (2) Mediation is also made available off-site for more complex cases. This is a subsidized service with rates based on a sliding scale geared to the client’s ability to pay.

As with the other “alternative” approaches adopted or sponsored by LAO, mediation awaits a full study of its cost-effectiveness and its consequences for clients, though in recent years, an extensive body of research has been developed which specifically evaluates family mediation’s effectiveness.<sup>118</sup>

## B. NEW TECHNOLOGIES

There is no question that online services will play an increasingly important role, not only in the delivery of legal aid services, but in the way all Canadians interact with the legal system. However, LAO has not taken the lead in this particular area. Rather, it is British Columbia that

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<sup>113</sup> Buckley, *supra* note 103 at 116; Action Committee on Access to Justice in Civil and Family Matters, “Access to Civil and Family Justice: A Roadmap for Change” (October 2013) at 3, online: <cfjc-fcjc.org/sites/default/files/docs/2013/AC\_Report\_English\_Final.pdf > [perma.cc/SZ8Q-DAQ4].

<sup>114</sup> *Ibid* at 102.

<sup>115</sup> *Ibid* at 9.

<sup>116</sup> Personal communication with Darrel Pink, Executive Director of the Nova Scotia Barristers’ Society, 20 July 2015.

<sup>117</sup> See Mary Jane Mossman et al, *Families and the Law: Cases and Commentary*, 2nd ed (Concord, Ontario: Captus Press Inc, 2015) at 393, citing Lorna Yates, “Mediate393: New Family Mediation Program in Toronto,” *The Lawyers Weekly* (23 September 2011) at 11.

<sup>118</sup> See generally Noel Semple, “Mandatory Family Mediation and the Settlement Mission: A Feminist Critique” (2012) 24 *CJWL* 207.

has made the greatest progress in providing legal services online. The province has developed an online guided pathway known as MyLaw BC, which launched in 2015. It uses interactive technology to guide users to individualized action plans which will resolve their legal problems in a number of areas of law, starting with family law, with additional legal topics to be added over time.<sup>119</sup> The MyLawBC website is similar to the Dutch program *Rechtwijzer 2.0*,<sup>120</sup> which uses a question and answer diagnostic approach, combined with branching logic, to provide the user with next-step advice. MyLawBC is integrated with in-person legal assistance services such as telephone hotlines, text (chat) services, social media, and mobile applications.<sup>121</sup>

LAO's Public Legal Information department is currently exploring the use of "Guided Pathways" and other facilitative technologies to improve service to low-income individuals. It is investigating systems in place in other jurisdictions, reviewing the lessons learned through MyLawBC, and considering undertaking a Guided Pathways project in collaboration with other provinces.<sup>122</sup> However, no plan is currently in place to initiate wide-scale implementation of Guided Pathways in Ontario. More positively, LAO is developing a suite of digital strategies including: knowledge-sharing initiatives; improving access to justice for rural and remote communities;<sup>123</sup> websites with legal information; a Trans\* legal needs assessment;<sup>124</sup> and an online "legal health check-up."<sup>125</sup> Online intake is already in use in Ontario through the Clinic Interview Partnership ("CIP") established in 2010,<sup>126</sup> and is currently used by seventeen legal clinics.<sup>127</sup> CIP has created ten interactive interview protocols using A2J Author.<sup>128</sup>

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<sup>119</sup> Patricia Byrne, "Public Legal Education and Information Formats and Delivery Channels" (17 July 2014) at 59, online: \Legal Services Society / Legal Research Fund of the Law Foundation of BC <legalaid.bc.ca/assets/aboutUs/reports/PLEI/pleiFormatsAndDeliveryChannelsJuly2014.pdf> [perma.cc/L9V3-2FLT] [Byrne].

<sup>120</sup> See HiiL Innovating Justice, "Rechtwijzer 2.0: Technology that puts justice in your hands," online: <hiil.org/project/rechtwijzer> [perma.cc/VE9B-TP6L]. Rechtwijzer is a platform where "people can learn about their legal options while receiving rich support for an interest-based dialogue between the people involved." Rechtwijzer 2.0 also provides mediation, adjudication, and a neutral review of all agreements. HiiL Innovating Justice has a joint venture with Tilburg University in the Netherlands.

<sup>121</sup> Byrne, *supra* note 119 at 59.

<sup>122</sup> McKillop email, *supra* note 79.

<sup>123</sup> Rural & Remote Access to Justice: A Boldness Project, "Projects," online: <boldnessproject.ruralandremoteresources.com/projects/> [perma.cc/988V-U2HB]

<sup>124</sup> HIV & AIDS Legal Clinic Ontario, "Trans\* Legal Needs Project," online: <halco.org/our-services/trans-legal-needs-assessment-ontario> [perma.cc/J3VY-VRT6].

<sup>125</sup> Halton Legal Clinic, "Legal Health Check-Up," online: <legalhealthcheckup.ca/en/> [perma.cc/EK8L-Q2AV].

<sup>126</sup> Community Legal Clinic - Simcoe, Haliburton, Kawartha Lakes, "Communitylegalclinic.com project now a 14 clinic partnership" (14 October 2012),

online: <communitylegalclinic.ca/newsdetail.aspx?ntID=1&pID=87> [perma.cc/AF6R-4PGR]. The partnership is exploring whether online technology, a combination of interactive interviews, wikis, and other knowledge management tools can connect clinics and their communities in helpful new ways. The project mission is to pilot a system of interactive interviews that reflect community legal clinic values. Project work involves capturing caseworker practice knowledge in a form that can be customized and used online, at a local level, to help a clinic.

<sup>127</sup> See PLE Learning Exchange Ontario, "Community Legal Clinics and A2J Guided Interviews – October 2016," online: <plelearningexchange.ca/database/community-legal-clinics-a2j-guided-interviews-october-2016/> [perma.cc/KCC7-UJBF].

<sup>128</sup> Clinic Interview Partnership, "Community Legal Clinics and A2J Guided Interviews" (October 2016) at 4, online: <plelearningexchange.ca/wp-content/uploads/2017/03/a2j-guided-interviews-oct-2016.pdf> [perma.cc/C3T J-

These technological developments are important because they allow most people to access legal information and tools anytime, anywhere. While there is certainly a digital divide between the rich and the poor in Canada, a 2016 report from the Canadian Radio-television and Telecommunications Commission (“CRTC”) revealed that households in the lowest income quintiles have more cell phones than home computers. The CRTC concluded that cell phone usage is likely higher than home computer usage in the lower income quintiles because the technology provides multiple communication services (voice and internet), meaning poorer Canadians do not need to subscribe to each service individually.<sup>129</sup>

Technology also allows for efficiencies that free up time for legal aid service providers, which can be spent on more important tasks. For instance, the CIP is investigating the integration of their online intake tool with the case management system used by legal aid clinics. This would allow for forms to be pre-populated based on existing databases and could even automatically generate answers to common questions.<sup>130</sup>

While technology is particularly promising with respect to addressing the chronic dilemma of doing “more with less,” any assessment of future tools must be mindful that access to legal services and information is not necessarily the same as “access to justice.”

## IV. CONCLUSION

This survey of developments in legal aid in Ontario over the past two decades has largely focussed on LAO’s responses to the severe funding cuts it experienced during the mid-1990s and subsequently. As explained above, the cuts, and LAO’s response to those cuts, have led to two concerning trends: stagnant and declining funding from the federal and provincial governments; and financial eligibility guidelines that are out of step with accepted measures of poverty. However, as our account also reveals, LAO is now looking forward, even while it continues to cope with chronic underfunding. The introduction of new service delivery models—partly enabled by new technologies, partly by imaginative institutional redesign, partly by the recovery of some of its funding base through increased provincial funding—suggests that LAO may be poised to make significant progress in its mission of providing a broad range of high quality legal services to low-income Ontarians.

For Ontario’s legal aid system to continue to improve and expand its services, the trends which put existing services at risk need to be reversed: predictable (*i.e.*, annual) increased per capita funding is needed, particularly from the federal government; and financial eligibility guidelines need to be updated to match common measures of poverty such as the LICOs. It is not enough to simply reverse trends in federal funding which have threatened past gains, such as providing refugee legal aid services. Data which enables us to assess new services and technologies needs to be gathered. New services and technologies which are currently in development and which prove to be beneficial need to be made accessible province-wide.

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XTSA] [CIP]. A2J Author is a cloud-based software tool that enables non-technical authors to rapidly build and implement user friendly web-based interfaces for document assembly.

<sup>129</sup> Canadian Radio-television and Telecommunications Commission, “Canada’s Communication System: An Overview for Canadians,” online:

[crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2016/cmr2.pdf](http://crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2016/cmr2.pdf) [perma.cc/3ZT3-QF98] at 23.

<sup>130</sup> CIP, *supra* note 128 at 14.

We hope that our narrative will remind readers of how far LAO has come, but also how far it has yet to go. We hope it will also remind LAO and government officials of how necessary reliable data are to the objective evaluation of its past and future progress.