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Toward a Comprehensive Legal Aid Program in Canada: Exploring the Issues

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Toward a Comprehensive Legal Aid Program in Canada:
Exploring the Issues

Mary Jane Mossman*

Proposals to incorporate civil legal aid services into a comprehensive legal aid program provide a unique opportunity to re-examine the policy rationales for legal aid in Canada. Traditionally, the rationale for legal aid was based upon the norms of legal services for paying clients. The author explores the "social indicator" approach as an alternative method of defining needs, by means of identifying target populations.

The paper assesses the criteria for choosing policy objectives by looking at the legal obligations, including those required by sections of the Charter, to provide legal aid services. The functioning of Canadian federalism is taken into account in examining the design and implementation of a comprehensive legal aid program. The author concludes by identifying further areas of research to be considered.

Les propositions qui supportent l'incorporation des services d'assistance judiciaire civile dans un programme d'aide juridique comprehensif, presentent l'occasion de re-examiner le raison d'être des politiques d'assistance judiciaire au Canada. Traditionally, cette raison d'être était basée sur les normes qui s'appliquaient aux client(e)s payant(e)s. L'auteure examine l'approche de "l'indicatif social" — c'est-à-dire, une approche qui identifie les populations visées — comme méthode alternative de définir les besoins.

Mme Mossman discute des critères nécessaires pour choisir les objectifs politiques qui s'appliqueront aux services d'aide juridique en portant attention à l'examen des obligations légales, y compris celles contenues dans la Charte. Également, l'auteure tient compte de la structure du fédéralisme canadien lorsqu'elle considère la formulation et l'exécution d'un programme d'assistance judiciaire comprehensif. En conclusion, Mme Mossman identifie des domaines de recherche à explorer de façon plus approfondie.

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The research of Karen Thompson-Harry and Morag MacLean is warmly acknowledged, as well as helpful comments from colleagues involved in community legal clinics in Ontario.
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I. INTRODUCTION

This paper is an assessment of policy rationales for civil legal aid services in Canada. Its goal is to determine options for civil legal aid services as one component of a comprehensive legal aid cost-sharing agreement between Canada and the provinces, an arrangement which has frequently been proposed as a way of both rationalizing legal aid services in Canada and for extending services to larger numbers of clients who need them. This analysis draws on principles which have been developed in the evolution of legal aid services in Canada in recent decades and suggests new directions for such services, as well as ideas for further research in the development of legal aid programs.

Since 1972, the Department of Justice has been involved in cost-sharing arrangements for criminal legal aid services in the provinces. Under current legal aid cost-sharing agreements, there is a federal contribution to the cost of providing criminal legal aid or young offender legal aid for eligible persons charged with specified offenses. The cost-sharing formula consists of two components: “a base component reflecting 50 per cent of national shareable expenditures for the base year” and “a growth component allowing for increases in the federal contribution of 50 per cent of the provincial increase in costs up to a ceiling of the percentage growth in the GNP minus 1 per cent”.

By contrast, civil legal aid is currently administered by Health and Welfare Canada under the Canada Assistance Plan as an “item of special need” for eligible individuals under the “assistance” provisions of the scheme. With the ceilings for federal contributions set out in the cost-sharing agreements for criminal and young offender legal aid services, civil legal aid has been cost-shared under the Canada Assistance Plan on a 50-50 open-ended basis.

At the time of the Federal Task Force on Program Review in 1986, it was recommended that consideration be given to “rationalizing all federal involvement in legal aid (criminal legal aid, legal aid for young offenders, and civil legal aid) under a single agreement”. The stated objectives of this recommendation were

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1 This paper is a revised version of research prepared for the Department of Justice in 1990, contract #19081-9C046. The views expressed herein are those of the author and not of the Department of Justice.

2 For example, Legal Aid Cost-Sharing Agreement, Canada and Ontario (1987-88), Part I.

3 For example, Legal Aid Cost-Sharing Agreement, Canada and Ontario (1987-88), Schedule B.


6 Task Force on Program Review, supra note 4 at 200. Since 1986, the federal government has reduced its support to the provinces in relation to the CAP. For a good overview, see “Constitutional Reform and Social Policy” (1991), CCSD Social Development Overview (#1) at 1.

7 Ibid. at 201.
to achieve agreement with the provinces on the standards to be achieved, the provision of stable funding to meet those long-term objectives and to end the ongoing process of federal/provincial negotiation which has been more or less continuous in this area since the early 1970's".8

Among a number of other recommendations,9 it was also suggested that consideration be given to developing "a civil legal aid program to replace present cost-sharing of civil legal aid under the Canada Assistance Plan". The Report suggested that civil legal aid coverage include those matters of "federal areas of interest (divorce, enforcement of maintenance orders, court-appointed counsel under the provisions of the Charter, federal administrative or quasi-judicial tribunals, etc.)".10

Particularly in conjunction with the other recommendations of the Task Force, it is evident that these recommended changes for rationalization of legal aid under one agreement and the transfer of jurisdiction for civil legal aid to the Department of Justice were motivated primarily for reasons of administrative efficiency and rationality. However, these recommended changes coincided with similar recommendations proposed by the Canadian Bar Association (CBA) in 1985:

The separate agreements covering adult criminal, Y.O.A. and civil legal aid cost sharing should be unified, with federal responsibility given to the Minister of Justice and provincial responsibility to the respective Attorneys General. This would remove the present duplication of negotiation, administration and audit and allow priorities to reflect need and not funding biases.11

The basis for the CBA recommendations was broader in scope, suggesting that legal aid "is the expression of the basic, democratic principle of the protection of the rights of individuals against the overwhelming power of the state" and an essential service "to ensure equal access to justice in our society".12

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8 Ibid. at 201-202.
9 The other recommendations included a suggestion for resistance to increases in federal contributions to provinces with "high unit costs" of delivering legal aid, particularly because of provincial reliance on the private bar; the possibility of assessing the level of federal contributions by reference to the cost of delivering services through a public defender program (with provincial autonomy to utilize any other delivery method); consideration of a linkage of the criminal legal aid cost-sharing formula to the unit costs of service delivery rather than per capita expenditures; and a review of provincial eligibility criteria to determine the extent to which the program's intended beneficiaries ("the poor, including the working poor") are excluded from service because of increasingly restrictive financial eligibility requirements. Ibid. at 201-202.
10 Ibid. at 202.
12 CBA Report, 1985, ibid. at 1.
Reflecting its broader objectives, the CBA Report recommended that "essential legal service coverage" for eligible legal aid clients include family law matters; criminal law matters; administrative law matters "which present real jeopardy to liberty, livelihood, health, safety, sustenance or shelter"; other civil matters presenting jeopardy to individuals and groups where there is an inability to retain counsel "and the matter is not capable of being fairly resolved by other means"; and public legal education and advice.

These recommendations proposed by both the Task Force on Program Review and the Canadian Bar Association present an excellent opportunity to assess the options for the civil legal aid component of a possible comprehensive legal aid cost-sharing agreement. This paper is an effort to do so, having regard to both the needs of potential clients of civil legal aid services and the needs of government to rationalize such services.

In addressing these issues, the paper provides a detailed examination of the principles appropriate to legal aid services in Canada. Traditionally, the rationale for providing such services has focused on the "need" for legal aid services, especially by comparison with legal services available to lawyers' paying clients. While such a concept often appears objective, the analysis demonstrates how the meaning of legal needs has evolved over more than two decades of state-funded legal aid programs in Canada, and suggests the inadequacy of "needs" surveys as the primary method for defining a rationale for legal aid services. Instead, it is recommended that legal aid needs should be recognized as normative issues for policy-making, and the paper explores the usefulness of an alternate method of defining such needs — the "social indicator" approach. Such an approach recognizes the normative basis for particular policy options and offers a means of identifying target populations in terms of defined policy objectives.

The paper then examines the criteria for choosing policy objectives about legal aid services. This assessment includes both broadly-defined social and

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13 Ibid. at 6-7.
14 Including child welfare, custody and access, independent representation for children, domestic violence and maintenance proceedings, divorce and nullity proceedings, division of matrimonial property (subject to financial eligibility), paternity and adoption.
15 Including all indictable offenses, all summary conviction offenses where conviction is likely to lead to imprisonment or loss of means of earning a livelihood or where there are special circumstances requiring counsel to ensure the fairness of the adversarial process, all Crown appeals and conviction and sentence appeals by an accused where there is apparent substantial merit or a substantial miscarriage of justice.
16 Including workers' compensation, immigration, welfare, unemployment insurance, housing, pension and human rights cases.
17 Including foreclosures, residential tenant evictions, uninsured motorists, and Charter proceedings.
18 Including information to enable all members of society to "know, respect and exercise their legal responsibilities and rights, to prevent legal problems, and to help themselves to resolve legal problems without or with limited need for lawyers and courts". CBA Report, 1985, supra note 11 at 7.
political values of Canadian society as well as more specific legal obligations entrenched by the Canadian Charter of Rights and Freedoms. As well, the choice of policy objectives depends on the arrangements of Canadian federalism, including the spending power and the potential impact of constitutional changes on its use in future federal-provincial agreements.

In light of the principles identified in this analysis, the paper explores the problems of target populations and their needs for legal aid services, particularly the relationship of needs between potential civil and criminal legal aid clients. The paper tries to identify additional research which would be helpful in further identifying such needs and appropriate responses on the part of policy-makers at the federal and provincial levels.

Overall, the paper attempts to provide an analytical framework for assessing specific policy options for legal aid services in Canada in the coming years, taking account of both past experiences documented in legal aid reports and evaluations as well as more theoretical perspectives in academic writing. The paper has been written with the intention of creating a purposeful framework for discussion of policy options about legal aid services, having regard to both the individual needs of low income clients as well as our society’s collective aspirations for fairness in the administration of justice. In identifying issues and suggesting differing approaches to resolving them, the paper analyzes the implications of various options, and identifies further research which will be necessary to make informed policy choices, particularly in relation to scarce resources. This paper provides an opportunity for reviewing and assessing legal aid programs which currently operate in Canada as well as a basis for discussion and consultation about the future of legal aid services within the Canadian justice system.

II. PRINCIPLES FOR LEGAL AID SERVICES: DEFINING NEEDS

The choice of an appropriate civil legal aid component for a comprehensive cost-sharing agreement on legal aid services between the Department of Justice and each of the provinces depends on the identification of guiding principles for legal aid services in Canada. Such a search for principles is a complex task, one which may involve an enunciation of basic philosophical and social values as well as an assessment of fiscal and political contexts. As is evident in their differing recommendations about the scope of legal aid services, the Task Force on Program Review and the Canadian Bar Association adopted different principles concerning the basis for legal aid services in Canada. Thus, the definition of legal aid objectives as well as the selection of appropriate methods for achieving them are dependent on the choice of guiding principles for legal aid services.

This paper examines the issue of appropriate principles for civil legal aid services by focusing first on the identification of “needs” for civil legal aid services and then on the development of appropriate rationales for governmental policy.

responses to such needs, including rationales for a response from the federal
government of Canada. Such a process is not an easy one because the search
for principles is more a creative process of constructing ideas and models than
merely one of searching for and discovering them.

In addition, the task is difficult because such a search for principles about
legal aid at the end of the twentieth century requires us to confront the real extent
of our society’s commitment to access to justice. Inevitably, the perspective from
which such questions are approached may significantly affect proposed solutions
as well, a point suggested bluntly in a recent policy paper on legal aid services
in Australia:

Expectations of the goals and objectives of legal aid policy, expenditure and legal
aid services depend upon the social vantage point of the person who answers the
question [about the purpose of legal aid services], and whether, for example, he or
she is employed by government, or is an advocate of legal or social reform or is
dependent on government income support or welfare subsidy.20

Thus, in developing rationales for governmental responses to legal aid needs,
a further objective of this paper is to define policy options for legal aid services
to target groups.

The Evolution of the Concept of “Needs”

The history of government-funded legal aid programs in Canada21 over the
past two decades illustrates the dynamic nature of the concept of “needs” for
civil legal aid services. For example, the 1965 Joint Committee Report, which
recommended Ontario’s legal aid legislation, identified the need for civil legal
aid services characterized exclusively by reference to the legal services then
available to paying clients. Seeking to provide “equal” services for both legal
aid and paying clients, the Joint Committee Report stated that there was “no

20 National Legal Aid Advisory Committee, Funding, Providing and Supplying Legal Aid
Services (Canberra: Australian Government Printing Services, 1989) at 100 [hereinafter
Australian Legal Aid Services].

21 For an excellent account of the history of policy-making about legal aid in Canada,
see D. Hoehne, Legal Aid in Canada (Toronto: Edwin Mellen Press, 1989). Hoehne’s analysis
suggested three stages of policy development: the period of “individual coping” with the need
for legal services; the period of “charity” provided to indigent clients by lawyers; and the period
of “collective coping” with the development of state-funded legal aid programs. Hoehne also
identified a significant tension in legal aid policy:

Since legal aid policy develops under the combined influence of legal and political
demands, it will always be characterized by an inherent tension between the rights of
the individual and the demands of the dominant political order. The study argues that
this ambivalence of legal aid is its main characteristic. The price to pay for obtaining
free legal assistance is the acceptance of a legal system whose inner logic often militates
against the interests of those in need (at 8).

For an account of the history of legal aid in Ontario, see M. P. Reilly, “The Origins and
Development of Legal Aid in Ontario” (1988) 8 Windsor Y.B. Access Just. 81; and for Manitoba,
see N. Larsen, “Seven Years with Legal Aid (1972-79): A Personal View of Some Events
logical reason" for excluding representation before administrative tribunals from legal aid coverage. On this basis as well, the Committee concluded that there was no principled difference between matrimonial proceedings and other civil actions:

In the contemplation of the law of Ontario they are equal. . . . Any legal aid system which intends to ensure the advancement of the protection of the legal rights of the needy must surely include matrimonial causes.\(^{22}\)

In this conception of civil legal aid needs, services were consciously patterned on the services then offered to paying clients by their lawyers.\(^{23}\) Inspired primarily by legal aid initiatives in the United Kingdom, the Ontario legal aid program was designed essentially as a judicare system, with the same lawyers providing services to both legal aid and paying clients.

This early conception of legal aid needs was soon challenged by developments in the United States where government-funded legal services were initiated by the Office of Economic Opportunity as part of the “war on poverty”. Because its objective was the elimination of poverty (rather than the extension of existing legal services to non-paying clients), the American program expanded the idea of legal needs beyond those of fee-paying clients to a focus on the legal needs of the poor, and utilized staff lawyers with special interests in poverty law with offices located in low income communities.\(^{24}\) The legal aid programs subsequently adopted in Quebec and some of the western provinces in Canada reflected this American notion of legal needs, at least in their formative years. In Saskatchewan, for example, legal aid was originally understood as a means of achieving fundamental societal reform, best reflected in a recommendation of the Carter Committee that a “legal aid scheme should be capable of acting, on proper occasions, as a vehicle for social change”.\(^{25}\) In Ontario, this conception of needs was eventually reflected in the mandate of the community legal clinics, a program

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\(^{22}\) Ontario, Ministry of the Attorney General, Report of the Joint Committee on Legal Aid (Toronto: Queen’s Printer, 1965) at 65 [hereinafter Joint Committee Report].


\(^{25}\) DPA Group Inc., “Evaluation of Saskatchewan Legal Aid” (1988) at 149 [hereinafter “Saskatchewan Evaluation”]. As the evaluation report noted, this early conception of the role of legal aid in Saskatchewan has eroded over the years, particularly because of disagreements within the justice system about the appropriate role for legal aid, the diminishing role of local boards, the increasing preponderance of criminal law matters, and “a general societal move away from civil rights interests towards more traditional ones”. The report concluded that the legal aid scheme in Saskatchewan by 1988 did no poverty law cases except reactively on a case-by-case basis (at 150).
added to the judicare program in the mid-1970's to "take a more comprehensive approach to the problems of the poor".26

These divergent perspectives on the definition of legal needs, broadly illustrated by the differing approaches in the United Kingdom (legal aid services based on those offered by lawyers to paying clients) and in the United States (the strategic use of law and lawyers in the "war on poverty")27 remain evident in policy debates in Canada more than two decades after government-funded legal aid programs were initially introduced. Indeed, it has been suggested that the early initiatives of the federal government reflected these two approaches, with the Department of Justice focusing on legal aid as part of its responsibility for the administration of justice, and the Department of Health and Welfare funding legal aid programs as part of its overall commitment to social welfare for designated target groups in need.28

More recently, the "essential services" defined by the 1985 Canadian Bar Association Report similarly appear to reflect an awareness of both approaches to the question of legal needs in the current legal aid context (along with a commitment to a "mix" of delivery systems, now so characteristic of legal aid programs in Canada). Thus, as Dieter Hoehne has persuasively argued, current Canadian legal aid programs remain deeply ambivalent about their objectives, reflecting both their historical development and the inherent tension within such legal services:

The main characteristic of any legal aid plan is the ambivalence of the service it provides to the clients. While on the one hand strengthening their position within the adversary system of justice, it subjects them on the other hand to a legal system whose logic militates against their interests.29

For purposes of policy analysis, it is essential to recognize the impact of these competing objectives for legal aid services on the process of defining service needs. Indeed, much of the dynamic quality of the concept of legal aid "needs" is the direct result of these competing visions, as will be evident in the following analysis of the methodology for defining such needs.

A Methodology for Defining "Needs"

The definition of legal needs is often presented as a primary task in the development of options for legal aid services. Such a task is also a difficult and elusive one; as an American academic suggested recently:


27 The classic articulation of the usefulness of lawyering on behalf of the poor, but with significant direction from clients about the process, is found in E. Cahn & J. Cahn, "The War on Poverty: A Civilian Perspective" (1964) 73 Yale L.J. 1317.

28 For a detailed analysis of these policy initiatives, see Hoehne, supra note 21 at 81ff.

29 Ibid. at 310.
in a society in which law at least potentially touches everything, there is no such thing as a uniquely legal problem. There are only problems, which people have, about which the law might have something to say if somebody asked it to. That observation, even if it's a truism, suggests that the concept of legal needs is a moving target and that it's propelled by considerations not of legal definition, but rather of pragmatic benefit and cost.\(^{30}\)

Despite its pessimism about the possibility of defining legal needs, this comment usefully emphasizes two special aspects of the concept of legal needs: first, its essentially dynamic quality, and; second, its relationship to the broader context of problem-solving, particularly for those who are poor. In seeking to define legal needs, both of these aspects are critically important.

1. **Surveys of Legal “Needs”**

   In seeking to define legal needs, there have been a number of different approaches, reflecting the differing ways in which such questions can be posed. Where the question is posed as one of measuring the amount of perceived need, for example, the use of the survey method has frequently been adopted. As early as 1974, the American Bar Association (ABA) conducted a national survey of a representative sample of the U.S. adult population to examine “the incidence of personal, non-business legal problems and the use of legal services in their resolution”.\(^{31}\) In 1989, the ABA conducted a follow-up survey, again of a representative sample of adults, to determine whether there were changes in the perceived needs for legal services and in the use of lawyers.

   The results of these surveys are useful in defining general trends in the perceived needs for legal services in the United States, and also for the ways in which they demonstrate the intricate relationship between perceived needs and other factors. According to the data, a larger proportion of those surveyed had consulted lawyers in 1989 than in 1974. While the upward trend to increased use of lawyers' services occurred among respondents of all age groups, the most significant change was attributed to the demographic change in the population over the 15-year period; specifically, while 44% of the 1989 population was between age 25 and 45, only 37% of the 1974 population was within that age group. Because “an older population will have had a greater exposure to risk and, consequently, a higher incidence of legal problems and reason for seeking help”, the survey suggested that changes in demographic patterns might be the factor responsible for the apparent change in the perception of legal needs. This conclusion was reinforced by figures about the use of lawyers for home purchases, where a downward shift occurred between 1974 and 1989. However,

   
   . . . the downward shift was not . . . the result of a decline in the proportion of home buyers who sought the advice and help of lawyers at the time of purchase. In both

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1974 and 1989, around 40% of home buyers consulted lawyers. Rather, the reduction in lawyer use is attributable to the decline in home purchases. . . . [Moreover,] the decline in home purchases occurred primarily among adults under 35 years of age and was most pronounced among 25-34 year olds.  

Thus, it seems clear that both changes in the demography of clients and changes in the pattern of their activities (such as home purchase) can affect the calculation of legal needs.

The two surveys also questioned respondents about problems for which they chose not to consult a lawyer. Within the lowest income group in 1974, 11% of persons had chosen not to consult a lawyer and this figure declined to 8% in 1989; similarly, the proportion of persons within the highest income category who had chosen not to consult a lawyer declined from 14% in 1974 to 8% in 1989. The survey indicated that only 29% of respondents reported that:

. . . they had not consulted a lawyer because they had found some other way to solve the difficulty. The second most frequently given reason was the cost involved in taking the matter to an attorney or pursuing the matter through the legal process.  

While these figures suggest the existence of legal needs which remain unserviced, particularly for poor people, it is difficult to reach any firm conclusions about the nature of the needs or the appropriate responses.

There have been a number of surveys of low income communities in terms of legal needs, especially in the United States, in Australia in the United Kingdom.  

In a 1989 nationwide survey of low income households in the U.S.,

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32 Ibid. at 7.
33 Ibid. at 21-22.
34 There are over 25 such studies dating back to 1969, six of which were statewide while others were limited to one city, one county or multi-county jurisdictions. See Spangenberg Group, “National Civil Legal Needs Survey” (New Orleans: Conference on Access to Justice in the 1990's, 1989) at 1 and 7. This study offered “empirical data on a nationwide basis” for the first time, having surveyed 500 low income households, with at least one respondent in every state except Hawaii and Alaska.

A more theoretical, but nonetheless influential, study is G. Hazard, Jr., “Legal Problems Peculiar to the Poor” (1970) 26 J. of Soc. Issues 47, in which the author identified problems of poverty in terms of rampant consumerism: “lavish inducement on the one hand and strong impulse on the other conduct to more or less chronic financial distress”. In terms of this analysis of the problem, Hazard suggested the need for substantive changes in consumer law as one way of addressing the underlying issue (at 56-57).

35 There are a number of papers on legal needs in Australia collected in P. Cashman, ed., Research and the Delivery of Legal Services (Canberra: Law Foundation of N.S.W., 1981). See also M. Cass & R. Sackville, Legal Needs of the Poor (Canberra: Australian Government Printing Services, 1975) and M. Cass & J. Western, Legal Aid and Legal Need (Canberra: Australian Government Printing Services, 1980).

for example, the data suggested that “among the ten categories of problems, respondents with family problems most frequently had legal assistance”.

Indeed, the authors concluded that there were some difficulties in the perception of a broader range of legal needs among such respondents:

Our observation is that low income persons generally consider family and consumer problems as those for which legal assistance might be necessary, but do not consider the relevance of legal assistance when faced with problems in the medical, utility and public benefits categories.

In Canada, such surveys have occurred less frequently. At the time of the evaluation of the legal aid program in Quebec, a modest survey was conducted among the population of the province aged 18 years or older whose annual income at that time was less than $25,000. “The investigation was intended to identify the needs for information and legal advice, the perception by the client population of legal aid and the actual use of legal services.” The results demonstrated a high level of awareness about legal aid services in the province: more than 50% of the population considered themselves well-informed about the law, and more than 90% had heard of legal aid (although it was noted that this level of awareness might not be wholly attributable to the legal aid scheme).

In the evaluation of other legal aid schemes in Canada, such legal needs surveys have not generally been undertaken, partly perhaps for the reasons stated in the Manitoba evaluation. Such studies are complex and thus “could not be conducted within the budgetary and time restraints of this evaluation study”. Some data about general legal needs is available for Ontario, from a survey of about 3000 households undertaken in 1987-88. This survey was supplemented by a series of focus group discussions, on experiences with the civil justice system in relation to a number of problems: torts, consumer, debt, landlord and tenant, divorce/separation, problems with various levels of government, discrimination, and invasions of privacy.

The preliminary results of the study indicate that one in three Ontario households reported one or more serious civil problems in the preceding three-year period. “Younger, better educated, and higher income households reported more problems than older, less-educated, lower income households” but the data did not suggest “substantial differences in compensation seeking between

37 Spangenberg, supra note 34 at ii.
38 Ibid. at ii.
40 Ibid. at 49.
41 Department of Justice, “Legal Aid in Manitoba” (1987) at 118 [hereinafter “Manitoba Evaluation”].
households in various levels of the socio-economic strata". The data also confirmed a generally satisfactory assessment of lawyers by those involved with the justice system. However, the study also suggested that civil legal services may need to be assessed as discrete units rather than as one system, suggesting that different categories of claims may be treated very differently within the civil legal services context:

Those with auto accident problems are more likely to get what they claimed, be satisfied with the result, be satisfied with their lawyer’s fees, not think the process took too long, not think the cost was too high and to have a more positive attitude toward the civil justice system. More or less, the opposite is likely to be true regarding those points for those with discrimination and professional services problems.

All of these studies provide useful insights about individuals’ perceptions of their legal service needs, but none of the studies offer precise and accurate conclusions appropriate, by themselves, for policy-making purposes. Moreover, the absence of significant numbers of legal needs surveys in Canada precludes their use as a scientific measurement of needs for civil legal aid services. Thus, it is not a feasible option to design a new civil legal aid program on the basis only of this existing data on the needs of low income people for such legal aid services. On the other hand, the issue of whether governmental legal aid programs might initiate such needs surveys is a more complex question. On the basis of surveys which have been completed elsewhere, it is clear that the measurement of legal needs is a complex sampling and statistical process, and one which yields data which is more useful for establishing general trends than for defining precise needs. On this basis, any such survey would have to be both comprehensive and highly detailed, requirements which would both entail significant expense. For these reasons, it may be more appropriate in the policy-making process to utilize the available data merely as one group of indicators of problems experienced by legal service consumers, but without relying on it for scientific accuracy.

This conclusion is strengthened by concerns that such surveys suffer from a number of inherent weaknesses, both in their conception and in their administration. From a conceptual point of view, they are conservative by nature, focusing on problems currently understood to be legal problems rather than on problems for which legal solutions may be appropriate even though previously untried. In this way, the survey format may actually impede an understanding of legal needs as a dynamic concept. As well, “such a survey will provide meaningful and useful information only if certain, rigorous prescribed procedures are applied in selecting the sample of the population to be used, and in defining the measures, instruments, and procedures to be used for collecting, processing and analyzing the data”. Even careful procedures, however, cannot address all

43 Bogart & Vidmar, ibid. at 88.
44 Ibid. at 91.
45 For a similar analysis, see ibid. at 12, and citing F.R. Marks, “Some Research Perspectives for Looking at Legal Need and Legal Services Delivery Systems: Old Forms and New” (1976) 11 L. & Society Rev. 191.
46 “Manitoba Evaluation”, supra note 41 at 117.
the ambiguities inherent in the relationship between legal aspects of problem-solving and other factors. As was noted in the U.S. context:

... there is... no obvious line dividing legal problems from other problems. For example, are legal problems not recognized by the person with the problems included or excluded from legal need? Does legal need include those problems that a person believes to be a legal problem but a lawyer does not? When a problem has other solutions besides legal action, should it be classified as a legal problem?47

Thus, both because of this ambiguity, and because the concept of "needs" for policy-making purposes must be a dynamic one, there may be only limited utility to a comprehensive legal aid needs survey in the context of governmental policy needs to define appropriate civil legal aid services for a comprehensive legal aid program.

2. Social Indicators of Legal "Needs"

An alternative method for determining the extent of needs for civil legal aid services in Canada is the use of social indicators. In an analysis of methods of implementing legal aid policy goals in Australia, Hanks48 identified two basic methods for providing government services: the "demand-based" or expressed need method and; the "needs-based" or measured need method. Moreover, because most legal aid programs in Australia have relied on expressed need or demand as the basis for policy choices about the allocation of governmental resources, Hanks asserted that the need for legal aid services had been constructed "in terms of the experiences of individuals involved in the provision of legal services" and had reflected "current delivery patterns" — as if "current demand and use patterns establish the course on which legal aid services are to develop".49

This assumption was seriously criticized in Australia in relation to welfare services:

Many Australian initiatives have been a response to expressed need rather than measured need. To this extent, they have ignored the inarticulate or powerless who have not known how to express their needs effectively. [Such a process] has very little to do with the level of need in the community [and] largely ensures that resources will go to the aspirant with the loudest voice.50

By contrast, Hanks suggested the use of social indicators to measure the extent and distribution of characteristics in defined populations which match the defined aims of legal service delivery programs. The value of any particular

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47 "The Legal Services Corporation and the Activities of Its Grantees: A Fact Book" (U.S. Legal Services Corporation: 1979) at 10. Significantly, in the Australian context, researchers have suggested that it is "intermediaries" who are most important "in the determination both of whether a problem admits of a legal solution and of whether such a solution should necessarily involve a lawyer". See Cass & Western, supra note 35 at 60.


49 Ibid. at 1, citing Cass & Western, supra note 35 at 18.

50 Ibid. at 1-2, citing Senate Standing Committee on Social Welfare, Through a Glass Darkly (Canberra: Australian Government Publishing Services, 1979) at 57-58.
indicator is dependent, of course, on its congruence with the objectives of the service delivery program, as well as its accuracy and accessibility for policy planners. Thus, in terms of the planning process, the use of social indicators to assess needs requires policy-makers to first define their program objectives and then to identify accurate and accessible indicators to measure needs accordingly. It also requires some flexibility to permit policy-makers to recognize when they need to supplement the information on program targets to achieve defined objectives. In conceding this limitation, Hanks recommended that subjective data be gleaned from both current service deliverers and consumers.51

Hanks' assessment of the use of social indicators in measuring needs in Australia suggested that some agencies had developed quite sophisticated systems for ensuring that program objectives were properly targeted to those most in need of the services. In his view legal aid agencies were noticeably less sophisticated in doing so than other service agencies, since they paid significantly less attention to both the theoretical and methodological problems compared with other agencies:

First, there has been little attempt to isolate the objectives of the delivery of legal aid services — the needs which legal aid services are designed to meet. Some legal aid agencies have identified target populations; but that identification appears to have been influenced by the agencies' experience with their current clientele, rather than by reference to their programme objectives. Finally, the selection of the indicators which measure the location and distribution of the target populations has not displayed the degree of rigour which other agencies' studies suggest is necessary. . . . If legal aid agencies are to build on their experience in the use of social indicators, these theoretical and practical problems must be addressed.52

From a Canadian perspective, Hanks' analysis of the objectives of legal aid programs in Australia (mainly derived from written documentation which stated objectives only implicitly) is significant because it demonstrates the same pattern evident in Canada: over time, a perceptible "narrowing of the scope" of legal aid services. Despite some early statements in Australia about the possibility of using legal aid "to change the political, economic and social status of the poor",53 Hanks suggested that the activity and work of legal aid agencies had more consistently demonstrated a commitment to the narrower objective of achieving "equality throughout the Australian community in access to and distribution of standard litigation-oriented legal services".54 Recognizing that such an objective focuses on equality of opportunity rather than on equality of outcome, Hanks

51 Ibid. at 5.
52 Ibid. at 37.
53 Ibid. at 46, citing R. Sackville, Legal Aid in Australia (Canberra: Australian Government Publishing Services, 1975) at para 1.7.
54 Ibid. at 47. For a similar conclusion, see R. Cranston, "Legal Services and Social Policy" in Cashman, supra note 35 at 41; and Armstrong & Graycar, "Two Pragmatic Views After Ten Months of Operations from the South Australian Legal Services Commission" in Cashman, supra note 35 at 91.
asserted that even this narrower objective would lend itself readily to an assessment of needs by social indicators:

... setting objectives for legal aid delivery (assuming an "equality of opportunity" goal) hinges on the identification of those sections of the community who have two characteristics — a need for legal services and a reduced capacity to obtain those services through the private market. It is, at least, likely that these groups can be identified from indicators of social deprivation — unemployment, geographic isolation, ethnicity, and dependency on the social security system for income support. ...  

Thus, the use of social indicators to define needs for civil legal aid services seems to offer a more helpful approach for policy-makers in designing legal aid programs, whether they are comprehensive or more narrowly focused.

The appropriateness of a social indicator approach has been accepted by the National Legal Aid Advisory Committee in Australia. In a 1989 discussion paper, the Committee confirmed that “social indicators [were] likely to have a significant role in its recommendations on legal aid policy and evaluation of legal aid”, and that it would give consideration to the “identification and selection of appropriate social indicators of needs for legal aid services”. In the latter task, the Committee requested the assistance of those engaged in legal services and in the work of courts and tribunals, as well as those in “the community and the social welfare sector” to contribute to the collection of information which would assist in the development of additional social indicators of the need for legal aid services.

In Canada, the published reports of evaluations of provincial legal aid programs disclose no use of social indicators in the process of designing and

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56 Australian Legal Aid Services, supra note 20.

57 Ibid. at 24. The Discussion Paper accepted Hanks’ suggestions about possible social indicators of legal needs as an appropriate starting point.

58 Ibid. at 28. The Committee expressly recognized that it did not “pretend to be undertaking a survey of those needs. At best, it appear[ed] to NLAAC that any evidence of needs [so provided] by respondents [would] represent an informed 'indication' of needs for legal aid in the short to medium-term” (at 28-29).

The Committee also recognized the impact of such an approach on the arrangements for funding of legal aid services, particularly on the part of the federal government in Australia:

The establishment of legal aid indices, in conjunction with the collection and compilation of reliable data about the cost and availability of legal services and community legal services, would be the key to the proposal. Public funds could then be made available to the legal aid program or legal aid providers in accordance with those indices, rather than on a per capita or other basis unrelated to the effective implementation of legal aid policies (at 55).

According to the Committee, the timeline required to implement such an approach meant that the new arrangements could not be “fully effective” until after 1995-96.
implementing program objectives as suggested by Hanks. Demographic data has been used as a basis for conclusions about a program's effectiveness in responding to needs for legal services. In the evaluation of the legal aid program in British Columbia, for example, demographic data was used to isolate factors influencing patterns of utilization (both the volume of use and rates of utilization) for criminal, family, and civil non-family legal aid services. In this context, the data suggested that “the major predictor of the volume of services [in family law] was the number of single parent families with children under six”.59 As well, “the proportion of the population composed of single female welfare recipients” was a good predictor of family legal aid utilization rates.60 By contrast, the utilization rates for civil non-family legal aid matters was almost entirely predictable by the population of the area, the budget of the legal aid office, and the number of lawyers on its staff; that is “availability/resource factors” rather than need factors.61

The use of demographic data to assess utilization was similarly adopted in the evaluation of the legal aid program in Manitoba, but the report concluded that there were no strong links between the demographic profile/income characteristics of regions and the use of legal aid services. Significantly, the evaluators suggested that the absence of such strong links was probably itself evidence of unmet needs for legal aid services:

While it is difficult to interpret the lack of strong relationships between utilization of certificates and demographic, poverty and crime characteristics of regions, one possibility is that there is still a large amount of unmet need. If all eligible persons were receiving help then there should be a stronger relationship. The possibility of unmet need warrants further investigation.62

The absence of evidence that legal aid needs might be defined in Canada using a social indicator approach may perhaps be explained by two factors. In the first place, legal aid services in Canada have been primarily designed by lawyers and others knowledgeable about the legal system. Thus, just as Hanks found that legal aid programs in Australia had generally failed to use a sophisticated approach to identify their program objectives and then seek measures to achieve them, so legal aid programs in Canada have been substantially fashioned by lawyers, unconsciously using the norm of legal services for paying clients. Thus, like legal aid agencies in Australia, Canadian legal aid programs have probably used demographic data to support decisions (about services and office locations, for example) already taken — “presumably influenced by such factors as demand, political considerations, . . . the attitude of legal practitioners, . . . and managerial and ‘professional’ considerations”.63 Clearly, such processes do not utilize a social indicator approach in defining legal aid needs.

60 Ibid. at 250.
61 Ibid. at 253.
62 “Manitoba Evaluation”, supra note 41 at 137.
63 Hanks, supra note 48 at 36-37.
Another factor, perhaps even more significant, is that the use of social indicators to define legal needs is most appropriate for a decision-making process about the scope of legal aid services and the setting of priorities among groups of potential clients. Such a process is most evident at the commencement of a legal aid program or in the context of a review of policies for the purpose of extending services. The policies of governmental restraint for legal aid services in Canada during the past decade have resulted in very few opportunities for significant policy development and planning. The expansion program for community legal clinics in Ontario, for example, has routinely used such demographic data to assess competing applications for the establishment of new office locations, but their expansion has been an exceptional development among legal aid programs generally in Canada. Moreover, the substantial requirements for legal aid services in criminal matters agreed to in the federal-provincial negotiations have probably deterred at least some re-examination of the appropriate targets for legal aid services in Canada. Some provinces have simply implemented the cost-sharing agreements without offering many other services.

If this latter point is valid, the need to develop options for a civil legal aid component in a possible comprehensive legal aid program for Canada, offers a unique opportunity to define national legal aid program objectives and to identify social indicators which will assist the program to meet its defined goals. Such a process of defining legal needs is more attractive than legal needs surveys. The reasons for this are twofold: the use of defined goals and social indicators recognizes the dynamic quality of the concept of needs and its complexity, and; it permits a clear assessment of priorities.

At the same time, the proposed approach is not without difficulty. It will be necessary to decide controversial issues such as the objectives for a national legal aid program and to determine the weight to be assigned to particular social indicators to implement policy decisions. Such concerns necessarily raise the essentially subjective or political nature of legal aid decision-making, a matter, according to Hanks, rarely confronted in legal aid policy discussions:

... if the difficulty were acknowledged, it would lead to a substantial modification of "scientific" or "objective" attempts to measure the extent and incidence of the need for legal services. That phenomenon is subjective and elastic: the definition

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64 See Ontario Legal Aid Plan, Annual Reports; and M.J. Mossman, “Community Legal Clinics in Ontario: A Personal Assessment” (1983) 3 Windsor Y.B. Access Just. 375, especially at 393ff [hereinafter “Community Legal Clinics”].

65 See DPA Group, Inc., “Evaluation of Legal Aid in New Brunswick” at 29-30 [hereinafter “New Brunswick Evaluation”]. According to data in the report, the rate of criminal legal aid (both certificates and duty counsel) appeared to have remained relatively constant for the ten-year period 1975-85. By contrast, the number of civil legal aid cases declined steadily (with certificates declining at a greater rate than duty counsel services). The cuts for civil legal aid services in New Brunswick were described more recently as cutting "to the bone"; according to Judith MacPherson, President of the CBA-NB Branch, "aid for civil cases, such as matrimonial disputes, restraining orders and physical abuse was dropped entirely". See the CBA National, September 1989, at 37.
of legal services (what lawyers can, or should, do) imports broad political and narrow professional values, as well as being influenced by the class-based experience of the person offering the definition.66

Thus, explicit recognition of both the subjectivity and elasticity, rather than scientific objectivity, in the definition of legal needs necessarily requires a normative assessment of the objectives of legal aid programs.

III. PRINCIPLES FOR LEGAL AID SERVICES: POLITICAL VALUES AND LEGAL OBLIGATIONS

The Context for Creating Legal Aid Objectives

Where the process of defining legal aid objectives depends on defining "needs", the definition of needs is used to identify gaps in legal services; and filling the gaps then becomes the rationale or justification for a legal aid program. By contrast, where the process of defining needs is recognized as less a scientific process and more a normative one, the rationale for providing legal aid services requires a different kind of analysis. Moreover, where the search for appropriate objectives for legal aid services is a normative one, it raises questions about the ways in which choices should be made, the criteria to be adopted in deciding what options should be considered, and the extent to which future aspirations as well as past experiences should influence choices required in the search process.

In a sense, this search for appropriate objectives is not a new task, of course, since these issues were all considered both at an early stage when governmental funding for legal aid programs was initiated, and subsequently each time reviews have been undertaken. However, just as the attempt to define unmet needs for legal aid services was an evolutionary process, so the process of defining objectives has been a dynamic rather than static one. In the context of designing a civil legal aid component for a comprehensive legal aid program in Canada, the challenge to define legal aid program objectives is thus renewed.

The context of the development of legal aid programs and their express (and implicit) objectives deserve scrutiny in the process of defining objectives for the future. Legal aid programs, funded by government and (usually) created by statute,67 were established throughout Canada only within the past two decades, coinciding with the creation of similar kinds of legal aid programs in other western countries, all of which are now generally characterized as part of the worldwide "access to justice" movement.68 Focusing on the creation and enforcement

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of rights for members of society traditionally disadvantaged in terms of political and economic power, the access to justice movement supported legal rights and processes "aimed at the challenging problem of making rights effective" in the welfare state of the late twentieth century:

... the rights at the center of access-improving reforms are those typical of welfare state efforts to bolster the position of the weak — especially individuals in such capacities as consumers, tenants, or employees — against relatively powerful organizations. The welfare state has been characterized increasingly by the proliferation of such rights — rights that are designed to promote social change on behalf of the "have-nots". The existence of substantive rights representing broad social goals has helped to inspire the access-to-justice movement.69

Within the access to justice movement, three "waves" of reform efforts have been recognized: the enforcement of existing rights through efforts to ensure legal representation; the extension of legal representation to groups with diffuse and broadly-based interests traditionally excluded from the legal system (consumers, environmentalists, for example); and efforts to experiment with new forms of representation and dispute-resolution. Within each of the three waves, there is a tension between the "procedural right of access to justice and the substantive goals of many access-oriented reformers".70

The exact role of legal aid in the access to justice movement has changed from one context to another. The three waves of reform efforts define a broad range of tasks which might be undertaken by a legal aid program: representation of individuals in relation to the enforcement of existing rights; representation of individuals and groups with more broadly-based claims to rights as consumers, etc.; or representation and participation in new forms of dispute-resolution. Moreover, these essentially procedural tasks could be augmented by efforts at substantive change within each of the three categories: efforts to use legal representation to change the law's impact on the poor; attempts to use the enforcement of legal rights in the interests of cleaner air, improved products, or better housing, etc.; and willingness to design processes to better accomplish substantive goals within the legal system. The point is that there is no reason in principle which prevents a legal aid program from defining its objectives in any or all of the ways described as the three waves of reform in the access to justice movement. It is clear from evidence both in Canada and elsewhere that various legal aid initiatives have been used to pursue many of these goals from time to time.71 In general, legal aid initiatives in Canada have focused less on clearly-defined and positive objectives than on the apparent needs for legal services, broadly characterized as "gaps" or "unmet needs". Only infrequently


70 Ibid. at x.

have there been statements of principle, such as the assertion of the Joint Committee in Ontario that legal aid was “no longer a charity but a right” and that it should be “the responsibility of the whole community.” Similar sentiments were expressed at the time of the adoption of other provincial legal aid programs in the early 1970’s as well, although legislation both in Ontario and elsewhere carefully restricted those matters for which legal aid would be provided as of right, and all the programs operated with considerable discretion. As was noted by Hanks in Australia, program goals have frequently been more implicit than expressed in the legal aid context.

Discussions about the objectives of legal aid programs in Canada became more overt, with the inception of governmental restraint policies in the early 1980’s, when policy-makers began to focus more explicitly on objectives relating to cost-effectiveness. As Lazar noted (perhaps ironically) in 1979:

When money was more readily available, discussions about legal aid concentrated on meeting needs. Now discussions focus on controlling costs. But the objectives of legal aid have not changed — they still relate to meeting needs. What has changed is the resources available to legal aid. This, like our newly heightened interest in the costs of justice, is a result of government financial restraint.

The cautious optimism of this comment — that legal aid program objectives were to continue to meet needs — has remained valid in most Canadian provinces in the past decade only on the basis of a very circumscribed definition of needs, that is, a political and normative process for deciding on legal aid objectives. In the evaluation of the British Columbia legal aid program, for example, the impact of provincial government restraint policies (and federal government policies, to a lesser extent) was documented. The evaluation demonstrated not only the staff reductions, elimination of coverage for some matters, and termination of programs for special groups, but also changes in the overall context of legal services: the abolition of the Office of the Rentalsman and the complaint and mediation services of the Ministry of Consumer and Corporate Affairs, along with all the investigative staff in the Human Rights office. As the evaluator suggested:

The reductions in coverage forced by restraint have also re-opened the issue of whether legal aid is provided under a state responsibility to ensure justice, or is seen simply as a social need which may or may not be filled. Clearly, in significant areas of criminal and matrimonial coverage, legal aid was treated as a need to be addressed subject to available funds rather than as a right which the state has a responsibility to meet.

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72 Joint Committee Report, supra note 22 at 97.
73 Ibid. at 51, citing brief submitted by the Ontario Federation of Labour.
74 For an overview, see “Legal Aid in Canada”, supra note 23 at 17-40.
75 Hanks, supra note 48 at 39-46.
76 A. Lazar, “Legal Aid in the Age of Restraint” (Canadian Institute for the Administration of Justice Conference on the Cost of Justice: 1979) at 1.
78 Ibid. at 51.
Moreover, the recession of the early 1980's which resulted in governmental restraint policies actually created a larger target population for legal aid services, just as they were being so drastically reduced. As the evaluators in British Columbia noted, "more persons were unemployed; more persons were on social assistance; more persons were financially eligible for legal aid".79

More recently, evaluations of other provincial programs have also drawn attention to the gap between goals of access to legal aid implicit in the programs and the actual services delivered. In New Brunswick, for example, the evaluators reported that:

... coverage in civil cases is not good enough, mainly due to inadequate funding. Opinions range from feeling that the system is working, but will soon break down if nothing is done about it, to the view that the system is so badly funded it is beyond salvation. LANB [Legal Aid of New Brunswick] in theory covers all civil matters except divorce proceedings. It will also not pay for disbursements in civil cases. These are two serious constraints on coverage.80

The report of the evaluation of the legal aid program in Saskatchewan also documented changes in coverage since 1983-84, noting substantial changes from "the original intent of the founders of Legal Aid": the provision of virtually all services except those "fee generating".81 At the same time, however, the evaluators concluded that services offered were the "more critical" services, suggesting that if additional resources became available, services should be provided for summary convictions, matrimonial property, poverty law, administrative tribunals, wills/estates and landlord/tenant.82

The relationship among various legal aid services is also important in assessing the commitment to such a program. In Saskatchewan, for example, the restraint policy of the early 1980's resulted in a larger proportion of legal aid resources being directed to persons charged with criminal offenses, presumably because of the requirements of the federal-provincial agreement. Where the total amount of resources is diminished without any change in the list of services to which priority must be given, such a result seems inevitable. The evaluators noted that "the gain in criminal matters has been mainly at the expense of civil matters",83 and they drew attention to competing philosophies about legal representation in criminal matters on the issue of whether representation should always be available or whether there are some "trivial" matters for which legal aid services are less necessary (especially in an era of financial restraint). Without resolving this issue, the evaluators also made the important observation that whether such representation in trivial matters is paid for by legal aid funds or by private funds, there are public costs involved:

79 Ibid. at 53.
80 "New Brunswick Evaluation", supra note 65 at 52.
82 Ibid. at 180-181.
83 Ibid. at 147.
Is the trend to greater amounts of litigation serving the cause of justice or is it self-serving to those who work in the justice system? If trying minor cases abuses the justice system, should rich and poor have equal opportunity to do so? Since the rich are rarely even charged with minor offenses, can the poor be denied even access to counsel? Is the achievement of perfectly equal access to justice worth the social and economic costs, and do those costs in turn deny justice to the greater public?84

The interrelationship of issues about legal aid services on one hand, and the overall arrangements for the administration of justice on the other,85 is implicit in such a comment. Yet, while the relationship between such arrangements is obvious, the appropriate answers to the questions remain much less clear.

This brief review of possible rationales for legal aid services, either expressed or implicit, in the history of the past two decades of government-funded legal aid programs in Canada reveals the absence of consensus on this issue. At the same time, it demonstrates the vitality of the ongoing debate. Indeed, the issue has remained a lively one as new programs of the early 1970’s have matured over two decades in the midst of significant social changes in Canada, as new developments in the legal system (such as the Young Offenders Act86) have been introduced, and as Canada has experienced periods of economic recession, especially at the beginning and end of the 1980’s. The fact that the debate over the appropriate rationale for legal aid services has remained a lively one offers some evidence of the essential commitment to legal aid services and their continued improvement on the part of both the federal and provincial governments. Thus, the idea of creating a civil legal aid component as part of a comprehensive legal aid program presents an opportunity to re-think the rationale for legal aid services in Canada and to explore the potential for developing a broader consensus about the fundamental objectives of such services for the future.

In seeking to define objectives for a program of civil legal aid in Canada, the social and political values of the late twentieth century welfare state provide a general context for policy choices. In addition constitutional and other legal obligations both within Canada and in terms of international agreements may provide concrete requirements for defining goals for a civil legal aid program. Moreover, there are important elements of financial relationships between the federal government and the provinces which must be taken into account.

84 Ibid. at 172. The evaluators did not try to answer these questions because of “the complexity of the issues”, referring to other recommendations about user fees in their report.


Criteria for Choosing Objectives: Political Values

Both the implicit and expressed objectives of most legal aid programs in Canada to date have focused on the need to achieve equality in relation to the law. Yet, just as the access to justice movement has demonstrated how ideas about equality have changed from the elimination of formal barriers in the nineteenth century to that of affirmative state action in the twentieth, so ideas about the meaning of equality have differed within the legal aid context.

In general terms, these ideas fall into two categories. For those involved in the initial efforts to establish government-funded legal aid programs, there was an emphasis on the need for equality of opportunity for fee-paying and poor clients in terms of legal representation; the goal was the creation of formal equality among litigants by ensuring that all had legal assistance. In pursuit of this goal, it was assumed that legal aid clients would require the same kinds of services and that the representation of poor people would make no different demands on arrangements for the administration of justice. In this conception of the purpose of legal aid as one of equalizing the position of poor people before the courts, there was no recognition of inequality as a structural problem and little appreciation of the potential impact of changes in legal aid on the overall administration of justice.

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87 The emphasis on equality in the social policy process in Canada extends beyond debates about legal services, of course, to many other areas of concern. In this context, see A. Moscovitch and G. Drover, eds., Inequality: Essays on the Political Economy of Social Welfare (Toronto: University of Toronto Press, 1981); Report of the Special Senate Committee on Poverty, Poverty in Canada (Ottawa: Queen’s Printer, 1971), especially at 141ff; D. Guest, The Emergence of Social Security in Canada (Vancouver: University of British Columbia Press, 1980); and more recently, G. Drover, ed., Free Trade and Social Policy (Ottawa: C.C.S.D., 1988). In the international context, see Herausgegeben von, Broekman, Opalek and Kerimov, Social Justice and Individual Responsibility in the Welfare State (Stuttgart: Franz Steiner Verlag Wiesbaden GMBH, 1985), especially chap. 3.

88 Hoehne noted that such a conception of legal services did not challenge the traditional service roles of lawyers; only the source of funding was altered, thereby ensuring the continued control of legal services by the legal profession:

[The Ontario Plan] did not upset the established structures and principles of the earlier legal aid service. The profession stayed in control of the service and every lawyer had the option to participate in the plan. Adopting the judicare concept did not require a change in the profession’s underlying philosophy of legal aid. The only change affected funding of the service. Funding by individual members of the profession was replaced by external funding.

See Hoehne, supra note 21 at 59-60.

89 Hoehne has carefully documented the process by which legal aid services came to be characterized in terms which went beyond the idea of due process in the courts, including U.S. developments on the right to counsel (Gideon v. Wainwright 372 U.S. 335 (1963); and Argersinger v. Hamlin 407 U.S. 25 (1972)); the 1966 debate on capital punishment in Canada (and concerns about ensuring proper convictions); Warren Allmand’s Private Member’s Public Bill in 1970 supporting an effective legal aid scheme; the Trudeau Government’s interest in issues of justice and equality; and the impact of developments within the Department of Health and Welfare on the concept of legal aid as a matter of “social welfare”. See Hoehne, ibid. at chap. 3.
At the same time these early initiatives to establish legal aid programs in Canada established firmly the idea of affirmative state action to redress inequality (however defined) in the administration of justice. In the past two decades of debate in Canada about legal aid, there has been little serious questioning of the existence of a basic state obligation to ensure equality in the justice context through funding for legal aid programs. Even though there has been controversy about the extent of the obligation, the nature of a federal-provincial responsibility for funding services, and the kinds of services covered, there has been quiet consensus about the existence of a state obligation to provide legal aid services to ensure access to justice.

This consensus is an important starting point for defining goals for legal aid services, even though it is still necessary to decide on the details of any such program, a process which may be more controversial. Such an obligation has increasingly been recognized in the context of measures to ensure equality for all citizens, and in the trend to extend rights to individuals, not just in the criminal law context but also in matters of civil rights, matters which "directly affect the burning issues of the economy and economic structures — of wealth and poverty and all their consequences in terms of equality, of power and subordination, of culture and ignorance". Characterized as a part of the "new vision of justice", measures such as legal aid foster the "quest for effectiveness", a quest which embraces:

... effective right of action and defence, effective access to court, effective equality of the parties — encompassing all the once-neglected problems of legal aid, of delay, of costs and small claims, in a pervasive attempt to bring this new justice within the reach of all.

In Canada, ideas such as these have been expressed frequently over the past two decades. In 1969, for example, the Minister of Justice stated that one of his three main objectives was "to move as far as we can towards equality of access and equality of treatment before the law for rich and poor.

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Despite remarkable differences in emphasis and timing, Western and Eastern, developed and developing societies, all share a common trend: to abandon and demythicize ineffective proclamations of liberties not accessible to all (at 264).

91 Ibid. at 265.

92 Ibid. at 266. In the American context, the existence of such an affirmative state obligation has been defined in this way:

... if justice is a "special" characteristic in our legal system, further efforts are required to create more effective and comprehensive solutions to access problems. ... [Because] there is a unique character to justice, ... the capacity of every individual to have effective access to legal services is an essential element of the nation we seek to become. Since the free market seems unable to provide a true equality of access to legal services of reasonable quality, some form of subsidized delivery system may be needed.

alike". More recently, such an affirmative state obligation to redress inequality in the justice system was clearly asserted in the 1985 CBA Report: "the primary responsibility to ensure that these essential [legal aid] services are provided lies with government". The rationale offered to support this assertion was similar to that suggested above:

Legal aid services are essential because they help to ensure equality before the law. Together, representative government and equality before the law form the base of our democratic system. The first requires the right to vote and the second requires equal access to the judicial system.

The report also suggested the need for fairness in court proceedings as a related justification for legal aid programs.

Recognition of such an affirmative state obligation to provide subsidized legal aid services has also contributed to the creation of a second way of approaching the goal of equality, a conception which focuses on substantive outcomes achieved by legal aid services rather than merely the right to formal representation. Such an approach recognizes inequality in society as structural rather than individual: "it is the mark of a civilized society to aim at eliminating such inequalities as have their source, not in individual differences, but in its own organization". In this context, the idea of equality is one which advances the goal of achieving justice for individuals within the structure of the welfare state. Indeed, the CBA Report apparently recognized this form of equality as a rationale for legal aid programs as well:

[Legal aid] is the expression of the basic, democratic principle of protection of the rights of individuals against the overwhelming power of the state. As such, legal aid is essential in order to ensure equal access to justice in our society. Justice is indivisible; if it is not accessible to everyone then it does not exist.

Societal acceptance of a state obligation to provide legal aid services on the basis of a rationale of protecting "the rights of individuals against the overwhelming power of the state" also suggests the complex roles of the modern welfare state: both as the provider of fundamental legal aid services to ensure equality in relation to the law and, frequently at the same time, as the litigation opponent of the legal aid client. In such a context, it has been suggested that "access to justice necessarily implicates issues central to the politics of the modern welfare state" especially because of the increased capacity for the enforcement of rights where legal aid is available. Indeed, some of the ambiguity in levels

93 Hon. John Turner (House of Commons, November 7, 1969); the other two objectives related to law reform and the balance between citizens' rights and the government. Cited in Hoehne, supra note 21 at 99. Hoehne concluded that "legal aid policy was to be part of the constructive political action whose ultimate goal was to create the 'just society'" (at 100).
94 CBA Report, 1985, supra note 11 at 3.
95 Ibid. at 2.
97 CBA Report, 1985, supra note 11 at 1.
98 "Access to Justice", supra note 69 at xvi.
of support for legal aid services may be related to the political tension between the creation of rights and governmental expectations about their enforcement:

One assumption access reformers may make is that the legislative creation of a right implies a societal commitment to its full enforcement. The political reality is much more complicated. At one extreme, new rights may represent political symbols enacted by those who wish to mollify dissent without effecting any serious change. At the other extreme would be rights that policymakers wish to have enforced at virtually any cost. The typical situation is that legislators proliferate rights with an understanding that they will be enforced at a certain level and impose a more or less predictable burden on those against whom they are enforced. Access reforms may drastically affect that level of enforcement, and that in turn may lead to a strong political reaction manifested in hostility to the underlying substantive law or to the procedural reform (emphasis added).

In this context, legal aid services represent the effort to balance societal values which promote equality for individuals (especially those who are vulnerable or disadvantaged) with the state's goal of efficiency and effectiveness in the administration of justice. Thus, in the choice of legal aid objectives, social and political values may frequently be in tension, reflecting the difficulty of finding acceptable compromises among competing goals.

In the end, only two basic aspects of legal aid policy seem clear in terms of social and political values in Canada. One is that legal aid is intended to promote equality in the justice system. Even though it has continued to be unclear whether the equality objective is formal or substantive or both, the sense that fairness demands equality in relation to the law is widely accepted. As well, there appears to be consensus that there is an affirmative state obligation to fund legal aid services. On this issue, there is little agreement about the extent of the obligation and the appropriate measures for implementing it, but there is also little dissent about the existence of such an obligation. For policy-making purposes, therefore, the significant point is the existence of substantial consensus in Canadian society on these two issues. In the context of designing programs which broadly reflect social and political values, such consensus is an important first step in the development of goals for legal aid services in Canada.

Legal Obligations and Legal Aid Objectives: The Charter

As part of Canadian society's "shared consensus" about values, it is often argued that the law is an expression of the community's social and political values, and that it should be taken into account in designing a civil legal aid program. In the American context, the idea of law as such an expression of social and political values has been explained in this way:

The justification for access rights [rights to legal aid] derives from an analysis of the role of courts and the legal system in society. In the modern state, the legal system provides a "general normative code" performing integrative functions in the social system by use of formal dispute resolution mechanisms. . . . As members of

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99 Ibid. at xvii-xviii.
society, individuals are entitled to effective access to the law. Legal aid is a means of providing such access to those who cannot otherwise afford it. 100

In the Canadian context, such a view suggests that the enactment of constitutionally entrenched rights in the *Canadian Charter of Rights and Freedoms* must now be taken into account in seeking to define appropriate principles for a civil legal aid program in Canada. Whether one subscribes to the interpretivism view of the *Charter* (that judges should confine themselves to the stated norms in the text in *Charter* decisions) or the non-interpretivism view (that judges should go beyond the text to enforce norms not found there), 101 it seems to be generally accepted that the *Charter* has established both legal and equality rights obligations which provide direction to governmental policy-makers and administrators, as well as to judges. 102

Because the legal rights provisions of the *Charter* became effective law in 1982, while the equality rights provisions have been effective only since 1985, judicial interpretation of the scope of *Charter* provisions continues to be an evolving process. In general terms, the interpretation of *Charter* provisions has tended to be purposive and expansive, especially in the Supreme Court of Canada. In *Hunter v. Southam*, for example, the court asserted that the *Charter* should be interpreted “with a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects”. 103 In a subsequent case, *R v. Big M Drug Mart*, 104 the Chief Justice enumerated a three-part test to determine whether there had been an infringement of the *Charter*, suggesting that there should be a generous rather than a legalistic interpretation, designed to give individuals the full benefit of *Charter* protections. 105 Despite these

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105 The test provided that first, the *Charter* right must be ascertained by reference to the purpose of the guarantee in light of the interests it was meant to protect; second, four factors need to be considered in determining purpose (character and objects of the *Charter*, language of the right or freedom; historical origins of the concepts enshrined; and the meaning and purpose of other specific rights and freedoms); and third, the interpretation should be a generous one. See also S. Peck, “An Analytical Framework for the Application of the *Canadian Charter of Rights and Freedoms*” (1987) 25 Osgoode Hall L.J. 1 at 13-21.

assertions, the current view is that the Charter does not provide a constitutionally-guaranteed right to the provision of legal aid services. At the same time, some of the decided cases offer assistance in defining the scope of Charter rights and the nature of societal values underlying such rights, both of which are useful in identifying values and principles for the Department of Justice’s policy-making process in relation to legal aid services.107

1. Legal Rights

The legal rights sections of the Charter that relate to legal aid services include section 7, section 10(b), and section 11(d). Among these sections, section 7 has been given the broadest interpretation to date. In relation to this section, which guarantees the right to “life, liberty and security of the person” and the right not to be deprived thereof “except in accordance with the principles of fundamental justice”, Wilson J. (dissenting) has indicated that it should not receive a restricted meaning:

Some have suggested that the terms “life, liberty and security of the person” refer to one’s physical being and therefore guarantee only freedom from physical harm or restraint... My own view is that this is much too niggardly an interpretation of a document proclaiming the fundamental rights and freedoms of the citizen.108

The court has also clearly indicated that it is not appropriate to draw a distinction between the substantive and procedural parts of section 7, suggesting instead that the provision was designed to secure for a person “the full benefit of the Charter’s protection... while avoiding adjudication of the merits of public policy”.109

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109 Reference Re s.94(2) of the Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 at 546, Lamer J. In R v. Morgentaler, [1988] 1 S.C.R. 30 at 45, 44 D.L.R. (4th) 385 [hereinafter Morgentaler cited to S.C.R.], Wilson J. suggested that where an infringement of a protected interest had been made without fundamental justice, there could be no inquiry under section 1 of the Charter as to the reasonableness of the governmental action. Similarly, in Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481, Wilson J. raised, without deciding, the issue of whether there were deprivations of life, liberty and security of the person which could not be justified no matter what procedure was employed. See also Abner, supra note 107 at 101-103.
In Singh v. Minister of Employment and Immigration, the Supreme Court of Canada held that the then current procedures for determining "Convention Refugee" status under the Immigration Act were not acceptable, with three judges relying on section 7 and other judges focusing on the Canadian Bill of Rights to reach the same conclusion. In Singh, Wilson J. stated that:

... the principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles.

In Morgentaler, Dickson C.J., quoting from Mills v. the Queen, expanded on the idea of security of the person suggesting that it included protection against "stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to outcome and sanction".

Both Wilson J.'s language, suggesting a need to override administrative convenience where other issues are at stake, and Dickson C.J.'s recognition of the adverse consequences for individuals criminally charged and at trials, suggest some regard for the value of individual security which arguably might include a need for legal aid. Nothing in these decisions, however, focused the court's attention explicitly on the need for legal aid services, even in the context of the required hearing for refugee claimants in Singh.

Ironically, the constitutional right to a hearing in the immigration context (mandated by Singh), was augmented by a judicial decision requiring the Legal Services Society of British Columbia to provide legal aid to an indigent refugee claimant for a hearing under the newly-revised immigration legislation. Holmes J. held that the Society was obliged to provide legal aid to the refugee claimant pursuant to B.C.'s legal aid legislation which guaranteed legal representation to anyone who "may be imprisoned or confined through a civil proceeding" (concluding that an immigration inquiry is a "civil proceeding" and deportation is akin to "imprisonment or

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113 Singh, supra note 110 at 219. In Morgentaler, supra note 109, Wilson, Beetz, Estey, Lamer, J.J. and Dickson C.J. all refer to state interference with psychological as well as physical well-being as a breach of the guarantee of security of the person.
115 Morgentaler, supra note 109 at 55. In the same case, the Chief Justice decided that "state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person" (at 56).
confinement"). Unlike a Charter guarantee, however, the right to legal aid services held to be available in this case could be altered by a legislative amendment to the British Columbia Legal Services Society Act at any time.

Thus, to date, the guarantees of section 7 of the Charter have not included legal aid services. Moreover, in Bernard, the Nova Scotia Court of Appeal held that security of tenure of a public housing tenant was an economic interest and therefore not within the scope of protection of section 7:

... the right asserted was a proprietary right which bestowed a direct economical benefit on the appellant and as such has no constitutional protection afforded under s. 7 of the Charter.

Because of some procedural irregularities on the facts of the case, Bernard may not offer a determinative decision on this issue, but the failure to find constitutional protection for a low-income tenant's housing needs may suggest less support for the existence of such protection in relation to a poor person's right to legal aid. At the same time, it is arguable that the benefit of public housing is an economic benefit in a way that the right to legal aid is not, and that a right to legal aid is more in the character of a democratic or process right than an economic benefit.  

Case of Marcos Gonzalez-Davi, as reported in the Globe and Mail (4 January 1990) A2 [now reported as Gonzalez-Davi v. B.C. (Legal Aid Services Society) (1991), 55 B.C.L.R (2d) 236, 81 D.L.R. (4th) 12 (C.A.)]. The newspaper report stated that the Legal Services Society had decided to appeal the decision to the British Columbia Court of Appeal. Under current arrangements, federal funding for refugee claimants is provided where the claimant makes the claim on arrival in Canada; such federal funding is not, however, available for "inland claimants", those who arrive in Canada with a different status and then subsequently make a refugee claim. See also the report in the Lawyers Weekly (19 January 1990) in which the judge is reported to have stated that the issue of rights between an individual and the state is one which is "amongst the most fundamental of civil rights" (at 7).

In an earlier case in which section 7 was raised, the court ordered counsel to be appointed but did not rely on section 7 in doing so. In R. v. Powell (1984), 30 Alta. L.R.(2d) 83, 4 C.R.R. 54 (Prov. Ct.), the accused were charged with two counts of truancy in relation to their children, contrary to a section of Alberta's School Act, R.S.A. 1980, c. S-3. The accused had been refused legal counsel by the legal aid program in Alberta, but Litsky J. held that it was a case in which counsel should be appointed and made an order accordingly. However, in reaching this conclusion, Litsky J. relied on Re White and the Queen (1976), 1 Alta. L. R. 292 (S.C.) (a pre-Charter decision) in which criteria were listed for consideration by a judge prior to deciding to order the appointment of counsel, including: the financial circumstances of the accused; the availability of a legal aid certificate; the educational level of the accused; the complexity of the case; the difficulty of marshalling evidence; and the likelihood of imprisonment upon conviction. Ironically, because the accused wanted to raise Charter issues as part of their defence, Litsky J. concluded that "the Court surely cannot expect lay people to become legal pundits navigating this case with provocative points of fact and law into unsettled seas of constitutional issue", thereby suggesting as an additional factor for consideration: the fact that Charter arguments might be presented. In this case, however, it seems that the judge relied on the court's inherent power to order the appointment of counsel, in accordance with the reasons of Re White and the Queen, rather than on the existence of guaranteed rights to legal representation in the Charter.

benefit. This argument raises again the need to make a fundamental characterization of legal aid: whether it should be regarded as a procedural right in the context of the administration of justice, or whether, on the other hand, it should be characterized as a social welfare right capable of achieving substantive changes in the lives of the poor.

For administrators, it is important to note the criticism which has been directed at efforts to use the Charter as a policy-making tool in cases like Singh. It has been suggested that the court is not a suitable forum for designing comprehensive procedures for governmental initiatives such as refugee determination because it is not able to look at the process as a whole. Furthermore, the decision in Singh placed priority on due process at the expense of other substantive policy objectives. As a result of the court’s decision, policy-makers were required to work within its framework, and substantive policy changes in immigration determination procedures occurred, directly in response to Singh. These changes, according to Mandel, left refugee claimants in a worse position overall even though their procedural rights were guaranteed:

Singh dictated the form of our response. There shall be hearings. But this form could in no way contradict the substance: not more but rather less generosity in granting refugees admission to the country. The right to a hearing turned out to be no more than a consolation prize for our stinginess. . . . (emphasis in original).

In this context, the issue of whether legal aid services may be protected by section 7 is important for policy-makers and administrators. If there is potential for such a court decision, the freedom of policy-makers to design an appropriate and comprehensive scheme is more substantial prior to (or in the absence of) judicial determination of any such issue. Because of the increasing complexity of law’s impact on the lives of individual citizens, the court’s broad definition of the scope of section 7 protection might well be found to encompass a need for timely and professional legal assistance in certain contexts. Thus, although the cases decided to date have not yet mandated a right to legal aid services under section 7, the views expressed make it impossible to foreclose the possibility that such protection may be held to exist in some future fact situations.

In such a context, the goal of policy-makers should be to take account of the requirements of section 7 in designing appropriate programs before being required to do so by judicial decisions, both to avoid the possibility of less appropriate programs and to prevent the inevitably ad hoc nature of such solutions. In the absence of judicial determination of the issue, policy-makers obviously have greater latitude to design programs which ensure fairness and consistency,

120 See also J. Whyte, “Fundamental Justice: The Scope and Application of Section 7 of the Charter” (1983) 13 Man. L.J. 455. Whyte argues that the purpose of the Charter is to protect the fundamental interests of minorities “in order to enhance their representation in the political process” (at 469).

and which meet program objectives efficiently and effectively. Moreover, while taking account of the spirit of the court's determinations on section 7, policymakers are not confined only to these considerations, but they can nonetheless ensure that constitutional values guaranteed by section 7 are substantively achieved in the design of a comprehensive civil legal aid program.

In addition to section 7, there are two other sections of the Charter which mandate legal rights of individuals. Section 10(b) of the Charter applies to persons "on arrest or detention" and section 11(d) applies to persons "charged with an offence". Both of these rights focus on the criminal justice system, and seem less relevant as a basis for creating rights to civil legal aid services in Canada. At the same time, the potential for these sections to create rights to legal aid services in matters of criminal law may significantly impact on the availability of resources for civil legal aid services. For this reason, some assessment of the potential impact of judicial interpretation of these sections is also warranted here.

Neither of these sections has yet been interpreted to include a right to legal aid.122 In the Alberta decision, R v. Robinson,123 the court reviewed the legislative history of the adoption of section 10(b) and concluded that the federal government did not intend to confer a right to legal aid.124 Similarly, in R v. MacKay,125 Alberta Chief Justice Sinclair reviewed section 11(d) in the context of a claim to legal aid representation and concluded that "nowhere in this section does it say such a person has the right to have counsel paid for at public expense".126 By contrast, Craig J. concluded in an Ontario case that there might be rare cases where the right to a fair trial (entrenched by the Charter in section 11(d)) would be impossible to achieve in the absence of counsel; in such cases, he concluded that the court should order state-funded legal aid, but that the accused's right to such legal aid was the same as the right available

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122 For an overview of the impact of section 10(b), see M. Finkelstein, The Right to Counsel (Toronto: Butterworths, 1988). A number of pre-Charter cases considered the issue of entitlement to state-funded counsel, most of which recognized an inherent power of the court to so order the appointment of counsel although the circumstances in which such orders were granted were narrowly construed. See Re Ciglen and the Queen (1978), 45 C.C.C. (2d) 227 (Ont. H.C.J); R v. Littlejohn and Tirabasso (1978), 41 C.C.C. (2d) 161 (Ont. C.A.); Re Gilberg and the Queen (1974), 20 C.C.C. (2d) 356 (Alta. C.A.); Re Ewing and Kearney and the Queen (1974), 18 C.C.C. (2d) 356 (Alta. S.C.); and Re White and the Queen, supra note 118 in which McDonald J. set out a list of factors for consideration in the exercise of the court's inherent power to appoint counsel. For an overview of the right to counsel in civil matters from a comparative perspective, see E. Johnson, Jr., "The Right to Counsel in Civil Cases: An International Perspective" (1985) 19 Loyola L.A. L. Rev. 341.


126 Ibid. at 232.
Indeed, both these sections can be contrasted with the wording of section 14 of the *Charter* which guarantees the “right to the assistance of an interpreter for a party or witness who does not speak the language of the proceedings or who is deaf”. Such wording, according to Peter Hogg, seems more apt for the conferral of a right to governmental funding than that in sections 10(b) and 11(d):

The interpreter should probably be paid for out of public funds, at least for a party or witness who cannot afford to pay the cost himself (compare the right to retain and instruct counsel in s. 10(b)).

In a subsequent decision, the Supreme Court of Canada concluded that section 10(b) requires police officers to provide information regarding the availability of legal aid services to persons who are arrested or detained. In reviewing legal aid and duty counsel systems across Canada, Lamer J. [as he then was] noted “the extent of Canada’s recognition of the importance of the right to counsel for all persons detained in connection with criminal offenses” contained in the *Bill of Rights* and the *Charter* and also in Canada’s commitments internationally.

Indeed, some commentators have suggested that a right to counsel paid out of public funds might be possible by reading the *Charter* in conjunction with Canada’s international legal obligations. As a signatory to the *International

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127 *Deutsch v. Law Society of Upper Canada Legal Aid Fund, Lawson and Legge* (1985), 48 C.R. (3d) 166 at 174 (Ont. S.C. [Div. Ct.]). The issue was considered in terms of sections 7 and 11(d). The court noted that section 15 was not yet in force at the time of the accused’s application for legal aid, but concluded that there was no suggestion that the legal aid guidelines were discriminatory against any persons or groups in society; “rather, the [Legal Aid] Act was designed to overcome possible discrimination that might exist in relation to economically disadvantaged persons” (at 175).

See also *R. v. Rowbotham* (1988), 25 O.A.C. 321, 63 C.R.(3d) 113, for a similar conclusion about the court’s inherent power to order counsel to ensure a fair trial. In that case, the accused had been denied legal aid because the area legal aid director believed her earnings were sufficient to enable her to retain a lawyer. However, the Court of Appeal decided that, while it was appropriate to take account of the opinion of the area legal aid director, it was apparent that she could not afford a lawyer for a 12 month hearing in a complex drug case. The court relied on sections 7 and 11(d) to provide a right to funded counsel, leading a CBA representative to comment that “[t]his country is gradually moving towards a right to be represented in any serious court case, be it criminal, civil, or family”. For an account of the case and these comments, see M. Kideckel, “Legal Aid: The State of the Union”, (September 1988) Can. Law. 14, especially at 17.


129 *R v. Brydges* (1990), 74 C.R. (3d) 129 (S.C.C.). The court decided that such information should be included “as part of the standard caution” on arrest or detention in accordance with section 10(b), and permitted police forces across the country a period of 30 days to comply with the decision.


Covenant on Civil and Political Rights\textsuperscript{132} and its Optional Protocol since 1976, Canada is bound by Article 14(3)(d) of the Covenant which provides a right to legal assistance in any case where the interests of justice so require, and without payment by the person charged “if he does not have sufficient means to pay for it”. Arguably, this international legal obligation might require the provision of legal aid in criminal matters other than those currently offered by some of the provincial legal aid programs. Moreover, if sections 10(b) and 11(d) were to be considered domestic law implementing Canada’s international obligations under the Covenant, the scope of these Charter sections might also be extended.\textsuperscript{133} Such an analysis may be even more useful in the context of equality rights in the Charter and will be discussed further in that context.

2. Equality Rights

Section 15 provides for the protection of equality “before and under the law” as well as “equal protection and equal benefit of the law”, without “discrimination” and in particular without discrimination on the basis of a number of listed grounds. Some commentators have suggested that the equality rights provisions in the Charter signalled a striking departure in Canadian law and politics. Peter Russell, for example, expressed his concern about the adoption of such rights without “a widespread public and parliamentary discussion about the principles and practice of equality”.\textsuperscript{134} The extent of such concern depends on assumptions which are made about its intended purpose. Was section 15 intended just to codify existing rights or was it intended to effect some (substantial, and perhaps substantive) societal change in Canada?\textsuperscript{135} In this context, the three-year delay in its effective date (to which section 15 was subjected, unlike any other section), suggests that governments believed that some changes were to occur to meet the requirements of the equality rights


\textsuperscript{133} Such analysis might also draw on pre-Charter cases, and the distinction between the Bill of Rights and the Charter in relation to the right to counsel. For such a suggested analysis, see “Right to Legal Aid”, supra note 131 at 27-30.

\textsuperscript{134} P. Russell, “The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts” (1982) 25 Can. Pub. Admin. 1 at 26. Russell continued: The public and legislative discussions concerning it provide little guidance to our judges as to how far or how fast it is desirable to eliminate all forms of discrimination in Canadian society. Leaving these matters to our judges may have the unfortunate consequence of relieving ourselves as citizens from the responsibility of reasoning together about acceptable answers to these questions of social justice.

provisions. This fact alone reinforces the view that the equality rights provisions were intended to be more than a codification of existing rights.

Section 15 has been considered in a number of decisions since 1985. The most significant decision to date is *Andrews v. Law Society of British Columbia,* a decision of the Supreme Court of Canada in which a majority of the court held that a legislative requirement of Canadian citizenship for admission to the legal profession in British Columbia violated the Charter's equality rights. Writing for the majority on the issue of the infringement of section 15, McIntyre J. stated that decisions about the equality guarantee must have regard "to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application".

At the same time, McIntyre J. recognized that the modern welfare state depends on legislation which creates distinctions among various groups of citizens. The creation of governmental benefits inevitably depends on the creation of eligibility criteria which categorizes those for whom the benefits are intended and excludes others. As McIntyre J. suggested,

... it is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the Charter. It is, of course, obvious that legislatures may — and to govern effectively — must treat different individuals and groups in different ways. ... The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society.

Thus, the issue in *Andrews* was how to define those distinctions which are acceptable according to section 15 and those which are not, especially in the context of eligibility criteria for becoming a member of the legal profession of a province. In deciding this issue, McIntyre J. focused on the link in section 15 between the equality guarantees and the discrimination clause to conclude that equality must be defined by reference to discrimination, and that discrimination was:

a distinction, whether intentional or not... which has the effect of imposing burdens, obligations, or disadvantages on [an] individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape

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138 Ibid. at 168.

139 Ibid. at 168-169.
the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.140

Similarly, LaForest J. defined discrimination in terms of the “relatively powerless” political position of non-citizens, persons “whose interests are likely to be compromised by legislative decisions”.141 Wilson J. adopted the language of an American decision in concluding that non-citizens permanently resident in Canada formed a “discrete and insular minority”,142 vulnerable to having “their interests overlooked and their rights to equal concern and respect violated” and to “becoming a disadvantaged group in our society”.143 Moreover, she emphasized that the determination that non-citizens were protected by section 15 was one,

... which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or re-enforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.144

All of the judges agreed that it was not appropriate to use the “similarly situated” test45 so frequently adopted in cases decided under the Bill of Rights,46 believing that it was that test which resulted in the denial of equality claims. They also were in agreement that the list of prohibited grounds of discrimination in section 15 was not closed, thereby permitting non-citizens to be entitled to its protection. However, the justices declined to offer any further directions as to what other groups might qualify.

This latter issue is especially important in the legal aid context because it is necessary to decide whether those poor persons who are denied legal aid services form a disadvantaged group, a “discrete and insular minority”, or a group which is “relatively powerless politically”. In light of the fact that those who are denied legal aid services are poor, it seems arguable that they will also be disadvantaged as a group and that they will be politically among the least powerful in Canada.147
Moreover, if discrimination is defined in McIntyre J.'s words as a distinction which has the effect of "imposing burdens, obligations, or disadvantages on [an individual or a group which are not imposed on others] or which withholds or limits access to opportunities, benefits, and advantages available to other members of society" (emphasis added), the failure of a legal aid program to provide such services to some persons who are poor might violate section 15.

The reasoning in Andrews adopts a sophisticated and purposive approach to the process of defining equality and discrimination in the modern welfare state. It accepts the need for governmental policies to be implemented using classifications and eligibility criteria, and that the process of doing so means that distinctions must be drawn. However, no longer is legislative policy immune from review by the courts in terms of the distinctions adopted to achieve governmental objectives. Indeed, not only may the court assess the validity of the distinctions but also the ways in which the distinctions are related to governmental policy objectives.

People with persistently low-incomes do not simply live scaled-down versions of the lifestyle of middle-income people; they are in fact required to lead markedly different lives. Poverty is a "package" of economic conditions of which low income is only one. . . (at 10-11).

The Report also noted that people who are poor and who live in poverty for a while become overwhelmed with a sense of powerlessness and worthlessness (at 37).

Andrews, supra note 137 at 168.

By contrast with Andrews, the Supreme Court of Canada concluded that there was no violation of section 15 in R v. Turpin, [1989] 2 S.C.R. 1296. The court found that certain sections of the Criminal Code resulted in inequality before the law (by permitting persons accused of murder in Alberta, but not in other provinces, to elect to be tried by a judge alone rather than in a trial by judge and jury). However, the court also concluded that the distinction drawn by the Code was not discriminatory in its purpose or effect, and accordingly that it was not a violation of section 15:

It would be stretching the imagination to characterize persons accused of one of the crimes listed in s. 427 of the Criminal Code in all provinces except Alberta as members of a "discrete and insular minority. . ." Differentiating for mode of trial purposes between those accused of s. 427 offenses in Alberta and those accused of the same offenses elsewhere in Canada would not, in my view, advance the purposes of s. 15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society. A search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice would be fruitless in this case . . . (at 1332).

As a result of the Turpin decision, the Ontario Court of Appeal changed its view with respect to differences in the criminal justice context, differences which do not meet the test for discrimination set out in Andrews: see Lawyers Weekly (12 January 1990) 1. As well, in two other cases, those asserting equality rights were found not to constitute the category of disadvantaged persons, as in Turpin: see Reference Re Constitutional Validity of Sections 32 and 34 of the Worker's Compensation Act, 1983 (Nfld), [1989] 1 S.C.R. 922; and Mirhadizedah v. Ontario (1990), 69 O.R. (2d) 422 (C.A.).
The use of section 15 as a basis for challenging legislation on behalf of the poor has not occurred frequently and the judicial decisions are not entirely consistent. However, the pattern is becoming clearer, especially after Andrews. More recently, when section 15 was argued as a ground for striking down provisions limiting the availability of legal aid in appeals from criminal convictions to those with merit, the court concluded that the absence of legal aid services in such a context did not violate section 15 of the Charter. On the basis that the right of appeal from conviction in Canada is a "sharply qualified, often merely permissive, right", McClung J. in R. v. Robinson asserted that it was impossible to find "an unqualified right to state-funded counsel to advance it". The court considered the test in Andrews in connection with section 684 of the Criminal Code (permitting a court to exercise discretion to appoint counsel for an indigent where legal representation is necessary), and whether the refusal of legal aid in this case constituted discrimination. In deciding that there was no discrimination, the court stated:

The refusal does not flow from some irrelevant personal characteristic of the convicted accused. The indigent with meritorious appeals will be funded. The indigent without meritorious appeals will not. . . Indigency does not decide; trial guilt that is not reasonably disputable, in fact or law does. . . If indigency can fell legislation under the Charter, the Charter should say so. . . Legislation that allows a court or judge to declare that public funding should be refused where an appeal is undeserving does not pose a violation of established Canadian values either.

Commenting on this case, the lawyer who acted for the accused offered a different interpretation, suggesting the existence of two different rights of appeal, one for the rich and one for the poor.

[The decision] allows the person who has money to order transcripts, to retain counsel and to proceed forward with [his] appeal. But if the person has no funds to get the appeal books, . . . then you don't have documentation to argue before the Court of Appeal and you can't proceed with your appeal.

The question of indigency thus poses an interesting one for the equality guarantee. Where an accused cannot pay for trial transcripts necessary to proceed with an appeal, does the legislation impose "a burden, obligation or disadvantage" on the accused which is not imposed on others? Does the legislation "withhold or limit access to opportunities, benefits, and advantages available to other members of society"? Clearly, the obligation to pay for the transcripts is implicit, rather than explicit as was the citizenship requirement in Andrews, and the accused's inability to pay is not created by the statute. How should

150 Supra note 123.
152 Robinson, supra note 123 at 321.
inequality, which is the result of impecuniosity, be interpreted in the context of section 15?

One suggestion is found in *The Queen v. Hebb*, in which the Nova Scotia Supreme Court considered the problem of poverty in relation to a person sentenced to pay a fine who had no money to do so. The Nova Scotia government had not implemented provisions of the *Criminal Code* making fine options (community work to the value of the fine) available, and thus Ms. Hebb’s failure to pay was likely to result in her imprisonment. The court considered section 646 of the *Code* which authorized a court to review the circumstances before issuing a warrant for commitment for convicted persons between the ages of 16 and 22 years, and held that the restriction of this section to only these young persons violated section 15 of the *Charter*. In the result, the court held that the appropriate remedy was to remove the age references from section 646 so as to make it age-neutral, thus permitting the court to conduct the review of circumstances for the accused who was older. In the result, the court quashed the warrant of commitment against Ms. Hebb.

The decision in *Hebb* is not one which directly involved the court in the issue of poverty as a ground of discrimination under section 15 of the *Charter*. At the same time, there is considerable evidence that Kelly J. understood that Ms. Hebb was a disadvantaged person. After indicating his awareness that some persons choose not to pay fines but to serve time in jail instead, and that others fail to pay in hopes that their failure will not be noticed, he acknowledged that poor persons do not have such choices:

No such choice exists for those who are unable to pay their fine because of a temporary financial limitation brought on by either misfortune or bad judgment on their part. As well, no such choice exists for those, such as the applicant in this matter, who are the walking wounded of our society, those who cannot now and are unlikely ever to be in a position to pay a fine of any amount in excess of a few dollars. Judith Ann Hebb comes before this court as a person without financial resources or any prospect of having sufficient resources to pay the fine which is assessed against her.

The other question raised by the equality guarantee in the context of benefits provided by legislation in the welfare state is the extent to which section 15 can mandate the provision of such benefits. Some cases have required governments

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154 For a comparative analysis, see G. Binion, “The Disadvantaged Before the Burger Court” (1982) Law & Pol'y Q. 37. A few cases in Canada have approached this issue more directly, including *Kask v. Shimizu* (1986), 28 D.L.R. (4th) 64 (Alta.Q.B.); *Mangold v. 330002 Ontario Ltd.* (1987), 57 O.R. (2d) 716 (H.C.); and *Mullaly v. Younggreen* (21 December 1988), (B.C.) [unreported]. However, in relation to all of these cases, it has been suggested that the decisions to strike down provisions which adversely impact on an impoverished litigant’s opportunity to participate in a court process may be less the result of “a heightened interest since the advent of the *Charter*” and more likely “simply a continuation of the court’s general respect for the need to protect such access”. See Abner, *supra* note 107 at 87-89.

155 (1989), 89 N.S.R. (2d) 137 (S.C.(T.D.)).

to extend benefits beyond the category of persons included in a legislative scheme,\textsuperscript{157} while others have merely held the legislative scheme unconstitutional, leaving it to governments to determine how to rectify the problem of invalidity.\textsuperscript{158} Cases have also considered the constitutionality of eligibility criteria, some concluding that the court should not alter the legislatively-defined criteria for benefits,\textsuperscript{159} while others have declared unconstitutional the limits imposed on eligibility criteria in legislative schemes,\textsuperscript{160} sometimes fashioning remedies which alter the legislative scheme itself.\textsuperscript{161}

In such an evolving context, it is difficult to identify precisely the elements of an equality guarantee for civil or criminal legal aid services. What is evident in the cases is the court's ongoing concern to ensure fair access to the litigation process even if special measures may be needed to accomplish this goal for those who are poor. However, the exercise of discretion on an individual basis, a measure which is consistent with the court's historic power to ensure fairness in the litigation process, is significantly different from a judicial decision mandating an affirmative governmental action to ensure the availability of legal aid on a broad basis. In the policy-making process therefore, the court's careful attention to issues of

\textsuperscript{157} See \textit{Hoogbruin v. A.G. British Columbia} (1986), 24 D.L.R. (4th) 718, where the British Columbia Court of Appeal held that it was unconstitutional for the province not to have a procedure for absentee voting, especially where it would be relatively inexpensive to make such procedures available. In Ontario, in \textit{R. v. Sheldon S.} (1988), 26 O.A.C. 285, the Ontario Court of Appeal decided that there had been a violation of the accused's equality rights when a statutorily mandated alternative measures program for young offenders had not been implemented in Ontario, unlike in other provinces. Such decisions may need to be reconsidered, of course, in light of \textit{Andrews}, supra note 137.

\textsuperscript{158} In \textit{Reference Re Family Benefits Act (N.S.) Section 5} (1987), 75 N.S.R. (2d) 338, the Nova Scotia Court of Appeal held unconstitutional the legislation which provided welfare benefits to women in some circumstances but not to men. The possibility that all benefits would be eliminated was overcome when the government passed regulations under another section of the Act. See also \textit{A.G. Nova Scotia v. Phillips} (1986), 34 D.L.R. (4th) 633 (C.A.). In a similar case in British Columbia, \textit{Silano v. The Queen in Right of British Columbia} (1987), 42 D.L.R. (4th) 406 (S.C.), where welfare benefits which provided lesser amounts of money for recipients under the age of 26 were held unconstitutional, the government responded by raising the benefits of the younger group and decreasing the amounts paid to the older group, ensuring that both groups received the same amounts. The net cost to the government also remained the same.

\textsuperscript{159} See \textit{Bregman v. A.G. Canada} (1987), 57 O.R. (2d) 409, where the Ontario Court of Appeal declined to use section 15 to interfere with the residency requirement for receipt of an allowance under the \textit{War Veteran's Allowance Act}, R.S.C. 1985, c. W-3.

\textsuperscript{160} See \textit{Tetreault-Gadoury v. Canada Employment and Immigration Commission} (1988), 88 N.R. 6, where the Federal Court struck down provisions of the \textit{Unemployment Insurance Act}, R.S.C. 1985, c. U-1, which disentitled persons over the age of 65 from receiving benefits. See also \textit{Schachter v. Canada Employment and Immigration Commission}, [1992] 2 S.C.R. 679, 92 C.L.L.C. 14,036, in which the court decided that provisions offering parental leave to adoptive, but not to natural, fathers was unconstitutional. In this case, the government responded with new provisions making the same parental leave available to both, but reducing the number of weeks available to adoptive fathers in the process.

\textsuperscript{161} For discussion of remedies in \textit{Charter} cases, see B. Morgan, "\textit{Charter Remedies: The Civil Side After the First Five Years}" in N. Finkelstein & B. Rogers, eds., \textit{Charter Issues in Civil Cases} (Toronto: Carswell, 1988) at 48.
equality of access to justice must be taken into account as a legal obligation, however difficult to describe in precise terms, not just as a social and political value.

In doing so, it may also be useful to take note of the international legal obligations which focus on equality of access to the justice system. In addition to the *International Covenant on Civil and Political Rights*, Canada is a signatory to the *Universal Declaration of Human Rights* which proclaims that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law”. As well, Canada has signed the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on the Elimination of All Forms of Discrimination Against Women*, both of which were designed to remove barriers to full participation in society.

In the context of international obligations, the *European Human Rights Convention* also offers a useful guide for policy-making about legal aid, even though the *Convention* is not binding in Canada. Article 6.1 of the *Convention* states:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Even though this provision does not guarantee any right to free legal aid as such, the *Airey Case* in 1979 decided that Article 6 required that a woman applying for a legal separation in Ireland, where such a decree could be obtained only from the High Court, required legal assistance because the procedure was complex despite the fact that there was no legal aid scheme in Ireland. The European Court of Human Rights therefore ordered that legal assistance be provided, stating that Article 6:

> ... may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court either because legal representation is rendered compulsory ... or by reason of the complexity of the procedure or of the case.

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162 *Supra* note 132.


170 *Airey Case*, *supra* note 168 at 15-16.
For purposes of policy-making in Canada, such decisions may be extremely useful to “confirm domestic sources of inspiration” about the meaning of equality in the legal aid context.

3. Section 1: Reasonable Limits

In the few years since the Charter’s enactment, cases addressing issues of both legal and equality rights have indicated some of the factors which will be considered by courts in deciding whether legislative provisions violate these constitutional rights. For administrators and policy-makers in the legal aid context, some of these decisions are helpful in defining, for example, the court’s strong support for procedural fairness (in cases like Singh) and its concern for those who are disadvantaged or who are “discrete and insular minorities” and for whom the equality rights provision was intended to provide some remedy to overcome their powerlessness in Canadian society (in cases like Andrews). However, in Charter cases where such violations are established, there is also a need to address section 1 of the Charter which offers an opportunity for governmental justification for infringements of Charter rights.

In a Charter challenge, “the burden of persuading a court that section 1 justifies a law or other governmental act that is ostensibly in breach of a Charter right rests on the government”. In R v. Oakes, the Supreme Court of Canada set out the test for assessing whether a law could be justified in accordance with section 1, suggesting that justification depends on 1) whether the objective is pressing and substantial; and 2) whether the means chosen are proportional to the objective. In applying the first part of this test in Andrews, Wilson J. confirmed that because “section 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one”. Moreover, in applying the proportionality test, the court is required to balance “the nature of the right, the extent of its infringement, and the degree to which the limitation furthers the attainment of the legitimate goal reflected in the legislation”. In applying this test in Andrews, Wilson J. also concluded that the citizenship requirement did not meet the test in Oakes, agreeing with

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171 Claydon, supra note 131 at 302.
172 It has been suggested that section 1 may have a lesser role to play in relation to those sections of the Charter which are themselves limited by notions of reasonableness, such as section 7. See Hogg, supra note 101 at 679ff.
173 Ibid. at 681.
175 Andrews, supra note 137 at 177. In his dissenting view, McIntyre J. suggested that a less onerous burden might rest on government and that:

... the first question the court should ask must relate to the nature and purpose of the enactment, with a view to deciding whether the limitation represents a legitimate exercise of the legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights (at 159).

176 Ibid. at 177.
the British Columbia Court of Appeal that the requirement did not "appear to relate closely to those ends, much less to have been carefully designed to achieve them with minimum impairment of individual rights".177

The strictness of the Oakes test in relation to section 1, particularly as it was applied by the majority in Andrews, suggests that the government would have an affirmative obligation to demonstrate that any program of legal aid services was coherent (in terms of coverage and eligibility criteria) to justify an infringement of Charter rights, if such a violation could be established by a claimant in the first place. It has been suggested that such a justification may need to be demonstrated affirmatively by government and that:

where there is room for argument about the legitimacy of the legislative purpose, or that the statute is unlikely to achieve the purpose, or that the purpose could be achieved by other means which did not involve restriction of a Charter right, or that were less restrictive of a Charter right, the court would need detailed reports or studies on the topic (if they exist), or a study prepared specifically for the case and filed as a social science brief (or Brandeis brief), or expert evidence from economists or other social scientists who are able to testify as to the necessity for and the likely efficacy of the impugned law. Only with this kind of information is the Court in a position to give due weight to the governmental purpose that is asserted in justification of the Charter infringement.178

For legal aid policy-makers the impact of section 1 is significant, necessitating clearly-defined objectives for legal aid services and coherent choices about measures to implement their objectives. Moreover, the opportunity to create a coherent and justifiable legal aid program is not only necessitated by the requirements of section 1, but it also helps to ensure that courts will be less likely to find an infringement of Charter rights in the first place. From a policy-making perspective, the creation of rational and comprehensive legal aid programs is clearly preferable to the potential for more ad hoc arrangements by courts in the context of Charter challenges. In this way, section 1 can be regarded as defining the parameters of administrative choices in the creation of a comprehensive legal aid program in Canada.179

Although it seems difficult to identify precisely the parameters of the protection offered by sections 1, 7, 10(b), 11(d) and 15 of the Charter, it is clear that the Charter's provisions have strengthened the general social and political value of equality and the idea of fairness it embodies. It also seems clear that the Charter cases recognize "powerlessness" in terms of equality rights, an important indicia for advocates of poverty as one of the grounds for discrimination.

177 Ibid. at 178.
178 Hogg, supra note 101 at 688-689.
179 The creation of a comprehensive legal aid program in a federal statute (or a combination of federal and provincial statutes) would clearly be subject to the Charter, and it is likely that a formal agreement would do so as well. See Charter, section 32. For an expansive interpretation of s.32, see Y. de Montigny, "Section 32 and Equality Rights" in A. Bayefsky and M. Eberts, eds., Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) at 565.
These cases imply the need to eliminate "stress and stigmatization" as part of the process of achieving a right to security of the person, similarly important elements in the characterization of goals for legal aid services for the poor.

Moreover, there is some acceptance of the appropriateness of governmental funding for legal aid services, even in the cases which deny a Charter remedy, at the same time as there is still deference to the legislature to define eligibility criteria and coverage for legal aid programs. Such a judicial approach suggests that it is perhaps unlikely that the courts will declare a right to legal aid in a Charter challenge case. However, it does not negate at all the need for policy-makers and administrators of legal aid programs to take the spirit of Charter rights into account in designing eligibility criteria and coverage — so as to ensure that Charter protections are achieved within the legislative and administrative process. Indeed, the creation of comprehensive and rational programs, rather than ad hoc programs created by courts (with potentially unjustifiable distinctions among classes of potential recipients of legal aid services), may be the best way of insulating legal aid program initiatives from judicial review. In this way, the Charter indirectly strengthens the recognition of a governmental commitment to equality and the existence of an affirmative state obligation, already evident in social and political values in Canada, in the legal aid context.

4. Fundamental Justice, Equality and Lawyers

The recognition that provisions of the Charter may create affirmative state obligations for legal aid services, however defined, necessarily occurs in the context of providing benefits for poor clients. What is also clear is that such an affirmative obligation ensures the availability of more clients for the legal profession. While non-poor clients will continue to assume the cost of their legal services personally, governmental schemes will enable lawyers to act for poor clients and receive payment for these services as well. In a sense, the existence of rights to legal aid services may benefit members of the legal profession as much as the poor clients for whom they are intended. As one commentator has caustically explained:

The most obvious winner in the Charter sweepstakes is the legal profession. . . . The right to counsel . . . means nothing if not plenty of work for lawyers. The decision in *Howard* (1985) may have put a strain on Legal Aid funds throughout the country by guaranteeing all prisoners the right to counsel in prison disciplinary hearings . . . but it relieved a lot of financial strain for lawyers who had a captive market of tens of thousands of "clients" opened wide to their services. . . . Around the same time as his court was delivering the *Singh* decision, Chief Justice Dickson . . . cited the Charter as a reason for optimism about [lawyers'] job prospects.180

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180 Mandel, *supra* note 121 at 167. In *Howard v. Stony Mountain Institution Inmate Disciplinary Court* (1984), 19 D.L.R. (4th) 502, appeal quashed for mootness, [1987] 2 S.C.R. 687, the Federal Court of Appeal held that an inmate of a penitentiary was entitled to counsel in disciplinary proceedings. The court held that there was a presumption that inmates required counsel in order not to be deprived of fundamental justice.
Even those who are less scathing about the self-interests of the legal profession recognize that the issue of legal aid services is one with some potential conflict of interest for lawyers. In the assertions of the Canadian Bar Association that legal aid is essential to ensure equality before the law, the implicit need for lawyers' services to be accordingly available and compensated is not so clearly identified. At the same time, both the CBA and others have repeatedly criticized legal aid arrangements in Canada in terms of the general inadequacy of compensation for lawyers who are willing to undertake work for legal aid clients.181 To its credit, the CBA formally reviewed the issue of the extent of lawyers' obligations to do pro bono legal work, an obligation adopted by many law associations in the United States faced with serious cutbacks in funding for legal aid services for poor clients.182 Focusing primarily on obligations of lawyers for the delivery of legal aid services, the Report recognized the requirements of the Law Society of Upper Canada Professional Conduct Handbook, including Rule 12:

Lawyers should make legal services available to the public in an efficient and convenient manner that will command respect and confidence, and by means that are compatible with the integrity, independence and effectiveness of the profession.183

The Report noted that this obligation was demonstrated by recent actions of the profession, notably in the decision of the CBA branch in British Columbia to sponsor an interim program in civil and administrative legal aid matters to "supplement legal aid coverage . . . (that had been) substantially cut back" in recent years, and the (then) proposal in Ontario for a province-wide levy on all lawyers to contribute to the cost of legal services.184


182 See CBA Report, 1986, supra note 11 especially at 4-5. In its report, the CBA defined pro bono legal work quite broadly to include the direct representation of clients without remuneration, but also the provision of such services "at a level of remuneration which is less than would be the normal rate"; participation in clinical or mentor programs or decision-making committees of a legal aid program without remuneration beyond expenses; employment by a legal aid program "where the remuneration is less than that which the lawyer would receive if performing the functions on a private basis"; participation in law reform or public legal education activities without remuneration; and the provision of legal and advisory services to charitable or public interest organizations at no remuneration or for a nominal stipend (at 1-2).

183 Formerly Rule XIII, as noted in CBA Report, 1986, supra note 11 at 2. This Rule is also similar to Canon 2 of the American Bar Association (ABA) Rules.

184 Ibid. at 3-4. Hoehne’s analysis, supra note 21 at 357, demonstrates the ongoing historical concern of the legal profession concerning access to legal aid services, documenting the debates within the profession from just after the First World War. According to Hoehne, the legal profession played an ambivalent role in relation to legal aid services:
The main point of the CBA Report was that the provision of legal aid services was essentially the responsibility of government, apparently concluding that neither the Law Society of Upper Canada's Professional Conduct Handbook nor isolated (or even widespread) acts of goodwill by lawyers in assisting in the availability of such services detracted from the existence of such a primary obligation on the part of the state:

Legal services must be considered a right in this nation. To suggest that such legal services ought to be performed on a pro bono basis, whether partially or wholly, is to put such services on the level both of charity vis-à-vis the government's funding obligation and vis-à-vis lawyers' time, energy and effort. The profession cannot support a return to the charitable concepts standing alone as were present in 1495. The government's obligation is of primary importance.185

Significantly, the CBA Report relied in part on the enactment of section 15 of the Charter as support for its assertion about the government's responsibility for making legal aid services available. In the words of the report, equal benefit of the law can be achieved only "if there is universal access to legal services".186

Although these issues continue to be controversial ones within the legal profession, there can be no doubt that the role of lawyers is a critical factor for determination in designing a comprehensive legal aid program. The roles of lawyers will necessarily impact on the design and implementation of effective legal aid programs, especially where they play key roles in a proposed delivery system, but sometimes even when they do not. For these reasons, it is essential to take account of the role and organization of the legal profession in terms of its impact on Charter rights and in relation to the development of appropriate principles for civil legal aid services in Canada, a matter discussed in greater detail later in this paper.

Had it not been for the reluctance of the professionals, a nationwide scheme could have been put in place as early as 1930. In contrast to their American colleagues, however, Canada's lawyers put the ball into the court of the politicians. Even when it became obvious that no government was going to pick up the ball, the profession remained inactive. The needs of the clients had first to affect the lawyers themselves before they took an interest in legal aid policy. Rising case loads in the Fifties motivated the provincial [law societies] to seek government assistance.

The extent to which social welfare principles are more evident in social policy in Canada in contrast to the U.S. seems to be reflected in the differences in the rhetoric (at least) about pro bono legal services. For an interesting analysis of the ways in which changes in legal aid services may demand more use of pro bono lawyers from private practice in the work of American legal aid clinics, see J.A. Tull, "Implications of Emerging Substantive Issues for the Delivery System for Legal Services for the Poor" (New Orleans: Conference on Access to Justice in the 1990's, 1989) at 33. Tull points to the need for systemic legal solutions to problems like adequate child care or unemployment, and the need for complex fact-based advocacy as requiring the skills of private practice lawyers working with legal aid lawyers.

185 CBA Report, 1986, supra note 11 at 3. The reference to 1495 is to the date of enactment of An Act to Admit Such Persons as are Poor to Sue "In Forma Pauperis"; the CBA report suggested that this statute did not recognize a right to legal aid, but merely its availability as charity.

186 Ibid. at 3.
IV. FEDERALISM: FUNDING CIVIL LEGAL AID SERVICES

Federalism and the Division of Powers

The design and implementation of a comprehensive criminal and civil legal aid scheme in Canada necessitates consideration of the role of the federal government and the provinces in any such scheme. Because of the constitutional division of legislative powers in Canada, there are some constraints on the ways in which the federal government may participate in a national and comprehensive legal aid program. Interestingly, just as our understanding of the meaning of concepts like "legal needs" and "equality" (explored earlier in this paper) appear to have evolved over a number of decades, so has the role of the federal government within the Canadian constitutional setting been dynamic. It has reflected changes in perception over time about which matters require national attention. In the constitutional context, this dynamism has been described (with approval) as follows:

... the original BNA Act did not constrain the ability of Canadians to create new processes and even new structures as and when the need arose. It is probably going too far to claim that the constitution is endogenous, but it is my view that when it comes to the evolution of the federation, the constitution is at best conditioning and not determining.\textsuperscript{187}

The flexibility which has permitted Canadian constitutional structures to accommodate changing needs has been reflected also in the structures of the federal government itself. In a study of the evolution of the Department of Justice, for example, one commentator has documented the significant change in the mandate of the Department beginning in 1970 and reflected most strongly in the Charter enacted in 1982. According to Sutherland,\textsuperscript{188} the Department's original responsibility for "providing legal advice to those who decide on what to do, on how to do it and in finding appropriate ways and means of implementing those decisions once made" was formally augmented in 1970 by additional responsibilities which "recognized that the lawyer should play a much more active, indeed creative, role in the decision making process of government", thereby suggesting a belief that:

\textsuperscript{187} T.J. Courchene, "Meech Lake and Federalism: Accord or Discord?" in K. Swinton & C. Rogerson, eds., \textit{Competing Constitutional Visions} (Toronto: Carswell, 1988) 121 at 126. The author also quoted Carl Friedrich to the effect that:

... federalism should not be seen only as a static pattern or design, characterized by a particular and precisely fixed division of power between government levels. Federalism is also and perhaps primarily the process ... of adopting joint policies and making joint decisions on joint problems.


In his major work on Canadian constitutional law, Peter Hogg has also noted the swings of the pendulum between centralized and decentralized exercises of constitutional power by the federal government and the provinces, especially in relation to matters of fiscal responsibility. See Hogg, \textit{supra} note 101 at 127-131.

... significant developments in this area will in turn produce more responsible and credible laws, both civil and criminal, and promote a greater functional equality for the individual before the courts and tribunals under the laws of this country. Indeed, the historic concern of the lawyer for freedom under the law must be made an effective counterweight within those continuing processes and pressures that tend to involve modern government, sometimes quite intimately, in the lives of all of us.  

On the basis of this change in focus in the work of the Department, it has been suggested that "it may well be said [in the future] that the decade and a half from 1970-85 saw, in the implementing of this statement, a formal re-making of the foundations of citizenship in Canada". The continuing concern for access to justice and the agreements for the delivery of legal aid services within this period clearly attest to the changing view of the role of law (and lawyers) in government.

The same period was one of experimentation with the formal structures of federalism in Canada. Through legislation such as the Canada Assistance Plan and the use of conditional agreements (and later, unconditional block grants), the federal government attempted to make its vision of social assistance, health care, pensions, and education (in addition to legal aid in criminal matters), for example, available to citizens in most parts of Canada. In contrast with federal structures in the United States and in Australia, Hogg has argued that Canadian federalism provides significantly less opportunity for unconstrained centralization of fiscal power. Instead, he has suggested that "cooperative federalism" has become the norm of federal-provincial relations in Canada, asserting that:

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189 Ibid. at 176, quoting the "General Explanation" provided by John Turner, then Minister of Justice, at the time of presentation of the Department's Estimates. In this conception of the role of the Department of Justice, the ideas of Pierre E. Trudeau, Prime Minister for most of the relevant period, are also evident: see P. Trudeau, Federalism and the French Canadians (Toronto: MacMillan, 1968) [hereinafter Federalism]; and P. Trudeau, Federal-Provincial Grants and the Spending Power of Parliament (Ottawa: Queen's Printer, 1969).

190 Sutherland, supra note 188 at 176. The author also traced some of the changes in the Department's expenditures and apparent policy priorities over the period to 1984, noting development of the federal-provincial agreements on legal aid; by 1984, the author noted that "criminal legal aid [was] another important policy issue", particularly because of the escalating number of applications for legal aid and the likelihood of provincial cutbacks. As well, Sutherland suggested:

And while legal aid is a cornerstone of the Liberals' accomplishments in the Justice portfolio, the federal government is likewise on an austerity drive. It is also in a mood to negotiate hard when legal aid agreements come up for renewal next year. This is because all provinces tend to give low visibility to the federal involvement in the delivery of the legal aid programs. Just last year, the federal government pledged to be very sensitive to such matters when it established its priorities for funding. It is likely, therefore, that the question of who should pay for the citizen's right of access to legal assistance to defend against criminal charges will become an issue of strong contention between the federal government and the provinces (at 192-193).

191 Supra note 5.

192 Hogg, supra note 101 at 131, referring here to federal-provincial financial arrangements, in particular.
The ideal of cooperative federalism is that each government recognizes its interdependence with the other governments, and is concerned about the repercussions of its actions on the policies of the others. This requires much more than respect for the legislative authority of others; it involves consultation with others before exercising one's own undoubted legislative authority, in order to ensure that one's own actions are as far as possible compatible with the plans of others. . . . [In Canada,] cooperation has become the rule and unilateral initiative the exception. 193

In such a context, the constitutional framework for a comprehensive legal aid program in Canada is a complex matter involving an analysis of both legislative authority of the Constitution Act, 1867194 (and its interpretation) and the prospects for federal-provincial cooperation. In terms of the constitutional division of powers, the federal government has authority to legislate with respect to matters of criminal law (s. 91.27), marriage and divorce (s. 91.26), naturalization and aliens (s. 91.25), and unemployment insurance (s. 91.2A). Thus at first glance, the list suggests that the federal government might claim jurisdiction to legislate in respect of legal aid services for those involved in matters of criminal law, divorce (and corollary matters),195 immigration and refugees, and unemployment insurance. Although such a list appears somewhat ad hoc, it is arguable that a legal aid scheme for persons affected by these matters could nonetheless address problems of some significance to those concerned: advice and representation in matters of criminal and family law (in so far as it relates to divorce, at least), in the context of difficult issues of immigration and refugee status, and with respect to income security in relation to employment patterns throughout the country. None of these matters are necessarily simple and all may have potentially significant repercussions for the persons concerned, both in terms of legal rights and in terms of personal liberty (criminal and immigration) or economic security (family benefits or unemployment insurance) or perhaps both.

Even within its own list of powers, the federal government may legislate about legal aid services only so long as its legislation can be characterized as fundamental to the implementation of objectives within its legislative competence. In a 1966 decision, the Supreme Court of Canada held that the federal government could legislate exclusively on “matters which are a vital part of the operation of an interprovincial undertaking as a going concern”, and that, therefore “. . . provincial minimum wage laws were not applicable to a federal undertaking”.196 Such a principle might be used, for example, to enable the federal government to legislate with respect to legal aid in immigration hearings on the basis that legal aid is a vital part of the immigration hearing process; such an

193 Ibid.
194 Constitution Act, 1867 (U.K.), 30 & 31 Vict., c.3. ss. 91-2 [hereinafter Constitution Act, 1867].
arrangement would be feasible only if legal advice and representation, like labour relations, can be characterized as vitally and integrally related to the federal undertaking.

In addition to problems of characterization, there is a more fundamental difficulty with any such proposal. A legal aid program which encompassed only the matters referred to in the above list of federal constitutional powers might inevitably appear *ad hoc* or incomplete, thereby creating invidious distinctions which are unacceptable in terms of policy-making objectives, including the need to conform to the equality guarantees of the Charter. What kind of program rationale can be suggested for a national legal aid scheme which offers assistance to unemployed persons and not to those entitled to welfare or to workers' compensation (all of whom receive state-funded income security); or which offers assistance to those who are immigrants or refugees but not to those who are imprisoned in provincial institutions or who are psychiatric patients (all of whom suffer or may suffer a deprivation of liberty); or which offers assistance to those involved in divorce but not to family members when the state intervenes to remove a child from its parental protection and authority (arguably, both family law matters)?

In addition to these policy problems, it is also necessary to take account of the provinces' competing list of matters within their exclusive jurisdiction. Under the Constitution Act, 1867, the provinces may legislate with respect to matters relating to property and civil rights in the province (s. 92.13) and the administration of justice in the province, including procedure in civil matters in provincial courts (s. 92.14). It is therefore the provinces which arguably have primary responsibility for legal aid programs, as is evidenced by provincially-enacted legislation concerning legal aid services currently in existence in most of the provinces across Canada. As well, the provinces have responsibility for all matters of a local or private nature in the province (s. 92.16), local works and undertakings (s. 92.10) and hospitals (s. 92.7), all matters which might include arrangements for some kinds of civil legal aid services.

For all these reasons, the creation of a comprehensive scheme of civil legal aid services in Canada seems to require federal-provincial cooperation. This

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197 Supra note 194.

198 The constitutional validity of legislation concerning legal aid in Canada, focusing on the division of legislative powers, has not been the subject of litigation very frequently. In *R v. Happeney* (1970), 2 N.B.R. (2d) 699, however, the New Brunswick Court of Appeal considered a challenge to the constitutional validity of section 590 of the *Criminal Code* which authorized a court of appeal or a judge of such a court to "assign counsel to act on behalf of an accused" in appellate proceedings where in the court's opinion it appeared "desirable in the interests of justice that the accused should have legal aid and where it appear[ed] that the accused ha[d] not sufficient means to obtain that aid". The argument that section 590 was *ultra vires* the Parliament of Canada because it interfered with the provincial jurisdiction over the administration of justice (section 92.14) was rejected by the Court. According to Hughes J.A.:
conclusion is further strengthened by consideration of the range of services which might be included in any such comprehensive program. Where legal aid services encompass, in addition to legal advice and representation, other activities such as counselling, public education, organizing or lobbying, how should these additional activities be characterized for purposes of constitutional jurisdiction? The possibility of characterizing such activities as "a vital part of the operation" of matters within legislative competence demonstrates how necessary it is to define the scope of legal aid services, both for purposes of constitutional jurisdiction and in terms of social and political values. Yet, although the courts have taken an expansive approach to the content of activities within a constitutional category, nothing can alter the essentially ad hoc nature of the list of matters within federal legislative competence. For this reason as well, federal-provincial cooperation seems essential to the creation of a comprehensive legal aid services program. Such cooperation requires an assessment of the federal spending power and the impact of potential constitutional reform on fiscal federalism in Canada.

Fiscal Federalism and Constitutional Reform:

The financial arrangements between the federal government and the provinces are complex and multi-faceted. In relation to legal aid programs, the federal government's ability to use its spending power and the implications of constitutional reforms on the spending power, are especially significant. As Hogg has suggested, the Canada Assistance Plan (pursuant to which some cost-sharing...
of civil legal aid services now occurs) is an excellent example of the use by the federal government of the conditional grant, "a transfer of funds which is made on condition that the grantee use the funds in accordance with the stipulations of the grantor".201

Such grants have had the merit of assuring "all Canadians a high minimum level of some important social services" over the years (including grants for education, health care and pensions), but they have also "effected a substantial shift in the distribution of power within confederation" by redirecting provincial funds to those programs for which federal cost-sharing has been available at the expense of provincial priorities for which such cost-sharing is absent.202 As Courchene has argued, the problem with shared-cost programs for the provinces arises in part because the federal largesse available in the "fiscally-flush days of the 1960's" (which made such programs so attractive that the provinces simply could not refuse to participate) has diminished greatly, even after the conversion of many of them to unconditional block-funding arrangements in the 1977 fiscal package. From the perspective of the provinces, therefore:

Shared-cost-programs do represent a real contribution to the ability of the provinces to offer effective programs to their citizens. However, once these programmes become established and the citizens have come to appreciate them, they are in the system to stay. Since Ottawa also knows this as well, the nature of the shared-cost game changes rather dramatically. The federal government can unilaterally cut back funding or impose new requirements and the provinces are rather helpless . . . to do much about this, both because the citizens will insist on maintaining the programs and because these shared-cost arrangements are federal acts so that in the final analysis the Parliament of Canada can alter them. . . (emphasis added).203

In response to such criticism, the federal government proposed in 1969 that such grants should be subject to two requirements: that a shared-cost program within provincial jurisdiction should be established only after evidence of a broad national consensus favouring the program; and that a decision of a province to forego participation in a program should not result in a fiscal penalty to the province.204 Since 1969, there have been some "opting out"

201 Ibid. at 119.
202 Ibid. at 121.
203 Courchene, supra note 187 at 43-44. As Courchene explained, the provinces were initially pleased with the conversion of the conditional grants to unconditional block funding. However, in the face of diminishing resources, the federal government proposed to reduce the agreed upon annual rate of escalation in the block grants; when the provinces refused to accept this departure from the fiscal agreement of 1977, the federal government responded by cancelling its intended conversion of the Canada Assistance Plan. Subsequently, the federal government imposed other constraints on the block grants which made shared-cost arrangements less attractive to the provinces (at 14-17 and 40-43).
204 Hogg, supra note 101 at 121-122. With respect to the first condition, the federal government proposed that such a consensus would be established by prior submission of the federal proposal to provincial legislatures. Hogg suggests that both these conditions may now be regarded as "current federal policy" because "there have been no new programmes which have violated these precepts" since 1969 (at 122).
arrangements in place for these conditional grants, although, as Hogg has noted, "all of these opting out arrangements bind the opting-out province to continue established programmes without significant change, or in the case of new programmes to establish or continue comparable provincial programmes". Thus:

... the province gains little more than the trappings of autonomy: the federal "compensation" to an opting-out province is really just as conditional as the federal contribution to participating provinces.

In spite of its widespread use, the constitutional authority for the spending power which permits the federal government to impose stipulations on programs outside federal legislative power is not explicit in the Constitution Act, 1867. Moreover, the authority to exercise this power outside objects within federal legislative competence has been subject to significant criticism from a number of sources:

The raison d'etre of the federal spending power (and of conditional grants in particular) is to permit the federal government to use fiscal means to influence decision-making at the provincial level. In other words, it allows national majorities to set priorities and to determine policy within spheres of influence allocated under the Constitution to regional majorities. Thus, both by design and effect, the spending power runs counter to the political purposes of a federal system.

Yet, even critics of the federal spending power have conceded that it is now an established part of Canadian "realpolitik", and that the courts have abandoned...
any desire to "undo forty years of political development". Moreover, Hogg has suggested that the spending power is indeed an appropriate interpretation of the objectives of confederation:

It seems to me that the better view of the law is that the federal Parliament may spend or lend its funds to any government, or institution, or individual it chooses, for any purpose it chooses; and that it may attach to any grant or loan any conditions it chooses, including conditions it could not directly legislate. There is a distinction, in my view, between compulsory regulation, which can obviously be accomplished only by legislation enacted within the limits of legislative power, and spending or lending or contracting, which either imposes no obligations on the recipient . . . or obligations which are voluntarily assumed by the recipient. There is no compelling reason to confine spending or lending or contracting within the limits of legislative power, because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subjects.211

On this basis, and the "slender case-law", Hogg has asserted that such a broad interpretation of the spending power is appropriate.

The significance of such a conclusion for the creation of a comprehensive legal aid program in Canada is clear. The authority to enter into agreements with the provinces about legal aid services, in civil matters as well as in criminal matters, seems to be constitutionally valid, just as such agreements concerning welfare, pensions, education or health care (all matters arguably within the legislative authority of the provinces) have been negotiated within the constitutional context. Moreover, it seems possible that Parliament could enact valid legislation concerning the funding arrangements (and conditions for such funding) for legal aid services in the same way. These arrangements appear preferable, from a policy perspective, by contrast with a legislative scheme for legal aid

210 Ibid. at 468 and 473, citing in particular Winterhaven Stables Inc. v. A.G. Canada (1988), 53 D.L.R. (4th) 413, in which the Alberta Court of Appeal dismissed the plaintiff's challenge to the constitutional validity of federal health, education and welfare expenditures (including the Canada Assistance Plan). Irving J.A. noted in particular that "no citizen would doubt that Canada... has established a robust posture in negotiating with the provinces toward establishing these shared-cost programmes which are intended to provide all Canadians with common national standards of services". In response to the plaintiff's argument that the federal government should not be able to attach conditions to its funding which it would not be able to legislate directly, he stated shortly:

The conclusion does not follow. Parliament has not by legislative force achieved the result. The Constitution does not proscribe those incentives or economic pressure. If, for example, all or a substantial number of provinces decided not to accept the conditions, there would be no effect on matters within provincial jurisdiction (at 433).

211 Hogg, supra note 101 at 126. In his article, Petter cited part of this quotation and then suggested:

With respect, the views of these scholars have a sense of unreality about them. What they seem to forget is that governmental spending is not an isolated activity. When a government spends, it must derive the revenue from somewhere. The way that government usually does this is through the imposition of taxation, something which is, without doubt, the exercise of a "peculiarly governmental authority" ("Meech Ado About Nothing?", supra note 208 at 461).
services embracing only those areas clearly within federal legislative competence: criminal law, divorce, immigration and unemployment insurance. This conclusion is strengthened, having regard to doubts about whether broadly-defined legal aid services would meet the test of matters which are "vital" to the operation of any such legislative undertaking.

These issues of funding within the federal context must also take account of suggested reforms. Even though the Meech Lake Accord and the Charlottetown Accord proposals were not successful, there have been changes in the federal arrangements for financing services, such as legal aid, in the provinces. On this basis, it is important for the policy-making process to take account of the dynamic nature of fiscal federalism in the process of designing legal aid services.

V. RE-VISIONING CIVIL LEGAL AID SERVICES IN CANADA

Creating Objectives in Context

In this review of principles for legal aid services, a number of factors have been identified as relevant to the process of designing a legal aid program in Canada, and for determining its appropriate civil legal aid component. In the first place, the importance of recognizing the concept of "needs" as a normative one has been emphasized, along with its dynamic quality in relation to problems which are characterized as legal problems. Such a concept makes it essential to take account of,

... the essentially political nature of any assessment of legal needs and of any statement of legal aid goals. The claim that the only need is for access to conventionally organized legal services within the framework of the current legal system is a statement of confidence in the scope of those services and in the shape of the legal system: it is a statement that society is well designed and that it needs only a little oil to function at maximum efficiency. The claim that the need is for legal education activity is (again) a statement of confidence in the legal system although it may express some reservations about legal services. The claim that the need is for law reform and community development work is a statement that the legal system and the current social structure are inadequate and require change. The claim that the need is for legal action to press the interests of conservation

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212 The Charlottetown Accord constitutional reform package, was put to the Canadian people by way of a referendum on October 26, 1992. See Shaping Canada's Future Together: Proposals (Ottawa: Ministry of Supply and Services, 1991), especially at Part III. This referendum did not pass and presumably constitutional proposals which may have had a bearing on federal legal aid funding are no longer under consideration in the manner envisioned by these proposals.

213 The federal government has reduced its contributions to the provinces in relation to Established Program Financing in recent years, and has altered its commitment under the Canada Assistance Plan to share 50% of the cost of providing social assistance and social services in the three provinces which do not receive equalization payments. A legal challenge to the federal government's decision was not successful: see Reference Re C.A.P. (B.C.) (August 15, 1991), Doc. 22017 (S.C.C.), rev'g (1990), 46 B.C.L.R. (2d) 273 (C.A.). For critiques of the federal government's approach, see "Constitutional Reform and Social Policy" (1991), CCSD Social Development Overview at 1-6; and A Canadian Social Charter (Min. of Intergovernmental Affairs: 1991) at 9-13.
as opposed to development or of tenants as opposed to landlords is a statement that those interests are of special value and deserve protection and promotion.\textsuperscript{214}

In contrast to a process of legal needs surveys, the use of social indicators in making normative determinations of needs for legal aid services may be more appropriate for the policy-making process.

In making political choices about objectives, this analysis has explored the extent to which Canadians share a strong social consensus about the importance of equality in the context of law and justice, and their acceptance of state-funded legal aid programs as a means of implementing a societal commitment to equality. As the analysis of legal principles has demonstrated, there has been no clear judicial decision as yet supporting the entrenchment of a right to state-funded counsel pursuant to the provisions of the \textit{Charter}. Yet, within the jurisprudence on the \textit{Charter}, there have been a number of comments which can usefully guide the policy-making process in relation to legal aid services.

In relation to the exercise of legal rights, for example, the comments in \textit{Singh} and \textit{Morgentaler} suggest that it is not administrative convenience but rather the fairness of proceedings which is determinative in relation to section 7, and that security of the person encompasses freedom from “stigmatization, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to outcome and sanction”. In considering the issue of coverage in a comprehensive legal aid program, for example, such comments are important directions about the content of section 7. Moreover, in relation to sections 10(b) and 11(d), courts have also indicated a willingness to assure that the right to counsel and the right to a fair trial are substantively recognized (in cases like \textit{Brydges}) even though no court has yet recognized an affirmative right to state-funded legal aid services. Yet, in reasserting inherent powers of the court to order the appointment of counsel in cases like \textit{Deutsch}, courts have demonstrated a willingness to ensure substantive fairness in judicial proceedings and the effectiveness of counsel in achieving this goal. Such approaches to the issue of fairness in trial proceedings and the need for legal representation also provide important signals for the policy-making process.

More fundamentally, the decision of the Supreme Court of Canada concerning section 15 equality rights in the \textit{Andrews} case offers a significant test for the coverage of legal services programs: whether distinctions (intentional or not) impose burdens, obligations or disadvantages on some persons and not on others, or limit access to opportunities, benefits and advantages available to

\textsuperscript{214} P. Hanks, \textit{Evaluating the Effectiveness of Legal Aid Programs: A Discussion of Issues, Options and Problems} (Canberra: Commonwealth Legal Aid Commission, 1980) at 37. Hanks conceded that “these political questions are difficult” but argued that they were nonetheless unavoidable because even “a modest conservative statement of community needs for legal services reflects a definite political position”, and that the political nature of the goal-setting process should therefore “be open to the broadest possible range of interest groups” (at 37).
whether the persons contemplated by the legislation (even in terms of exclusion, apparently) are "relatively powerless", form "a discrete and insular minority", or are vulnerable to "becoming a disadvantaged group in our society". All of these tests are most useful for policy-makers in the process of deciding on issues of coverage and eligibility appropriate to a comprehensive legal aid program.

These social, political and legal values provide the basic principles for policy choices about coverage and eligibility for state-funded legal aid services in Canada, and may also impact on the issue of delivery system in terms of the assurance of accessibility. In addition to these values, the principles which guide policy-making must accord with the requirements of the constitution. Accordingly, it is necessary to define those legal aid services which might be provided by the federal government, acting within its constitutional authority (section 91). As has been suggested, it is likely that there is constitutional authority to provide legal aid services in the defined areas of federal jurisdiction, although the result of such an approach would be a legal aid program which looked more *ad hoc* and piecemeal (and not at all comprehensive).

To achieve a comprehensive legal aid program, an alternative approach is the use of the spending power by the federal government, enabling it to make funding for legal aid services available in areas of provincial jurisdiction (pursuant to section 92 of the *Constitution*). In spite of the fact that the spending power is not defined in the constitution, its existence for such purposes appears unchallengeable. Thus, while the constitutional principles constrain the methods of implementing a comprehensive legal aid program, they do not alter the scope of legal aid services in terms of fundamental social, political and legal values in Canada. Indeed, the practice of cooperative federalism seems especially well-suited to a consultative political process designed to define legal aid program objectives and to identify appropriate social indicators to implement them.

**Designing Legal Aid Services: The Legal Services Context**

In the process of designing legal aid services, the traditional (and often implicit) starting point has been the context of legal services provided by lawyers to paying clients. This has shaped legal aid services in differing ways. In the context of some civil legal aid matters, the original objective of providing to poor people the same legal services available to paying clients has been modified in practice, at least in some cases, to include services directed more specifically at the special needs of poor people (including welfare representation, housing standards advice, and other issues in "poverty law"). Yet, in the delivery of legal aid services in criminal matters, by contrast, it has been expected that the services

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215 An interesting argument is whether the sections of the *Charter* can be read cumulatively, *i.e.*, whether the sections mandating a right to counsel and a fair trial, read together with section 15 (benefits and advantages available to others) would thereby create a right to state-funded legal counsel. For an earlier version of this argument, see "Right to Legal Aid", *supra* note 131 at 35-36.
generally available to paying clients will be substantially the same as those provided to eligible legal aid clients. In both cases, the basic standard is legal services available to paying clients, whether the legal aid services are designed to reflect them, or to depart from them in significant ways.

Yet, whether or not the legal aid services actually provided are modelled on services available to paying clients, the standard of services to paying clients must nevertheless be taken into account in the overall design of a legal aid program. Because the legal system is a complex and interrelated decision-making system, the effectiveness of legal aid services depends in part on the extent to which they are integrated within the overall system. In this context, the scope of services available to legal aid clients, by comparison with those available to paying clients, may have an impact on the effectiveness of legal aid services as well as on the efficiency of the legal system overall.

In general terms, legal services for paying clients may encompass a broad range of activities from advice, preventive action and planning; to negotiation, mediation and other forms of persuasive intervention; to representation and advocacy before courts, tribunals, municipal councils, governmental task force inquiries, legislative committees and other decision-making agencies. Both in Canada and elsewhere, such activity by lawyers has been regarded as both acceptable and desirable in the interest of serving clients well:

The professional and ethical standards of the bar not only recognize the importance of the role of the lawyer when representing a client's interest before a legislative and administrative tribunal, they also encourage lawyers to participate in the process because of being uniquely qualified to do so.216

Yet, particularly where legal aid services are state-funded, the scope of services available to legal aid clients may be significantly less than those provided to paying clients. This may be a result of either express restrictions on such services217 or more frequently, from funding constraints which lead necessarily

216 Tull, supra note 184. The author cited Rule 3.9 of the ABA Model Rules of Professional Conduct, requiring a lawyer engaged in representation before an administrative agency to meet the same standard of conduct as if he or she were engaged in litigation before a court of law. The Law Society of Upper Canada Professional Conduct Handbook similarly provides in Rule 9 that:

The principles of the Rule apply generally to the lawyer as advocate and therefore extend not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals and other bodies, regardless of their function or the informality of their procedures (See para. 18: “Scope of the Rule”, which also refers to the ABA Model Code of Professional Responsibility, EC 7-15).

217 In the United States, for example, “draconian measures” were undertaken by the Board of Directors of the Legal Services Corporation in the years of the Reagan administration “to eliminate legislative and administrative advocacy” on behalf of legal aid clients” (Tull, ibid. at 33). According to Tull, “the fundamental difference between an agency engaging in general grass-roots lobbying and an advocate representing a client before a legislative or administrative body has too often not been clear to either friends or critics of legal services”; however, the virulence of the attack on such legal services over the past decade has resulted, in Tull's view, in the education of both Congress and other national leaders on “the importance to legal services clients of legislative and administrative representation by legal services advocates” (at 33-34).
to choices to provide only those legal services traditionally regarded as matters of priority, such as advice and representation in serious matters. In this way, the level of funding provided may itself operate as a policy choice to restrict the scope of legal aid services, thereby diminishing the extent to which legal aid clients achieve real equality with paying clients in terms of access to legal assistance. In addition, the restricted scope of services available to legal aid clients may also impact on the effective use of legal aid resources, both for legal aid clients and in terms of the overall legal system.

The context of legal services available to paying clients also influences the design of legal aid services in terms of the organization of legal services, that is, the ways in which lawyers (and others who provide legal advice) structure the availability of their services to the public. Both in Canada and elsewhere, there has been increasing interest in the variety of organizational arrangements for the delivery of legal services and the impact of these arrangements on the services available to a broad range of clients. By characterizing legal services as part of a “marketplace”, some commentators emphasize that different consumers may need different kinds or levels of services, and moreover that some legal services may be competently provided by persons who are not lawyers at all:

In Canada, the most assertive recognition of the broad range of services provided by lawyers to clients is found in Ontario, Ministry of the Attorney-General Report of the Commission on Clinical Funding (Toronto: Queen’s Printer, 1978), in which the report identifies the shortcomings of the fee-for-service system of legal aid services in meeting the “needs” of the poor:

The private Bar and its clients know that it is sometimes not sufficient merely to resolve the immediate problem. Often the client’s welfare dictates much more. He must know the dangers in order to avoid them in the future, and if they cannot be avoided, he may have to combine with others to attack the root of the problem, which perhaps can only be done in the councils or legislatures of the land. Services such as these are well within the field of the private Bar, and if the aim of Legal Aid as often stated is the rendering to the poor of the same legal benefits as those available to their more fortunate brothers, some method needs to be found to provide them (emphasis added) (at 1-3).

The regulation authorizing funding for Ontario’s community clinics subsequently defined the scope of clinic services as “activities reasonably designed to encourage access to such services or to further such services and services designed solely to promote the legal welfare of a community...” O. Reg. 391/79, s. 148(2).

218 The funding constraints of the past decade in Canada have operated to restrict the scope of legal aid services in most provinces, as is evident in the evaluation reports. For details, see the evaluation reports of British Columbia, supra note 59, Saskatchewan, supra note 25 and New Brunswick, supra note 65.


... access to legal services by those who need them is fundamental to the rule of law and the preservation of liberty. It is important to recognise, however, that such access does not necessarily mean access to a lawyer. Much depends on the level and type of legal service required. In some cases a friend or advice agency may suffice; in others advice by one who is not only a lawyer but also a specialist lawyer, such as a patent lawyer, may be essential.221

The range of apparent choices for legal services consumers now includes diversity both within and outside the profession. Among lawyers, there have been traditional divisions between those who practised law as generalists (usually in smaller or one-person firms) and those who did so as specialists (more frequently, in large firms). However, there is mounting evidence of the difficulties of continuing to practise as a generalist in the face of pressures on large firms to merge, both nationally and internationally.222 These developments within the legal services “marketplace”, have occurred at the same time as other changes have increased the accessibility of legal services for middle-income families and individuals in areas such as: prepaid legal insurance plans;223 independent paralegal services,224 and; “fixed price” legal service schemes.225 Perhaps partly in response to the increasing variety of services available,226 many of the prohibitions on advertising by the legal profession have also been relaxed in recent years.

221 The Legal Profession, ibid. at 5.
222 See D. Watson, “The 1990’s and the Mega-Firms”, (March 1989) Can. Law. 18. The author quoted the lament of a senior Toronto lawyer for the role of the generalist in the profession:

There's a lot to be said for the old, generalist lawyer who wasn't an expert in all fields. He wasn't a tax lawyer, wasn't a securities lawyer. I think if someone with that general expertise disappears, the client is left dealing with a bunch of lawyers who are specialized and can't see the whole picture (at 20).

Yet, both the lawyer quoted and the author appear to agree that “the national firms will continue the trend toward specialization in the 1990's” (at 20).


224 The role, if any, for independent paralegals in providing legal services in Canada remains undecided. At its meeting in August 1989, the Canadian Bar Association opposed granting permission to unsupervised paralegals “to provide legal services directly to the public”. Its recommendations, however, included encouragement for open panel prepaid legal insurance programs and the employment of paralegals in law firms “to pass along cost-saving to the legal services consuming public”. See “Recommendations of the Special Committee on the Status of Paralegals to the CBA Council” (Toronto: Canadian Bar Association, 1989). In Ontario, a provincial Task Force was established in 1988 to make recommendations to the government about the role for unsupervised paralegals in delivering legal services directly to the public; the Task Force report recommended that qualified paralegals be permitted to provide legal services in specified areas on retainers similar to those used by lawyers. See Ontario, Ministry of the Attorney General, Task Force on Paralegals (Toronto: Queen’s Printer, 1990).

225 Established in Toronto, for example, by Jane Harvey Associates.

226 For an excellent overview of trends, both among large law firms and in relation to other forms of legal services, see G. Fung, Issues in the Delivery of Legal Services (Toronto: Research and Planning Committee, The Law Society of Upper Canada, 1987).
This proliferation of sources from which to obtain legal services, coupled with the broad range of services which lawyers may provide, makes the legal services “marketplace” a complex (and even bewildering) system for consumers. Yet, for those consumers with clearly-defined needs and resources to pay for services, the legal system probably works reasonably well. For consumers who are less certain of their legal needs (who may not know whether their problem is “legal” at all, for example) or for those whose resources are less certain, the effort to obtain assistance within a complex marketplace may be more difficult.227

These concerns dramatically illustrate the interrelationship between issues concerning the availability of legal aid services, and the design of legal aid programs as part of the issue of access to justice more generally. The structure and operation of the court system and administrative tribunals, the variety of arrangements for dispute-resolution for legal problems, the availability of measures such as prepaid legal insurance schemes to pay for legal services, and the extent to which both lawyers and other agencies are accessible to consumers of legal services all make a significant impact on the context within which legal services are generally provided.228 All of these factors also have an impact on the extent to which some consumers will perceive needs for legal aid services, while changes within the general legal services context may significantly influence the effectiveness as well as the appropriateness of individual legal aid programs. In such a context, it is necessary to understand that legal aid is only one element in a complex and dynamic legal system, and to take this concept into account in designing guidelines for legal aid services.

This analysis also demonstrates that a legal aid program designed to replicate for its clients both the breadth of services available to paying clients and the range of service providers (including lawyers) for different kinds of problems would likely be both costly and complex. At the same time, it is essential to take account of both these features of legal services generally available in Canada in the 1990's (breadth of scope of activity and range of service providers) as features to be considered in designing appropriate legal aid services for the future. As well, the need to provide for methods to continually assess priorities for legal aid services

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227 Concerns have often been expressed that this group includes, in addition to some poor clients, those middle-income clients who are too well-off to qualify for legal aid, but too poor to pay for legal services themselves. In Australia, such consumers are referred to as the “sandwich class”, middle-income legal clients with neither the financial resources of the wealthy nor sufficiently poor to qualify for legal aid. See E. McCarthy, “Aussies Study How Lawyers’ Earnings Affect Legal System” Lawyers Weekly (2 March 1990) 13. As eligibility guidelines for legal aid become more stringent, of course, the numbers of those in the “sandwich” class inevitably increases.

228 This point was stressed in the Australian context in Australian Legal Aid Services, supra note 20 at 25:

The need for legal aid services cannot be divorced from questions of timely and appropriate access to courts and tribunals, efficiency and effectiveness, procedural, technological and administrative innovation, funding and public policy issues in the legal system. In turn, the functions of the legal system and its institutions are affected by wider social, political and economic factors.
is clearly demanded by the dynamic nature of current changes in the work and organization of lawyers and others involved in the delivery of legal services.

"Coverage" and Legal Aid Objectives

The process of defining the parameters of a legal aid program ("coverage") is one of translating general values and objectives about legal aid services into concrete criteria which can be implemented so as to actually achieve the objectives identified. Such a process requires that the objectives be clearly defined and that the methods used to implement them be successful for their purposes — both difficult goals to accomplish.

The issue of coverage for legal aid programs is one which has been the subject of ongoing debate since the introduction of legal aid legislation in Canada. Although at the outset, it had been suggested that there was no rational way to distinguish between the need for legal aid services in criminal matters and for services in other areas, such as matrimonial proceedings, the lack of sufficient funding for legal aid in all possible cases limited the availability of services in practice in different ways across Canada. The 1985 CBA Report, requesting the provision of funding for legal aid services in an expanded range of categories, demonstrated the continued vitality of this debate about the range of legal aid services which should be available to all persons, regardless of their ability to pay.

In deciding on the coverage appropriate to a comprehensive legal aid scheme, it is necessary to adopt a rationale (or rationales) for the provision of legal aid services. Because legal aid services are currently being provided according to the cost-sharing agreements for criminal and Young Offender legal aid services, one option is to extend legal aid services for matters which are justified by the same rationales which support these current services. On the other hand, it may be possible to develop a new rationale for legal aid services, one which better accords with the social indicator approach to legal needs and which takes account of current political and legal values in Canada, as the basis for determining coverage for the future.

Both these approaches assume that a comprehensive legal aid program should include a criminal and civil component and that the rationales for these two components should be consistent, whether they are included in a cost-sharing agreement or in legislation. For practical purposes, of course, it may also be possible to create a civil legal aid component, utilizing the social indicator approach, for example, without altering the current arrangements for criminal and Young Offender legal aid services at all, on the basis that new funds are available to create a civil legal aid component and that it should be designed and administered separately from the current program. In the discussion which follows, the emphasis is on the creation of a comprehensive scheme which has a purpose and rationale which is consistent overall.229

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229 There is no discussion here about the constitutional arrangements for legal aid services. For a discussion of these issues and the problems of a civil legal aid program encompassing only those matters for which the federal government has legislative authority, see supra c. IV.
1. Extending the Rationale for Criminal Legal Aid

The existence of guidelines for the provision of criminal (and Young Offender) legal aid services has contributed already to uniformity in the nature and extent of such services in Canada, and provides some sense of the “bottom line” as to when an accused must be able to obtain state-funded legal counsel. The policy decision to make legal aid services available for accused persons in criminal proceedings resulted from the federal government’s constitutional responsibility for criminal law and its willingness to provide cost-sharing to provinces which introduced legal aid for accused persons, on condition that the provincial arrangements meet the federal guidelines for cost-shared legal aid services. Thus, such a pattern is available for replication in other matters for which similar rationales may exist.

Legal aid coverage for criminal and Young Offender matters accorded with a fundamental rationale for legal aid services: that such services should be available to persons in proceedings in which the state, with all its resources, was the other party. This rationale also took account of the need to provide legal aid where the accused, on conviction, might face loss of liberty (imprisonment) and perhaps loss of livelihood. The principles adopted in the federal-provincial cost-sharing agreements for criminal legal aid services, in utilizing these rationales, reflected developments in the American Supreme Court confirming a constitutional right to counsel for an accused facing a possible deprivation of life or liberty.230

If the rationale for legal aid services in criminal and Young Offender proceedings is the fact that the state, with its resources, is the other party to the proceedings, it would logically follow that other kinds of legal services in which the state is the other party should also attract the same level of commitment for legal aid services. In the civil legal aid context, such an analysis would support funding for legal aid services for parents in disputes with the state as to whether their children are “in need of protection” (possibly resulting in removal from parental care); for psychiatric patients in determinations about involuntary commitment and for these and other patients in relation to matters of involuntary treatment; for immigrants (and especially refugees) in determinations about their acceptability as residents of Canada; and for many persons involved in determinations about their entitlement to governmental benefits, including welfare; unemployment insurance; workers’ compensation and other entitlements based on need.

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230 See Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963); and Argersinger v. Hamlin, 407 U.S. 25 (1972). In Wolff v. Ruddy, 617 S.W. (2d) 64 (1981) (Mo. Sup. Ct. 1981), the court considered the impact of funding constraints on the availability of counsel, concluding that if no funds were available to enable the Public Defender to proceed in the case, the accused would be entitled to be discharged rather than being prosecuted without the benefit of counsel. The role of the lawyer in such a case, and the issue of whether a private solicitor appointed by the court to act without payment is a deprivation of property without due process under the American Constitution, is also explored in L.S. Dickens, “Appointed Pro Bono Defense: Involuntary Servitude And-Or An Unconstitutional Deprivation of Property?” (1982) 50 U.M.K.C.L. Rev. 207.
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on disability; old age, veterans' and other pensions; child care deductions; and student loans. In all of these (and other similar situations), the legal dispute involves an individual litigant as one party and the state as the other. Thus, if the rationale for providing legal aid services is based on the disparity between the parties because one party is the state, there are many other legal services, in addition to those needed for criminal proceedings, which should attract legal aid funding.

If, on the other hand, the rationale for legal aid services in criminal proceedings depends not only on the disparity between the parties because one party is the state, but in addition the likelihood of loss of liberty, would all the above listed matters still attract legal aid funding? Arguably, both the psychiatric patient and the immigrant (especially the refugee) may also face a loss of liberty, and for both of them the result may be more serious because it may be for an indeterminate period, by comparison with an accused sentenced to a term of imprisonment. Similarly, while parents whose children are removed from their care do not themselves experience a loss of liberty, their children may do so; and moreover, the loss of custody of children might well be characterized as of at least equal significance to that of a deprivation of liberty as a result of imprisonment. It may also be argued that, since procedures for the hearing and determination in child welfare cases, in some jurisdictions, provide many of the same due process protections to parents which are available to accused persons in criminal proceedings, this factor lends support to the conclusion that such proceedings might well be "equal" in terms of gravity to a criminal conviction.

In all of these cases, it is arguable that the rationales which support legal aid funding in criminal and Young Offender proceedings should similarly justify such funding in these civil cases. In contrast to these matters are the cases involving disputes about eligibility for governmental benefits, cases in which there may be disparity between the parties because one party is the state, but in which it may appear more difficult to argue that the potential outcome for the individual is as grave as a loss of liberty. Arguably, a decision to deny entitlement to welfare or other income maintenance programs, for example, is one which affects economic well-being as opposed to political liberty. Yet for the affected applicant, such a distinction may often appear tenuous, particularly where the result of the decision may be poverty, homelessness, hunger or illness. In cases where the result of a negative decision about such benefits creates economic vulnerability for the applicant, it may be callous to suggest that living in extreme poverty is less grave for the individual than a period of imprisonment (where at least shelter, food and medical care are generally available). Thus, although it may appear that these cases should be distinguished from the others, it is arguable that the potential economic vulnerability of a negative outcome should be taken into account in deciding on the appropriateness of legal aid in these cases, just as the potential for imprisonment or loss of livelihood is currently taken into account in decision-making about the availability of legal aid for accused persons. Such a decision may be a matter for an eligibility determination rather than being completely foreclosed by lack of coverage.
In this way, the underlying rationales for legal aid in criminal and Young Offender matters support the extension of legal aid services to civil cases. Yet, even where the same rationales can be shown to exist, there has been a traditional preference for criminal legal aid services because of the philosophical significance attached to a finding of guilt in relation to a criminal offence. On this basis, it might be argued that such a comparison of rationales is incomplete because it does not take account of the qualitative difference which attaches to proceedings in which the state is one party but in which the outcome may also be a determination of criminal liability.

The argument that criminal and Young Offender legal aid services must retain priority within a comprehensive scheme, notwithstanding that other legal aid services might qualify according to the same underlying rationales, must be addressed. The philosophical significance of criminal liability cannot be denied, although both the proliferation of quasi-criminal offenses as a means of state regulation and the use of scarce legal aid resources in such a context make the issue more complex than the bare philosophical question admits. Moreover, the actual significance of the stigma of criminal liability depends, to some extent, on the crime alleged to have been committed; it is not all criminal matters which carry philosophical significance for a finding of guilt, at least for adult accused. In the context of legal aid services for Young Offenders, of course, there may be the added significance that the accused faces the possibility of criminal liability in relation to a first offence, a factor which should certainly be taken into account.

An important critique of the philosophical perspective which supports priority for criminal legal aid services focuses on an analysis of the demography of the clients of such services. To the extent that a disparate proportion of those who commit, and are convicted of, criminal and Young Offender offenses are male persons, the priority accorded to these legal aid services disproportionately benefits males in Canada. Women accused of criminal offenses do, of course, have similar entitlement to legal aid services. However, the creation of a legal aid program which not only provides services primarily to one group of potential legal aid clients (males), and which at the same time routinely denies legal aid services for proceedings to enforce child support which might benefit another group (females), may seem to allocate scarce resources inequitably between males and females who are potential legal aid clients.

This problem has, indeed, led to suggestions that a continuation of the current level of funding for criminal and Young Offender legal aid services should be

231 Moreover, if one accepts Mandel's argument that it is lawyers, and not clients at all, who benefit from the extension of legal aid services, it is arguable that the priority attached to criminal and Young Offender legal aid services benefits male lawyers (who are substantially more numerous in the criminal law bar than women lawyers); by contrast, an increase in the availability of legal aid services for family law matters generally would benefit female lawyers as least as much as male lawyers in the same field. For preliminary data on the demography of the legal profession and the work done by male and female lawyers in Ontario, see F. Kay, Women in the Legal Profession (Toronto: Law Society of Upper Canada, 1989). See also, Law Society of Upper Canada, Transitions Report (1991).
matched by a similar level of funding for services in the family law context, both for issues of divorce and corollary relief and for other matters like the enforcement of support orders and assistance for legal problems arising out of family abuse and violence.\textsuperscript{232} Such a suggestion demonstrates the importance of determining the underlying rationale for both current and proposed legal aid services. If the rationale for criminal and Young Offender legal aid services is the fact that the state is one party and that the possible penalty may involve a deprivation of liberty, it seems at first glance that there would be no basis for extending services to persons involved in family disputes. However, if the frequent disparity of resources between men and women in family disputes is taken into account,\textsuperscript{233} along with increasing data on the "feminization of poverty" after marriage breakdown,\textsuperscript{234} it is at least arguable that the impact of legal problems for criminal and family legal aid clients may not be so dissimilar.

For policy purposes, therefore, it is important to analyze the priority currently accorded to criminal and Young Offender legal services, both because the rationales underlying legal aid services for these clients may be persuasively used to justify the extension of services to other (civil) legal aid clients, and because of gender disparity in the current allocation of legal aid resources. The present priority for criminal and Young Offender legal aid services is, of course, most justifiable if they are included within a comprehensive legal aid program which provides resources for (at least) those additional services which are shown to share the same rationales. In the absence of extension to these and other areas of client need, a policy which allocates most of its resources to one group of potential clients, while denying it to others who share the same reasons for needed services, is increasingly difficult to justify. For policy purposes, the appropriate course of action, therefore, is a re-examination of the use of criminal and Young Offender legal aid services, coupled with an analysis of other legal proceedings for which such services may be needed according to the existing rationale.

Such an approach has the advantage that it can build on the experience of the past two decades, and that it is incremental in terms of policy changes. On the other hand, it may also obscure problems with the current policy by precluding the need for fundamental re-thinking about the objectives of legal aid services and appropriate policies for implementing them. Even in the context of criminal and Young Offender legal aid services, for example, there is some need to understand not only the gender of accused persons, but other factors which may identify them as persons particularly at risk or disadvantaged in Canadian society (because they are Native Canadians or a visible minority, for

\textsuperscript{232} An interesting analysis of this problem was presented by Christine Boyle (Halifax: CBA National Conference on Legal Aid, 1985).

\textsuperscript{233} For a thorough analysis of the statistics on men and women who divorce in Canada, see C. McKie, Divorce: Law and the Family in Canada (Ottawa: Statistics Canada, 1983).

example) and which may influence the policy-making process in relation to legal aid for criminal matters as well. For all these reasons, it may be appropriate to adopt a different policy approach to the issue of coverage for legal aid services.

2. The "Disadvantaged" and Legal Aid Services

An alternative approach to defining coverage for legal aid services is the use of the social indicator method, recently considered in the Australian context. According to Hanks, this approach requires "the identification of those sections of the community who have two characteristics — a need for legal services and a reduced capacity to obtain them through the private market".235 Further, he suggested that these groups could be identified using "indicators of social deprivation — unemployment, geographic isolation, ethnicity, and dependency on the social security system for income support. . .".236 It is likely that use of these factors for the creation of target areas for legal aid services would also direct resources to those with greatest need, rather than simply reflecting current delivery patterns or the range of legal services offered to paying clients.

Such an approach offers a new method for defining matters to be covered by a comprehensive legal aid program in Canada. Although it appears to be a dramatic departure from previous approaches to defining coverage for legal aid services, the basic idea of the social indicator approach reflects some of the underlying assumptions about social and political values evident in recent Charter decisions. In particular, it clearly reflects concerns very similar to those expressed in the interpretation of section 7 about "stigmatization, . . . loss of privacy, stress and anxiety resulting from a multitude of factors."237; and in the definition of the equality guarantee in section 15 in Andrews as designed to protect those who are "relatively powerless"238 or vulnerable to becoming "a disadvantaged group in our society",239 taking account of "the place of the group in the entire social, political and legal fabric of our society".240 These judicial definitions of the scope of Charter guarantees, particularly in the context of access to law, suggest the desirability of a legal aid program which takes seriously the idea of disadvantage in Canadian society and which actively marshals resources to redress such inequities.

However, any decision to adopt the social indicator approach to the definition of coverage in a comprehensive legal aid program requires both the determination of objectives for the program and the identification of social indicators most likely to target those whose needs are reflected in stated objectives. Such a process

235 Hanks, supra note 48 at 49.
236 Ibid.
237 Mills, supra note 114 at 876.
238 Andrews, supra note 137 at 195.
239 Ibid. note 137 at 195.
240 Ibid. at 152.
is one which requires time, both for the creation of appropriate legal aid objectives and for the process of choosing suitable indicators to identify groups most likely to be in need of legal aid services. A policy decision to implement such an approach to defining coverage must take account of the time-frame required for such a task, and the need for further research to define both objectives and social indicators.

At the same time, such a process need not occur in isolation from the wealth of existing data about disadvantaged groups in Canadian society, and research which has already identified their vulnerability in terms of legal assistance. There have been a number of studies documenting, for example, the problems of mental patients,241 the disabled,242 Native Canadians,243 con-


242 See Ontario, Ministry of the Attorney General, Report of a Study: Access to Legal Services by the Disabled by Judge Rosalie S. Abella (Toronto: Queen’s Printer, 1983). The report focused on legal needs of the disabled, including persons “with physical or mental disabilities which interfere with their ability to do readily those things which non-disabled persons do readily” (at 10). The report defined the problem as follows:

For no one are the problems of access to legal services as severe as for the physically and mentally disabled. Added to the difficulties anyone else might have are the additional problems of mobility, communication, isolation and a parochial public attitude. And these obstacles are in addition to the financial hardship and lack of information which have traditionally impeded access to legal services. All of these impediments combine to make legal services practically unattainable for a significant number of disabled persons (at 11) and quoting from Report of the Special Committee on the Disabled and the Handicapped, Obstacles (Ottawa: Ministry of Supply and Services, 1981).

243 See J. Hathaway, Native Canadians and the Criminal Justice System: An Evaluation Assessment of the Native Courtworker Program (Ottawa: Department of Justice, 1984). The report documents the “culture of poverty” in which many Native Canadians live, including housing problems, unemployment, high mortality rates, especially for infants, and family breakdown. It also reports on the reasons for high levels of criminal activity:

In order to understand native criminality, . . . one must look to the social situation in which most natives find themselves. It is generally agreed that socio-economic status is negatively related to crime rates. As such, a meaningful reduction in the native crime rate can be achieved only by the adoption of an approach that recognizes native crime as a symptom of an inequitable social and economic order, rather than as a problem in and of itself. Clearly, no amount of courtroom intervention to assist natives can reduce the incarceration rate unless an effort is made to attack the factors underlying the criminal behaviour (at 46-47) and quoting R.M. Bienvenue and A.H. Latif, “Arrests, Disposition and Recidivism: A Comparison of Indians and Whites” (1974) 16 Can. J. Crim. 105; See also C.P. LaPrairie, “Native Juveniles in Court: Some Preliminary Observations” in T. Fleming & L. Visomo, eds., Deviant Designation: Crime, Law and Deviance in Canada (Toronto: Butterworths, 1983) and J. H. Hylton, The Native Offender in Saskatchewan: Some Implications for Crime Prevention Programming (1982).
sumers,\textsuperscript{244} children and young persons,\textsuperscript{245} welfare recipients,\textsuperscript{246} persons who live in remote areas,\textsuperscript{247} and women.\textsuperscript{248} All of this research can be utilized as the starting point for the process of creating objectives and identifying social indicators.

\textsuperscript{244} For an interesting study of the legal problems of consumers, see National Consumer Council, \textit{Ordinary Justice, Legal Services in Courts in England and Wales: A Consumer View} (London: HMSO, 1989). The study suggests that the legal system responds only very inadequately to the problems of consumers:

Lawyers often seem to see our system of civil justice as a hand-tailored suit — too good for everyday use. This report is about off-the-peg justice. We want a legal system that is simple, quick, cheap and fair, and which can be used by ordinary people to sort out ordinary problems. . . . [In practice], most individuals forego their rights. Individual consumers start at a disadvantage because they meet the legal system only rarely, have a limited understanding of how it works and limited resources in terms of money, time and energy. Their opponents use the courts frequently, have expert legal departments, and enough time and money to see the case through. The legal system does little to redress the balance. Most people do not even consider going to law. Of those who consider it, many reject it as being too costly or troublesome, and those who persevere have a number of obstacles thrown in their path (at 1-3).

\textsuperscript{245} This concern was identified in Government Activity Review Branch, "Ontario Legal Aid Plan" (Management Board Secretariat: 1987) at 90, referring in particular to the CBA-Ontario report, "Access to Justice — An Inquiry into Legal Aid in Ontario" (Toronto: CBAO, 1986). The Management Board report recommended "a further in-depth analysis of these problems" (at 90).


\textsuperscript{247} See Canada, Department of Justice, \textit{Legal Services in Rural Areas: An Evaluation}, by L. Snider (Ottawa: Queen's Printer, 1978; revised 1981). There is also an interesting, although now dated analysis of legal services in the north in C. Hunt, "Creative Law in the North" in Canadian Council on Social Development, \textit{Access to Justice: Report of the Conference on Legal Aid: 1975} (Ottawa: Canadian Council on Social Development, 1976) 122 [hereinafter \textit{Access to Justice Report}]. This brief paper lamented the report of the 1966 Carrothers Commission which ended the possibility of consideration of "a unique, native culture-oriented approach to laws in the North" (at 122). It also described eloquently the difficult task faced by a lawyer working for native peoples in the north, and concluded that: "Justice . . . will never be attainable by the native peoples of Canada unless our legal and governmental system is used in ways which reflect their special needs and aspirations" (at 129).

For an examination of the issues of justice in rural areas in the United Kingdom, see K. Economides & M. Blacksell, \textit{Access to Justice in Rural Britain: Final Report} (Oxford: Socio-Legal Group Annual Conference, 1988). The authors reported in this paper on the findings of the Exeter Access to Justice in Rural Britain project, which included surveys of three remote rural parishes. The authors found that the use of legal services was not dependent only on the nature and quality of available advice, but also on "personal circumstances":

Mobility is a critical factor and even though travel and communication did not emerge as posing serious difficulty in the initial survey, the follow-up revealed that for some groups, the elderly, the poor and women, they raised almost insuperable problems (at 10).

\textsuperscript{248} See D. Ellis, J. Ryan & A. Choi, \textit{Lawyers, Mediators and the Quality of Life Among Separated and Divorced Women: Report #25}, (Toronto: Laidlaw Foundation, 1988); and National Association of Women and the Law, \textit{Gender Equality in the Courts} (NAWL: 1989). In an earlier study by C. McKie & P. Reed, \textit{Women in the Civil Courts: Research Study #9} (Ottawa: Statistics Canada, 1979) at 20, the authors documented the lesser participation of women in the courts and suggested some possible explanations:
Moreover, as Hanks suggests, demographic data about income sources, geographic location, housing, etc. may also be used as indicators of "at risk" groups in society, along with information from those who provide legal services. In deciding to try to implement a social indicator approach in the Australian legal aid context, moreover, the National Legal Aid Advisory Committee noted the additional need to take account of the broader context of legal services generally, and changes in the legal system affecting potential legal aid clients.\footnote{249}

It is important to note the limits of such an approach. Although the social indicator method of defining legal aid services might significantly alter the traditional pattern of legal aid services, focusing on the needs disclosed by the most "at risk" groups in society instead of on current delivery patterns of service (sometimes related to the needs of paying clients), such an approach will achieve only what Hanks calls "equality of opportunity" goals. The social indicator approach does not, by itself, question the basic structures of the legal system nor does it change the inherent power relationships within it.\footnote{250} It merely alters

\footnote{249} The report noted:

NLAAC has already observed that there have been appreciable changes in needs for legal aid services since the early 1980's. In particular, it has noticed the increase in numbers of people receiving federal income support, changes to the administration of the Social Security Act 1947 (Cth.), including the CSS [enforcement scheme for child support], changing demographic patterns, State and Territorial domestic violence legislation, the emergence of specialist community legal centres, problems of access and availability in isolated areas and amongst underprivileged groups and the growth of urban concentrations (Australian Legal Aid Services, supra note 20 at 27).

\footnote{250} For an interesting analysis of the role of law in making social change, see R. Brooke, "Legal Services and Social Reform" in Access to Justice Report, supra note 247 at 99. Brooke quoted from R. Lefcourt, Law Against the People: Essays to Demystify Law, Order and the Courts (New York: Random House, 1971) at 137:

The belief that sufficient funds for legal services would considerably alter the economic status of the poor ignores the harsh reality that legal assistance cannot change existing social, economic and political relationships. Rather, the struggle for change in legal services must be part of a strategy toward the liberation of oppressed people, not towards a mythical legal equality.

See also V. Chouinard, "State Formation and the Politics of Place: The Case of Community Legal Aid Clinics" (1990) 9 Political Geography Q. 23.
the pattern for assigning priorities to the allocation of scarce resources from the "demand-based" model to a "needs-based" one.251

Such an approach, by focusing on "at risk" groups, demands a policy analysis and an assessment of (perhaps competing) rationales for both current and proposed legal aid services. Moreover, while the overall arrangements for the organization of the legal system and the work of lawyers must be taken into account, these factors are also not determinative of the issue of what legal aid services should be provided and what services should be accorded priority in the allocation of scarce resources. In this way, the use of a social indicator approach focuses policy-making attention on the process of defining objectives and identifying useful indicators to implement the objectives. Such an approach, moreover, defines the range of services which should be provided to legal aid clients by reference to their particular needs and interests, an approach which permits "equality of opportunity" objectives but does not exclude the possibility of more systemic legal action. This approach may, of course, alter current patterns of legal aid services, thereby affecting issues such as eligibility criteria and delivery systems (including the role for lawyers) as well.

**Eligibility Criteria**

Central to the system of Legal Aid is the question of who should benefit from the program, and how they should be identified. It is fair to say that the issue of eligibility is fundamental... and also the source of much controversy.252

The issue of eligibility for legal aid services is closely related to the issue of coverage, and similarly dependent on appropriate choices about underlying rationales for such services. Indeed, there is some confusion in the use of these terms and the extent of their overlap in the context of legal aid services currently provided. If coverage is defined as the range of legal actions for which legal aid may be available (both in terms of issues such as criminal or family, and in terms of scope such as representation or law reform activity), then financial eligibility criteria must be used to determine those individuals who are entitled to receive such legal aid services. Some commentators, by contrast, define coverage in more general terms (for example, representation in criminal matters),

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251 For an argument that such an approach should also be used in Ireland, see R. Grimes & R. Martin, "Legal Aid in Great Britain and the Republic of Ireland — Some Lessons to be Learnt" (1981) J. of Soc. Welfare Law 283:

Legal aid on the British model is an attractive scheme not only because it eases the financial burden of consulting lawyers but also because it can be implemented without causing interference to the established legal profession and its methods of practice. . . . However, such a scheme may not bring scarce public resources to bear where they would have the greatest beneficial effect (at 293).

The authors argued in particular against the introduction of coverage for matrimonial proceedings despite "a huge and unmet need" as demonstrated by the Airey Case, supra note 168, so as to make civil legal aid available for those matters which affect only the poor: social welfare claims, tenancy disputes and debt counselling.

252 Alberta Task Force, supra note 181.
and then define eligibility in terms of both financial and other criteria which must be demonstrated to qualify for legal aid services. In this context, the factor of serious consequences to the individual (because of the potential for imprisonment, for example) will be taken into account, along with financial criteria, in determining eligibility for legal aid services. On the other hand, if a social indicator approach were adopted so that “at risk” groups were identified according to social indicators, the concept of coverage might be used to define the range of services to be provided and eligibility criteria would define individuals, within the “at risk” group, who were entitled to legal aid services. On this basis, this paper uses “coverage” to define the broad scope of services offered by a legal aid program, and uses “eligibility” to refer to the level of financial resources (or lack thereof) which may entitle an individual client to receive such legal aid services.

In the context of current legal aid programs in Canada, most of the controversy about issues of eligibility has focused on criteria for defining those whose financial circumstances should entitle them to receive legal aid services. In the past few years, increasingly restrictive financial eligibility criteria, and the failure to reflect annual increases in the cost of living in eligibility guidelines, have been used by legal aid administrators to reduce demands for legal aid services in the face of diminishing resources. In Quebec, for example, the 1989 Annual Report of the Commission des Services Juridiques noted again that eligibility criteria applicable to single persons had not been changed since 1981. In firmly supporting the need to expand the limits in eligibility guidelines for legal aid clients, the Quebec Report argued strongly for recognition of the extent of state-funded legal assistance for paying clients:

It must be borne in mind that the much-delayed increase of the eligibility criteria affecting the poor would only partly compensate for the subsidies paid by the government as a matter of course to the rich individuals and corporations who are the heaviest users of the legal system. The entire judiciary system (judges, staff, courthouse) is at their disposal practically free of charge. ... In addition, since legal expenses are deductible from income tax, the government is depriving itself of this income. This is another way of subsidizing the rich. In addition, these privileges are perpetual and acquired without the need to gain the support of public opinion.

In Ontario as well, the issue of appropriate eligibility criteria has frequently been a matter of controversy, both in the certificate program and in the community clinics. In the context of the certificate program, the view that eligibility criteria should be applied with discretion was most forcefully presented in a 1981 report:

To deny access to legal services on the grounds that someone is living up to or beyond the limits of their income amounts to a refusal of access to the legal system and the destruction of that person’s capacity to assert or defend their rights. Ability

253 Ibid. at 5-6.
255 Ibid. at 23-24. The Report also noted that suggested increases in the eligibility criteria would cost an additional four million dollars (of which 48% would be paid by the federal government).
to pay must be viewed in the context of the nature of the legal services required, the seriousness of the need for services, the likely duration of the case, and the financial and social responsibilities of the applicant. In addition, ability to pay must also be judged against an accurate assessment of the actual cost of legal services retained on a private basis.\textsuperscript{256}

The recommendations of this report were in part a response to changes in eligibility criteria introduced the previous year. These changes created a two-tier approach for financial eligibility assessments: for those with gross incomes below a defined ceiling, no detailed assessment was required, while for all others, the assessment required an analysis of basic needs, transportation costs and debt repayment obligations.\textsuperscript{257} Although the two-tier approach was generally approved, the details of the system were subjected to significant criticism. According to the Social Planning Council, for example, "many households living on incomes at or just above the poverty level [would] be expected to contribute all or part of their legal aid costs" and "in some instances, people with very modest incomes could be denied assistance altogether".\textsuperscript{258}

Criticisms such as these raise fundamental issues about the role of eligibility criteria in achieving overall objectives within a legal aid program, taking into account that such services are provided within a broader legal services market in which legal services are also provided to paying clients. Distinguishing those clients who should be entitled to legal aid services from those who must pay for such services, particularly where the services are both provided by the same lawyers in private practice, is an important matter for the clients concerned and for the lawyers, as it is for the efficiency and integrity of the justice system as a whole. Moreover, it is clear that choices about eligibility criteria are intrinsically connected to those about coverage, particularly in the allocation of scarce legal aid resources. Assuming the existence of a ceiling on the total amount of funding available, a decision to expand the range of activities for which coverage will be available may require that eligibility guidelines be adopted which restrict the

\textsuperscript{256} "Report of the Sub-Committee on Financial Eligibility Criteria" (Legal Aid Committee of the Law Society of Upper Canada, March 1981), as quoted in "Examination of Ontario Legal Aid Plan", \textit{supra} note 181 at 10. The Legal Aid Sub-Committee's report was cited in the context of a discussion about the impact of eligibility criteria on the nature of legal aid services:

Restrictive financial eligibility criteria have a surface appeal for those who do not wish to see assistance provided to those who are living beyond their means or who are capable of paying their own way. In fact, most people would agree that the bulk of legal aid money should be directed toward the most economically disadvantaged members of society. It must be recognized however that legal aid was never intended to serve merely as a social assistance program, but rather as a guarantee of access to appropriate and necessary legal services for those unable to bear the cost of retaining private counsel (at 10).

\textsuperscript{257} For an overview of the details of the new rules, see \textit{ibid}. at 5-14.

\textsuperscript{258} \textit{Ibid}. at 9. The Report also analyzed the eligibility criteria in detail in relation to issues of indebtedness, property liens, transportation needs, and requirements for contributions from other family members or sponsoring organizations. See also "From Rights to Charity", \textit{supra} note 181.
groups of persons to whom such services can be offered. By contrast, the narrowing of the range of services covered may permit somewhat more generous eligibility criteria within the pool of funds available.

In the context of such choices, it is important to emphasize the need to consider the underlying rationale for a legal aid program. If the rationale is the creation of legal aid services for those most disadvantaged in Canadian society, the eligibility criteria should be designed to take account of their particular financial circumstances, just as choices about coverage should reflect the needs they actually experience. In designing guidelines from this perspective, it is necessary to take account of the particular features of their financial vulnerability rather than relying on guidelines drafted by reference to the financial arrangements of paying clients. Such an approach might, for example, permit greater use of general governmental statistics on poverty (including aspects of costs for shelter, food and transport) in the creation of eligibility guidelines for state-funded legal aid services.259

Eligibility criteria may also need to be sufficiently flexible to take into account the nature of legal aid services required by an applicant. Some legal services are more costly than others, depending on the nature of the problem and the length of any judicial proceeding required, as well as the requirement that a lawyer (rather than some other trained person) provide the service. Particularly if a social indicator approach is used to define legal aid needs and appropriate coverage for such services, it may be important to design eligibility criteria which ensure that essential legal services can be provided, using both lawyers and others according to the nature of the services required. In such a context, it may also be necessary to integrate decisions about eligibility criteria with rationales for both coverage and delivery methods for legal aid services. For this reason, an assessment of appropriate delivery systems is intrinsically part of the process of defining eligibility criteria.

The Impact of Delivery Systems

The issue of the appropriate model for delivery of legal aid services has remained a controversial one in Canada.260 A number of different delivery systems

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259 See Canada, Ministry of Supply and Services, National Council of Welfare, 1989 Poverty Lines, (Ottawa: Queen's Printer, 1989) at 4-7. The report concluded that one in seven Canadians "lived on low incomes in 1987, the most recent year for which data is available" (at 6). It also described the relative poverty for low income Canadians very clearly:

Poor Canadians have incomes substantially below average. The poverty line for a family of four is less than half (45 percent) of the average income for a family of four. The low income line for one person living in a metropolitan area is 48 percent of the average wage. Keep in mind that most poor people have incomes that are significantly less than the poverty line, so that the income gap between them and the average Canadian is even wider (at 7).

260 The controversy occurred again in Ontario in the context of rumours about the possible creation of a public defender system for criminal legal aid cases. See P. Kulig, "Public Defender System Not on Ont. Horizon Despite Call for Salaried Duty Counsel" Law Times (5-11 March 1990) 9. The news report indicated that the Ontario Legal Aid Plan was considering the possibility of instituting salaried duty counsel in other cities in Ontario, based on the success of the model initiated in Toronto in 1979.
were created originally in the establishment of provincial legal aid programs, utilizing both fee-for-service or judicare arrangements and a variety of salaried staff/clinic models. By 1987, the CBA had concluded that "only a mixed model can deliver effective legal aid services in Canadian jurisdictions", suggesting that innovation and creativity in the design of a variety of delivery models for different target populations would be more constructive than a continuation of the "sterile debate of staff vs. judicare". In particular, the 1987 CBA Report recommended that the Department of Justice encourage the use of mixed models through a comprehensive legal services cost-sharing agreement, a definition of essential legal services, funding for specific cost-effectiveness studies of different models, and encouragement of innovation by the definition of shareable expenditures and direct funding of programs.

The tenor of these recommendations was also reflected in the report of the Task Force in Alberta which assessed legal aid services. Emphasizing the need for cost-effectiveness, the Task Force recommended that the Board of the Legal Aid Society "consider employing staff lawyers where circumstances warrant, so that high quality legal services can continue to be provided to Alberta in a cost-effective way".

The salaried staff model for delivering legal aid services has, of course, been in existence for some time in a number of other provinces including Quebec, British Columbia, Saskatchewan, Manitoba and Nova Scotia. The expressed willingness in Alberta to consider departing from its judicare model to employ salaried lawyers seems to have been motivated, at least in part, by concerns to achieve cost-effectiveness. Indeed, a major concern in the debate about delivery systems has been the relative cost-effectiveness of the salaried model by comparison with judicare. This debate, however, merits close attention.

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261 CBA Report, 1987, supra note 11 at v. This view has been frequently expressed over the past two decades, particularly in Ontario where a mixed model was established utilizing the fee-for-service model for criminal and young offender legal aid services and for some civil services, including family law. Other civil services are substantially provided by salaried staff in community legal clinics. For an early statement of support for the mixed model of delivering legal aid services, see Action on Legal Aid, "Delivery of Legal Services" (Brief to the Osler Task Force on Legal Aid, 1976) at 6:

We . . . recommend that while the private bar should continue to deliver the services presently delivered by the profession under the existing Plan, alternatives to fee-for-service, and particularly community based organizations employing legal workers other than lawyers, should be relied on to deliver most of the expanded coverage of legal aid.

262 Ibid. at 247-248.

263 Ibid. at 248.

264 Alberta Task Force, supra note 181 at 13. The recommendation recognized that legal aid services had been provided in Alberta on a fee-for-service model for a considerable period, but noted that the possibility of utilizing staff lawyers "merits consideration if it is administratively feasible" (at 13).
1. Delivery Systems and Program Objectives

In fact, there have been two debates in progress at the same time. One debate has focused on the relative merits of the fee-for-service model, by comparison with a salaried lawyer model, in terms of their relative costs and the quality of services provided. In this debate, the issue has been characterized in terms of whether the lawyer in private practice, providing services to paying clients as well as to some legal aid clients (on a fee-for-service basis), provides a service which is preferable, both in terms of cost and quality, to that provided by a lawyer who works only on legal aid cases (on a salaried basis in a clinic setting). In the past decade, the issues of cost-effectiveness and quality of service have been explored frequently in a number of research studies, but no clear conclusions have emerged because of the difficulty of isolating all the variable factors relevant to any such comparison. As the 1987 CBA Report concluded in relation to a study in British Columbia:

... the Burnaby study demonstrates that cost per case in the staff lawyer model is roughly comparable to that for judicare. Sensitivity analysis would suggest that higher staff caseloads could generate a significant cost advantage to the staff model, while tariff levels and the pattern of tariff increases can have drastic effects upon cost comparisons.

Moreover, in addition to the indeterminacy of the conclusions in these studies about the relative cost advantages of judicare and the salaried staff model, it is clear that there is a more fundamental issue which must be addressed. The debate about judicare versus salaried staff services has focused mainly on the delivery system appropriate to those legal aid services traditionally provided by lawyers to paying clients; in the studies conducted in Ontario and British Columbia, for example, the comparison focused only on legal aid in criminal proceedings, while in the Quebec study, the comparison focused on criminal and family law matters, with some data on other civil matters as well. Thus, in all these studies, the cost comparisons were conducted taking account of services provided by lawyers, but in different kinds of settings.

In the context of a legal aid program which aspires to provide legal services to those who are most disadvantaged in Canadian society, the debate about delivery systems must be expressly directed to defining arrangements which meet such needs. If the legal aid services which are required by potential legal aid clients are not the same as those routinely provided by lawyers to paying clients,

265 In Ontario, see Ontario, Ministry of the Attorney General, Background Paper on the Implications of the Salaried Defender Concept for the Delivery of Criminal Legal Aid Services in Ontario (Toronto: The Subcommittee, 1978); in British Columbia, see P. Brantingham & P. Burns, "The Burnaby, British Columbia Experimental Public Defender Project: An Evaluation" (Ottawa: Department of Justice and British Columbia Legal Services Society, 1981) [hereinafter "Burnaby Evaluation"], in Quebec, see "Evaluation de l'aide juridique" (Justice-Analyse et Organisation: 1982). For an assessment of these studies and the limited conclusions which can be drawn from them, see "Legal Aid in Canada", supra note 23 at 46-56.

266 "Burnaby Evaluation", ibid.
267 CBA Report, 1987, supra note 11 at 50.
the debate can no longer be usefully conducted in terms of the relative advantages of judicare and the salaried staff model alone. As the 1987 CBA Report explained, neither the judicare nor salaried staff model has been successfully adapted to the delivery of "poverty law" services in Canada to date, suggesting that there may be three reasons why even the salaried staff model has not done so more effectively:

First, staff models appear to be just as "reactive" as judicare models, in that clients are required to present themselves with their self-defined legal problems for resolution by staff lawyers. Second, fiscal restraints and large caseloads create pressures to service the "hard core" criminal and family needs, leaving little time or inclination to extend services into non-family civil fields. Third, there appears to be a tendency for staff schemes to replicate the conventional private practice approach to law, complete with private sector notions of permissible expertise and what constitute "legal problems". Moreover, if potential clients are not likely to be well-served by lawyers whose usual work does not include the poverty law issues which must be addressed or the special needs of legal aid clients, the judicare versus salaried staff debate (and its assumption that only lawyers provide legal aid services) offers little help on this issue.

In this way, it is clear that the debate about delivery systems is directly related to issues of coverage and eligibility because of the crucial links between the nature of legal aid services to be provided, the definition of the potential clients of such services and the methods available to provide needed services. The debate about judicare versus the salaried staff model, for example, is based on assumptions about the coverage of legal aid services (and probably about eligibility as well) which really reflect the experience of paying clients. In this context, only the question of which lawyers should provide the services is at issue. By contrast, with more recent recognition of the advantages of a mixed delivery system directed to coverage for other and different kinds of legal aid services, the 1987 CBA Report expressed support for delivering some legal aid services in poverty law clinics, delivery systems characterized as more "capable of delivering 'poverty law' services, . . . largely ignored by staff and judicare models".

In asserting the need to include poverty law clinics in a mixed delivery system, the CBA Report suggested that only community legal clinics "seem consistently

268 Ibid. at 115. The Report also noted that the salaried staff model is "lawyer-driven", just as is the "judicare" model:

To the extent that a staff lawyer model replicates the private law firm, it equally adopts a "lawyer's approach" towards the delivery of legal services, with lawyers defining the areas of practice, the case priorities and the nature of the "legal" problems. To the extent that staff schemes are seen as a "program", within the network of government social programs, then it is the administration, not the clients, that define the limits and scope of the "program". Either way, client input, much less control, is minimal, given the "top-down" structure of policy-making. Moreover, since staff models essentially grant a "monopoly" over legal aid services to a defined commission or agency, there is less pressure to respond to the clientele, as clients have nowhere else to go. The result can be a narrowing of legal aid practice and less responsiveness to client needs (at 115-116).

269 Ibid. at 233.
capable of engaging in broader, reform-oriented legal work, through community legal education, formal and informal law reform activities and interest advocacy”.270 The CBA Report acknowledged the need for legal aid services of this kind, and recommended the use of a mixed model for delivering comprehensive legal aid services, including judicare, the salaried staff model and community clinics. This conclusion (that different delivery systems are appropriate for different kinds of legal aid services) is one shared by a number of other commentators,271 including those who have addressed the question of appropriate delivery models for legal aid services elsewhere.

In the American context, for example, it has been suggested that a mixed model in which criminal and family legal aid services are provided by a judicare system (using lawyers who act for paying clients in such cases who also act for legal aid clients) and in which “poverty law” services are provided by a neighbourhood law firm (community clinic) is the most effective use of available resources.272 Since most people can identify legal problems which involve criminal and family law, and because lawyers for paying clients have expertise in these areas, a judicare system works quite effectively and efficiently for these problems. In addition, the use of a judicare system for these problems releases the poverty law clinic from responsibility for providing these high demand services and allows its staff time to engage in outreach activities and more specialized legal services required only by clients who are poor. In this way, the judicare system and the poverty law clinic are mutually supportive within a comprehensive legal aid program; and neither is truly effective in the absence of the other.273

270 Ibid. at 233. The report identified in detail the rationale for poverty law clinics, including the “distinctive” legal problems of the poor often unrecognized by a judicare system, the need for outreach to help poor people define their problems as ones for which legal assistance may be useful, and the lack of expertise on the part of many private practitioners in areas of law where many poor people experience problems. As the report stated: “Quite simply, a pure judicare model will almost inevitably ignore ‘poverty law’ services...” (at 114-115).

271 See also “Community Legal Clinics”, supra note 64 for an analysis of the structures of such clinics in relation to their legal aid service objectives.

272 B. Garth, Neighbourhood Law Firms for the Poor (The Netherlands: Sijthoff and Noordhoff, 1980) especially at 160-161.

273 Garth, ibid. suggested that the Quebec model already combined judicare and the neighbourhood law firm in an effective way, although he noted that the availability of choice of counsel for clients seemed to use resources of the neighbourhood firm in a way which detracted from its availability for specialization in the problems of the poor. He also suggested that there are some disadvantages to this “division of labour” model, including “whether eliminating or severely restricting choice is desirable”. As well:

A healthy competition between the public and private bar, rather than a division of the labour, might help raise the standards of both parts of the profession. Nevertheless, the values of choice and competition must be carefully weighed against the possibility that [neighbourhood law firms] will be prevented from doing the work which they are best suited to undertake (at 161-162).

Garth’s general approval of the Quebec arrangement a decade ago might now be more subdued in light of the difficulties which have been experienced in implementing the objective of “poverty law” outreach in the face of mounting caseloads and diminished resources. For discussion of this issue, see “Legal Aid in Canada”, supra note 23 at 29ff.
The desirability of such complementary arrangements was also recommended in the United Kingdom more than a decade ago in response to a demand for the creation of law centres (poverty law clinics) as the main method of providing legal aid services. In spite of the obvious advantages of poverty law clinics for poor clients' special legal problems, one commentator recognized the inherent need to augment such clinics with the support of a judicare program:

It will clearly be impossible . . . to set up salaried law firms in every area where there are substantial numbers of potential clients poor enough to qualify for their services. Even if law centers [poverty law clinics] can be put in the worst slums, the poor do not all huddle conveniently in ghettoes. In most industrialized countries they are spread over substantial areas — in rural as well as urban communities. If clients cannot afford to use private practitioners and there are no law centres in their areas, they are effectively deprived of the service of lawyers. The only solution to this dilemma is to permit poor clients to use the services of private practitioners and by one means or another to subsidise such work.\(^{274}\)

The need for a mix of models seems to be well-accepted as the foundation for designing a comprehensive legal aid program, with lawyers providing some services to both paying clients and to those who are legal aid clients, while poverty law clinics offer specialized services on a broader basis to poor clients alone. In this context, the arrangements for lawyers' services, in terms of the relative effectiveness of judicare or salaried staff models, remains an important issue, despite the indeterminacy of the studies to date. In terms of efficiency, the possibility that concentrated demands for particular legal aid services (criminal, young offender, divorce and other family matters, or immigration, for example) may encourage the use of salaried staff in some locations should not preclude the use of judicare for such arrangements where circumstances differ. Within a comprehensive system, there is also a need to ensure an acceptable standard of quality of legal services, which may be enhanced by a salaried staff model for some purposes more readily than for others.

Thus, in the context of designing a comprehensive legal aid program, including a civil legal aid component for such a program, a range of delivery systems is needed; and there must be some flexibility within the program to design appropriate methods of providing services which effectively promote the objectives defined by issues of coverage and eligibility. To the extent that legal aid for criminal and young offender matters is now provided by judicare and salaried staff models in different parts of Canada, such models are obviously available for adaptation to an expanded group of services, including those for family proceedings. In the context of judicare, the tariff arrangements currently in place for criminal and young offender legal aid services may not be entirely appropriate as models for other kinds of legal aid services, including family law matters. For this reason, a special assessment of the tariff arrangements for criminal and family law matters in Ontario is included here, as an example of the kinds of considerations required in designing effective delivery systems.

2. Legal Aid Services and Tariff Arrangements

During the past decade, the attention paid to the issue of the cost-effectiveness of judicare arrangements, by comparison with salaried staff legal aid services, has been accompanied by similar expressions of concern about judicare tariff arrangements per se in those provinces which use judicare arrangements extensively. In a judicare program, "the tariff is a major means of leverage for management of the legal aid plan", and serves "to manage the total budget cost of legal aid":

The tariff plays a central role in the judicare model, defining not just cost-per-case, but also regulating the composition of panels, the "vintage" of participating lawyers, and ultimately the quality of service delivered.

Moreover, the structure of the tariff may significantly impact on issues of accessibility to legal aid services for clients and the quality of service available to them from lawyers, by reference to the type of legal aid services required. It is for this reason that it is important to examine the operation of the tariff in criminal and civil matters.

Such a structural analysis was recommended in the Report of the Fact Finder in the Matter of the Ontario Legal Aid Tariff in the context of an assessment of the relationship between tariff levels and the original intent of the Plan with respect to lawyer compensation. The Report made several recommendations, including the abolition of the 25% contribution of fees on the part of participating

275 See CBA Report, 1987, supra note 11; and "Legal Aid in Canada", supra note 23 at 46ff, for details about cost comparisons for British Columbia and Quebec. The latter study concluded that

... the definition of tariff levels may have a direct impact on the outcome of a cost-effectiveness study: a low tariff may mean that a fee-for-service system is more cost-effective than a salaried lawyer system (particularly where their salary levels are reasonably high and their caseload volume is average or low) while on the other hand, a high tariff may make fee-for-service delivery less cost-effective (particularly if salaried lawyers receive relatively low salaries and their caseload volume is high). On this basis, ... the cost-effectiveness in any particular case will be determined only by taking into account, among other things, the level and structure of the judicare tariff (at 57).


276 See Alberta Task Force, supra note 181; Canadian Bar Association, "Access to Justice: An Inquiry into Legal Aid in Ontario" (1986); and "Report to the Attorney-General by the Task Force on Public Legal Services in British Columbia" (1984); similar expressions of concern are apparent in the evaluations of some provincial legal aid schemes: see "New Brunswick Evaluation", supra note 65.


278 Ibid. at 79.

279 G. H. McKechnie, "Ontario Legal Aid Plan Tariff Fact Finder Report" (July, 1985) [hereinafter Fact Finder].

280 Ibid. The Fact Finder recommended increases to the tariff over a three year period; and stated "[a]lthough these are across the board increases, the question of structure should also be investigated" (at 41).
lawyers, increases over a three-year period in tariff levels, a guarantee of regular review of tariff levels, and the use of fact finding and arbitration for any future disputes about such issues.\textsuperscript{281} However, in the context of efforts to design a comprehensive legal aid program, the structure of the tariff, as well as its levels, must be assessed, particularly in relation to the nature of legal aid services in criminal matters, by comparison with those in matters of civil legal aid, particularly family law.

The basic structure of the legal aid tariff\textsuperscript{282} in Ontario is one of block fees for some defined matters, and hourly-based fees with designated maximum amounts for others. In addition, there are special services available, including duty counsel services and legal advice certificates;\textsuperscript{283} and more recently, a special program for residents of women's shelters, a program which permits them to obtain one hour of advice from a lawyer.\textsuperscript{284} For purposes of the comparison of criminal and civil legal aid matters, this analysis focuses on the structure of the tariff's operation in terms of block fees and hourly-based fees with maximums.

The central issue is the nature of the difference in the practice of law in criminal matters by comparison with civil matters and the appropriateness of methods of compensating lawyers for legal aid services in these different contexts. In the context of criminal proceedings, for example, the practice arrangements are more predictable for lawyers, in part because the court system dictates the stages of the proceedings. Meetings with clients are necessary as are meetings with the Crown for purposes of disclosure, but there is not likely to be a great deal of paperwork involved (and bail hearings and bail review matters are

\textsuperscript{281} \textit{Ibid.} at 37-43. The Report also confirmed a need for review of the tariff because of its impact on the quality of services apparently available to legal aid clients in 1985 by comparison with 1971, with fewer senior members of the bar doing legal aid cases more recently:

The inadequate tariff has meant that the burden of providing legal counsel to indigent clients has fallen on a decreasing proportion of the legal profession, thereby affecting the clients' freedom of choice. Data provided by the CBAO demonstrated that in 1984, 1006 new lawyers were admitted to the practice of law in Ontario, 84\% of whom joined the active Bar, increasing the numbers by 7.6 per cent. The CBAO also reported that, despite an increase in the number of lawyers generally, the number of lawyers who participated in Legal Aid decreased by 2.4 per cent. This means that the basic principle of freedom of choice without regard to ability to pay is clearly affected (at 27).

The Report also pointed out clearly that there was no evidence presented to the Fact Finder that counsel taking Legal Aid certificates were less competent than counsel who did not do so; but that there was substantial evidence that less experienced counsel were taking large proportions of Legal Aid cases, and that senior counsel were not participating in the Plan in 1984 to the same extent as they had done in 1971. For further details, see 32-33.

\textsuperscript{282} The details of the tariff are found in the regulations under the \textit{Legal Aid Act}, R.S.O. 1990, c. L-9. See O. Reg. 59/86, as am. by O. Reg. 126/86; O. Reg. 726/86; and O. Reg. 699/87.

\textsuperscript{283} Both of these services are compensated according to hourly rates with maximums. See M. MacLean, "A Preliminary Assessment of the OLAP Tariff" (Background Paper, Civil Legal Aid Project) at 7.

\textsuperscript{284} \textit{Ibid.} at 8.
independently compensated by the tariff). For reasons which are unclear, moreover, the tariff compensates lawyers, using two different block fees depending on the seriousness of the offence, even though the seriousness of the offence may not affect the amount of lawyer-time involved in preparation and conduct of the case. Furthermore, although police officers may lay multiple charges including one which is serious, the more serious charge may be dropped if the accused pleads guilty to a lesser offence; nonetheless the lawyer is compensated by the tariff according to the block fee for the more serious offence even though the case resulted in a guilty plea to a lesser charge. These arrangements raise important issues about the structure of the tariff itself, as well as by comparison with relative compensation for civil law matters:

First, it is questionable whether an assumption that underlies the fundamental division in the tariff, i.e. that more serious offenses should be compensated in a different manner is valid. Second, it encourages counsel to use the system to the detriment of the client's rights because a guilty plea involving very little work on counsel's part may result in a substantial fee. Third, it encourages counsel to be selective in accepting clients. Fourth, it ignores an important factor usually taken into account in civil assessments, namely the results obtained for the client.\textsuperscript{285}

In contrast to the criminal legal aid tariff, the tariff for family law proceedings in Ontario is substantially based on hourly rates with maximum amounts. One exception to this arrangement is the uncontested divorce, for which a block fee is available. However, in practice, the definition of an "uncontested" divorce is somewhat malleable because it may often require the negotiation of a separation agreement between the parties to ensure the respondent's willingness not to oppose the divorce petition. In such circumstances, counsel for the petitioner may need to seek an amendment to a legal aid certificate to authorize negotiation of a separation agreement; or to have the respondent file a defence so that the corollary matters can be negotiated as minutes of settlement (thereby becoming eligible for compensation on the basis of hourly rates). While these alternative arrangements are available and quite appropriate, the frequency with which such changes are required in a family law practice suggests that the idea of a block fee for an "uncontested" divorce assumes the existence of a legal matter which seldom accords with the reality of clients' lives. Thus, the existence of block fees in family law proceedings may be much less appropriate than in the criminal law context because of the inherent variability of family law (and other civil) proceedings.

The inadequacy of the block fee approach for family law matters demonstrates the inadequacy of the tariff's approach to civil law matters more generally. By comparison with criminal law proceedings, family law matters necessitate much more frequent contact between counsel and the client. In part, this additional contact occurs because of clients' anxiety about completing an emotional aspect of their lives, but it may also result from the lack of predictability about the relationship between one client and the opposing party, and the ways in which

\textsuperscript{285} \textit{Ibid.} at 12.
the termination of the relationship may require time and negotiation to resolve complex legal arrangements, especially ones which must try to assess future developments for both the spouses and their children. In this respect, the nature of the legal advice required is much more complicated, just as it is often somewhat more speculative.

Another difference between criminal and family legal aid matters is the extent to which family matters require the preparation of documents, and the impossibility of estimating in advance the amount of time typically required for this activity because of the significant range of variables in the circumstances of legal aid clients with family law problems: "children/ no children; property/ no property; child support/ no child support; respondent’s whereabouts known/ not known; child’s residence may have changed; oral agreements may have altered the terms of a separation agreement executed earlier; and so on". On this basis, it is arguable that the underlying rationale for the existence of block fees—that some uniformity exists—may be absent from the family law context completely.

On the other hand, there are also problems with the system of hourly rates in the family law context, again because of the variability of the cases in the face of maximum amounts for different parts of the process. The categorization of maximums is particularly aggravating to counsel:

It seems to me that if you spend more time with your client than the maximum permits and spend less time preparing documents, for instance, so that you don’t exceed the maximum in the preparation category, it is unsupportable for a compensation system to deny those extra hours simply because of the nature of the service provided. Creating maximums by way of artificial categories is very different [from] creating a general ceiling for a particular kind of case which ceiling cannot be exceeded without full justification. ... It seems to me that counsel is in a superior position to assess where her/his resources are best utilized to serve the client’s needs. ...

In addition to these problems in the context of legal aid for family law problems, there are procedural difficulties in other civil legal aid matters. In the immigration context, for example, a timely response to an application for legal aid is essential (as in some family law cases), and some counsel may be reluctant to proceed without at least oral approval (even though there is also the possibility of retroactive approval). In the immigration context, the tragic consequences of such a delay are obvious, but similar problems may also be experienced in the family law context, especially where only one spouse is financially assisted:

In addition to the financially assisted spouse being thwarted to some extent in initiating emergency proceedings, on the receiving end s/he is at a disadvantage in responding. Additionally, if the fee-paying spouse is always required to seek approvals, settlements may be arrived at the expense of real justice. This problem is further aggravated where regional disparities exist.

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286 Ibid. at 17-18.
287 Ibid. at 21-22.
288 Ibid. at 26.
Moreover, in terms of cost-effectiveness, it may be appropriate to question
the wisdom of increased tariff levels for experienced counsel in minor and routine
matters, the use of maximum amounts within particular categories of work, or
the provision of counsel in the context of proceedings which are merely formalities
to subsequent ones (the first stage hearings for refugee claimants, for example).
At a more fundamental level, it seems important to re-think the appropriateness
of elements of current legal aid tariff arrangements for criminal law matters,
and the wisdom of using them as the model for tariff arrangements in family
(and other civil) legal aid cases. In a number of respects, the policy-making context
is very different, suggesting that different rules should apply:

The “potential consequence” [to the client] . . . doesn’t determine the amount of
work required by the service provider [in the family law context], rather, the
complexity does. By way of comparison, if a client is charged with minor theft and
another with murder, the potential penalty is distinguishable and very different.
Correspondingly, the responsibility weighing upon counsel differs as does the requisite
preparation. The necessary work required and provided is easily identified and
adequate compensation easily determined by objective criteria. In family matters
such distinctions cannot objectively be assessed or compared. A client involved in
a child protection proceeding would surely perceive that the potential consequences
are grave, likewise a client who is battered and a client who hasn’t the financial
resources to solely support her/his children.289

On this basis, the need for care in adapting tariff arrangements to the context
of particular kinds of civil legal aid cases, especially in the family law context,
is clear. Thus, any decision to utilize a judicare system for the delivery of legal
aid services in the family law context (or other civil cases) should be accompanied
by a review of tariff arrangements so as to ensure that they accord with the nature
of practice in the civil law context and the needs of such clients. The use of
the criminal law tariff as a model seems completely inappropriate for such
purposes, having regard to the very different context of law practice involved.
As well, the degree to which legal aid clients (and lawyers) in the context of
criminal proceedings seem to be privileged by such tariff arrangements may not
be appropriate in the context of a comprehensive legal aid program.

3. Lawyers and Delivery Systems

A recurring theme for lawyers, legal sociologists, and policy makers has been that
[neighbourhood law firms] are necessary because of the “underutilization” of lawyers
in matters concerning new welfare state rights. The comparison with judicare adds
plausibility to that contention. The effort to make the new rights effective, however,
can be taken beyond the call for a new type of legal aid. The problem may not
be due so much to the underutilization of lawyers as to the overformality of the
judicial system.290

289 Ibid. at 33-34.
290 Garth, supra note 272 at 162.
The suggestion that the enforcement of legal rights on behalf of the poor may depend less on lawyers than on alternative arrangements within the justice system also creates an opportunity to consider the extent to which the creation of a legal aid program should involve the efforts of potential clients as well as lawyers in the design process. There has been a long tradition of involvement by clients and others in the creation and administration of legal aid programs in a number of provinces in Canada. In the context of fiscal restraint, however, the idea of broad community involvement in the design and implementation of legal aid programs has diminished, and reductions in coverage (especially, the lack of “poverty law” services) within legal aid programs has resulted in significantly less need for the use of personnel other than lawyers in the delivery of (mainly) traditional legal aid services. On this basis, the creation of a comprehensive legal aid program offers an opportunity for the federal Department of Justice to reconsider both the usefulness of non-lawyers in the design and administration of legal aid programs and the appropriateness of involving personnel other than lawyers in the delivery system itself.

The issue of the involvement of clients and others in the design and implementation of a legal aid program is directly related to the issues of coverage and eligibility for legal aid services. Where a legal aid program is designed on the basis of providing services to those who are most disadvantaged in Canadian society, the need for experience in problem-solving in such a context is essential, skills which (some) lawyers may be unable to provide. Moreover, recognition of the importance of focusing on the needs of clients may require a departure from traditional arrangements for providing legal aid services. In Ontario, a recent example of such innovative arrangements is the agreement entered into between the Ontario government and the Nishnawbe-Aski Nation for the provision of legal aid services. According to this agreement, the native community will receive “government money to set up a legal services corporation which they will control”. The corporation is run by a native board of directors and has wide-ranging responsibilities to hire and train lawyers as well as paralegal workers. In such a context, the choice of priorities for legal aid services is likely to reflect the legal needs perceived by clients and potential clients much more than the objectives of legal services traditionally provided by lawyers.

In addition, the focus on the needs of the most disadvantaged within Canadian society suggests the possibility that paralegals may be able to provide appropriate legal aid services, along with lawyers. The use of paralegals in the delivery of legal aid services was frequently advocated in the early years of state-funded

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291 For detailed descriptions of these changes, see for example the “Saskatchewan Evaluation”, supra note 25.


293 Ibid.
legal aid programs in Canada, although the actual use of such paralegal services has not been so widespread. At the same time, the focus on criminal legal aid services, and to a lesser extent on family and related civil matters, has made the use of paralegal workers much less central to the overall objectives of legal aid services. Once again, a choice to direct legal aid services to those most disadvantaged, and to provide services in accordance with their defined needs, may require a re-examination of the role for specialized paralegal workers, particularly where the needs of legal aid clients may substantially diverge from those of paying clients for whom lawyers are more accustomed to providing services. Even in the context of a range of legal aid services being offered, there may be an important role for paralegal workers in the delivery of some services, at the same time as there is reliance on lawyers for the provision of traditional services available to both legal aid and paying clients.

This analysis of design issues relating to legal aid services, including issues of coverage, eligibility criteria and delivery systems, demonstrates the critical link between legal aid objectives and issues of design. Indeed, the possibility of making effective policy choices about design issues is fundamentally linked to clarity in the definition of appropriate goals and objectives for a legal aid program. For this reason, it is essential to define the rationale for legal aid services as part of the process of implementing program objectives in terms of coverage, eligibility criteria and delivery systems.

Toward a Comprehensive Legal Aid Program

This analysis of legal aid principles and design features has identified significant areas for further exploration and research in future policy-making efforts. To realistically assess the usefulness of the social indicator approach, for example, a test project which utilized it, both for defining objectives and for identifying appropriate social indicators, would help to further clarify the advantages and disadvantages of such an approach, particularly by comparison with the use of legal needs surveys. As well, ongoing legal and constitutional advice is needed to clarify the framework of legal principles, and appropriate strategies for legislative and contractual approaches, within which a comprehensive legal aid program must be designed. Moreover, there is considerable scope for both empirical research and experimental legal aid projects to assist in defining coverage in ways which meet overall legal aid objectives in areas such as: identifying eligibility criteria which are appropriate both for meeting target group needs and for ensuring fairness in terms of access to justice for legal aid and paying clients, and; in creating delivery systems which are effective and efficient for legal aid clients and for the administration of justice generally.

In the context of an ongoing research agenda concerned with the creation of a comprehensive legal aid program, two principles are essential. One is the need for broadly-based, continuous and systematic consultation about legal aid services, in the context of the justice system as a whole. To confine participation in the creation of a legal aid program to governmental advisors and members of the legal profession is to risk creating a program with ill-defined objectives, inappropriate eligibility criteria and ineffective delivery systems because it does not accord with the reality of needed legal services by target groups. Moreover, recognition of the dynamic nature of legal services means that a process for ongoing consultation is needed, not just one opportunity for input at the commencement of the program. Finally, some process for ensuring a systematic opportunity for community consultation is also required, so that all aspects of a legal services program can be monitored regularly, by contrast to a wholly reactive approach to problems.

Such a consultation process requires creativity in its design and implementation, especially having regard to the difficulties experienced by a number of provincial legal aid programs with similar arrangements for community consultation in the 1970's. Indeed, disillusionment with community input and frustration about its apparent ineffectiveness led to the abandonment of such arrangements in a number of legal aid programs. For this reason, both the purpose of the consultation process and the expectations of participants need to be clearly defined, and the arrangements for seeking and using such perspectives carefully designed. In general terms, for example, the use of community consultation processes will be more effective in the context of smaller, experimental projects with specific objectives which can be monitored in quantitative as well as qualitative terms by a combination of professionals (including lawyers) and target group members.

In the context of defining arrangements for consultation, it is also critical to recognize the pivotal role for lawyers in the creation of a comprehensive legal aid program in Canada. Quite simply, without the support of the legal profession, it is probably impossible to create an effective program. At the same time, the objectives of a comprehensive legal aid program must focus on its clients, and the welfare and convenience of lawyers cannot take priority over that of clients. Recognition of the importance of lawyers, and at the same time an understanding that their importance is secondary to that of clients, requires finely-tuned balancing of legal aid objectives and the measures necessary to make them a reality for legal aid clients. The existence of a broadly-based, continuous and systematic process for creating and monitoring a comprehensive legal aid program offers an opportunity for the perspective of lawyers to be included, along with ideas from those for whom the program is primarily intended.

The need for such a consultation process also requires some consideration of the appropriateness of national, by comparison with regional, provincial, or even individual, consultation arrangements. This issue is one for which no single answer may be appropriate, and it may be necessary to design arrangements according to the needs and objectives of individual projects; as well, some experimentation with and monitoring of different consultation models may be
appropriate. In this way, the consultation process is itself a matter for further research and exploration.

The second principle for consideration in an ongoing research agenda is the need for independence in legal services, including legal aid services. Whether such services are provided by lawyers or others, and whether the services offered are those available to paying clients or not, the need for independence from government in arrangements for funding and providing legal aid services is fundamental to the principle of equality of access to legal services. In a number of Canadian provinces, this need to ensure independence has resulted in arrangements by which provincial law societies have assumed responsibility for (and control of) legal aid programs, an arrangement similar to that adopted in the United Kingdom. In other provinces, legal aid programs are administered by independent legal service corporations modelled on similar arrangements in the United States.

The merits of these different arrangements were frequently debated in the 1970’s, and the importance of the issue should not be measured by the relative lack of debate about it more recently. Creative re-thinking about practical arrangements for implementing the principle of independent legal services in a government-funded legal aid program may also need to be itself the focus of further research and exploration. In addition to those models developed when governmental funding for legal aid services was introduced in the early 1970’s, there may be others which can be designed to maintain the principle of independence both effectively and efficiently in the context of a comprehensive legal aid program for the future. Moreover, any such arrangements must take account of the full range of independent legal services available to paying clients, and reflect the need to ensure independence for legal aid services without at the same time constraining the range of services available to legal aid clients.

In identifying further research required and the principles for conducting such research, the need to recognize the issues as dynamic rather than static is evident. As well, the importance of process in the choice of objectives and decisions about measures to achieve them is clear. That neither the questions nor the solutions seem obvious must be regarded as a challenge rather than a problem, particularly because of what is at stake in the issue of legal aid. As John Willis, a wise lawyer and critic put it: “Law is too important to be left to the lawyers; law is for something”.

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