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The Emergence of Unmet Needs as an Issue in Canadian Legal Aid Policy Research

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THE EMERGENCE OF UNMET NEEDS AS AN ISSUE IN CANADIAN LEGAL AID POLICY RESEARCH

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THE VIEWS EXPRESSED IN THIS PAPER ARE THOSE OF THE AUTHOR AND DO NOT REPRESENT THE VIEWS OF THE DEPARTMENT OF JUSTICE

PART A: FROM FISCALLY-BASED POLICY TO UNMET NEEDS

This paper describes the changing policy environment that has led to the research on unmet needs in legal aid, and the early stages of a program of that program of research into the nature and extent of needs for legal aid in Canada. The intensive interest in legal aid needs is a new feature of legal aid landscape in Canada. This newfound interest arose as a policy issue for the federal government as the federal policy basis for cost sharing negotiations for criminal legal aid between the federal government and the provinces and territories shifted, as the time for a renewal of the agreements grew near. The nature of this shift will be explained in a subsequent part of this paper. If this development turns out to be a sustained feature of legal aid policy in Canada, the policy focus on needs will represent the end of one era in Canadian legal aid, an era in which legal aid was largely fiscally driven, and the beginning of a new that will hopefully be more client-focused.

The Growing Emphasis on Legal Aid Needs

It has been remarked elsewhere that client needs has not typically been high on the list of concerns in legal aid. There have been many general legal needs studies in the past.[1] However, it is only recent that specific studies have begun to appear, expressing the interests of government policy makers in legal aid needs.[2] The interest in legal aid

[1] Two recent summaries of this literature are found in Pascoe Pleasance, et. al., Local Legal Need, Research Paper 7, Legal Services Research Centre, Legal Services Commission, January, 2001 and in Gabrielle Maxwell, et. al., Legal Service Needs and Provision: A Framework for Research, Legal Services Board, New Zealand, 1997.

[2] Gabrielle Maxwell, et., al. in New Zealand; Rush Social Research and John Walker Consulting Services, Legal Assistance Needs Phase I, Estimation of a Basic Needs Based Planning Model, 1996 and Phase II, Summary Report, 1998 in Australia; and Pascoe Pleasance et. al. in the United Kingdom.

needs to the extent of sponsoring large-scale programs of research is a pattern that appears to be emerging simultaneously in several countries. The legal aid systems in these countries, Canada, Australia, Great Britain, and New Zealand, are generally similar institutions in countries with similar justice systems overall. They all have weathered similar fiscal crises at about the same time. Having experienced fiscal cutbacks and constraints, all seem to be turning, once again at about the same time, to a concern with legal aid needs. The possibilities for comparative research seem promising, if not intriguing.

Recent reviews confirm that Canada has generated very little research on needs for legal aid or the needs of legal aid clients.[3] The great debate that has preoccupied legal aid in Canada over the past twenty years has been delivery models.[4] The delivery models debate skirted the needs issue indirectly and in a very limited way. The debate over the superiority of staff lawyer versus judicare delivery focused in part on whether private bar lawyers better met the needs of clients by providing a higher quality service. It was argued that private bar lawyers were not as likely to carry crushing case loads that limited their ability to provide adequate service. A second argument was the direct employment of staff lawyers by the legal aid plan, ultimately paid by the state, compromised their ability to mount a full and fair defense.[5]

Canada is not alone in having paid scant attention to legal aid needs. The researchers who conducted the recent research on legal aid needs in Australian note that in the legal aid literature, concern with needs seems almost entirely focused on the professional and technical aspects of service provision.[6] This observation has a ring of truth about it, in relation to the needs issue in the delivery models debate that dominated so much of the discourse in legal aid for so long.

Don Fleming has observed that in common law countries, institutions for he provision of access to justice became dominated early in their development by the legal profession.[7] Access to justice came to mean access to the courts. The definitions of problems were legalistic, and the resolution of issues by formal court processes was the predominant mode. Access to justice took on the image of the legal profession, and legal aid developed similarly according to the norms of the legal profession. Client centered approaches to needs did not develop naturally in that environment.[8] It

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[3] W. Bogart, Colin Meredith, and Danielle Candler, Current Utilization Patterns and Unmet Need, in McCamus, A Blueprint for Publicly Funded Legal Services, Report of the Ontario Legal Aid Review, Vol. 2, 1997; and A. Currie, Meeting the Needs of Legal Aid Clients, Department of Justice, Ottawa, 2000.

[4] A. Currie, Legal Aid Delivery Models in Canada: Past Experience and Future Directions, University of British Columbia Law Review, 33, 2000

[5] Ibid., pp.

[6] Rush Social Research and John Walker Consulting Services, Legal Assistance Needs Project, Phase IIa, Needs-Based Planning for Legal Aid and Other Services, Legal Aid and Family Services Division, Attorney-General s Department, Australia, 1998

[7] Don Fleming, Reconsidering the Theory Behind Legal Aid, Paper Presented at the Legal Aid in a Changing World Conference, Legal Aid Board, London, November, 1999

[8] Hilary Somerlad, The English Perspectives on Quality: the Client-Led Model of Quality - A Third Way, Paper presented at the Meeting of the Working Group on the Legal Professions, Onati, Spain, July 1998

might be argued that in the case-by-case approach to service delivery of mainstream legal aid, and moreover, the fee for service structure peculiar to judicare delivery, legal aid needs was not an issue that required systematic attention.

Legal Needs and Federal Legal Aid Policy

In Canada, the federal interest in legal aid needs has for most of the thirty year history of the federal legal aid program has been expressed at a very high level of abstraction. The foundation for the involvement of the federal government in the provision of criminal legal aid is the federal Parliament's exclusive jurisdiction to legislate in criminal law matters under Section 91 of the Constitution. Under Section 92 of the Constitution, the provincial governments have jurisdiction over the administration of justice. The administration of justice includes the provision of legal aid. The Supreme Court has ruled that the responsibility for the provision of legal aid is a divided between the federal government under its authority in matters of criminal law and the provincial governments under their authority for the administration of justice and for civil and property rights.

Objectives for the federal legal aid program have been expressed in quite consistent terms over the years. For example:

- in 1978, to ensure equality before the criminal law throughout the nation;
- in 1991, to provide an accessible, efficient, and fair justice system which is inclusive of all Canadians; and,
- in 1999, to ensure an equitable and accessible justice system that is responsive to the needs of an evolving and diverse population.[9]

The legal aid program objectives have consistently recognized the traditional perspective that legal aid is an important part of the justice system, instrumental in assuring equality for individuals and fair, accessible, and equitable justice system. In the 1999 statement of objectives, the needs of an evolving and diverse population enter into the statement. However, these statements of objectives are at a high level of abstraction. This is because the nature of the federal involvement has, up until now, been limited to a funding role by the constitutional division of powers described above.

Federal legal aid policy was mainly cost sharing policy, buttressed by the philosophical statements of objectives illustrated above. The central policy objective of the legal aid program from the early 1970 s when the cost-sharing program was begun was to support the provinces and territories in their constitutional responsibility to develop legal aid programs. The provinces and territories were free to develop delivery approaches that met their own priorities and circumstances. The various jurisdictions in Canada developed quite different legal aid delivery systems, with varying mixes of staff and private bar lawyers and clinic delivery components.[10]

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[9] Colin Meredith and Russell Robinson, Evaluation of the Department of Justice Legal Aid Program, ARC
Research Associates, Ottawa, 2001. pp. 7 and 8.

[10] A. Currie, Legal Aid Delivery Models

The central feature of the federal legal aid program was the cost sharing formula. The formula evolved over the years, mainly in attempts to achieve equitable distribution of federal funding, and to limit overall growth of federal expenditures. The main policy objective expressed in the formula remained the same, to provide funding equal to fifty percent of legal aid expenditures on a national basis.[11] This was one of the twin pillars of federal legal aid policy. The second pillar, based on the recognition that the provision of legal aid was an aspect of the administration of justice and thus solely a provincial responsibility, was the principle that the federal government had no role in the operations of legal aid plans or the delivery of the service.

The federal cost sharing program was, in one major respect, an unqualified success. Over the period between 1972 – 1973 to 1998 -1999 the federal government contributed in excess of $1.3 billion to provinces and territories for criminal legal aid. This equals about 41 per cent of the total amount spent on criminal legal aid by all jurisdictions on criminal legal aid. For 41 per cent of the total cost, the federal government leveraged the development of a national legal aid system. This pillar of legal aid policy was a success. The other mainstay of federal legal aid policy, the principled lack of involvement in matters of delivery, had the consequence of virtually eliminating any effective mechanism for exercising a federal influence over the factors driving the cost of legal aid. This meant little influence over the factors driving federal program costs, outside of purely fiscal controls. The next section on the history of legal aid expenditures illustrates how that situation eventually turned out to be the less successful of two pillars of federal policy.

A Brief History of Criminal Legal Aid Expenditures

Traditionally, federal legal aid policy was largely fiscal in nature, focused mainly on cost sharing. It is not surprising then, that the current federal preoccupation with needs arose as a reaction to expenditure trends. The graph below shows a history of criminal legal aid expenditures since the beginning of the federal legal aid program in 1972-73.[12]

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[11] A. Currie and M. Bond, A Review and Synthesis of Criminal Legal Aid Cost Sharing Formulas: 1973
-74 to 1989-90, Department of Justice Ottawa, 1989.

[12] The data begin in 1973-74 although the cost sharing program began in 1972-73. This is because up until
1982-83 payments to the provinces and territories were made on a lag year basis. The federal contribution for any given fiscal year was made in the next year. This allowed sufficient time for audits
of expenditures to be made. In the early 1980's, the provinces and territories requested that the federal
payment be made on a current year basis. Because expenditures were growing rapidly, the federal contribution, paid in the following year, was always considerably less than current year expenditures.
This forced legal aid plans to cash manage an increasing proportion of the cost of legal aid.

The graph also shows a gap in payments. In 1982-83 the federal payment was changes fro a lag year to a
current year basis. In order to avoid doubling the payment in that that transition year, only one payment
was made. Thus the graph shows no payment in 1982-1983. Actually there was one, but it applied to the

The history of criminal legal aid expenditures can be divided into three periods.

The Period of Continuous Growth. From the beginning of the federal cost sharing program in 1972-1973 until 1992-1993 expenditures grew continuously on a national basis. Criminal legal aid expenditures grew from about $11.7 million in the first year to reach a high of $ $268.5 millions at their peak. This represents a 22-fold increase. The federal contribution also grew at a rapid rate. This picture varies somewhat from one jurisdiction to the next. In some jurisdictions there were periodic decreases in expenditures.

During this period, it is fair to say that unmet need was assumed to be a given; it was a defining feature of legal aid. The provincial and territorial legal aid plans were all in a period of growth from very modest beginnings. The existence of unmet needs was taken for granted, and it was assumed that expenditures, even though they were growing rapidly, were always playing catch-up with need.

The Federal Cap and Continued Growth in National Expenditures. In 1990-91, the federal contribution was capped at 1989-1990 levels. The federal cap on the level of the contribution was imposed by the Departments of Finance and Treasury Board in response to what was perceived as a lack of control over the growth of the federal contribution, and of legal aid expenditures generally. The reader will recall the reference to the twin pillars of federal legal aid policy discussed above, in particular, the second one relating to exclusive provincial and territorial control over program operations and service delivery. However sound this principle may have been on the basis of the Constitutional division of powers (the administration of justice being the sole responsibility of the provinces) it left the federal government in the precarious position of having no legitimate influence over the factors driving legal aid costs that were subject to control. In general, these were delivery models and certain key aspects of legal aid operations such as the structure and level of legal aid tariffs and levels of financial eligibility.

The federal contribution to criminal legal aid was growing at a rate, and eventually grew to a level, that came to be viewed with alarm by the central agencies of government. The peculiar features of the federal legal aid program gave the perception, if not the reality, of an absence of controls over the growth program costs. As a consequence, the federal government resorted to the only instrument available to it, the blunt instrument of a cap on expenditures.

Provincial and territorial expenditures continued to increase nationally. The federal contribution as a proportion of shareable expenditures declined from about 50 % in 1989-1990 to a low of 33% in 1994-95. The principle that 50 % cost sharing on the

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previous year. This was known in legal aid circles as the lost year. The federal – provincial agreement
allowed that if any jurisdiction dropped out of the federal legal aid contribution scheme within10 years,
the lost year payment would be made.

part of the federal government was the measure of partnership in legal aid between the federal government and the jurisdictions was a cornerstone of the relations between the levels of government. The reduction in the relative level of federal funding became a serious irritant to federal - provincial relations in legal aid.[13]

The Period of Precipitous Decline. The provincial and territorial governments absorbed the increases in criminal legal aid costs throughout period two. Then several governments began to cut back on funding for legal aid. Again, these patterns vary from one jurisdiction to the next. However, on a national basis, criminal legal aid expenditures began to decline dramatically in 1994-95. Expenditures declined by 27 % between 1994-95 and 1998-1999. It will be described in the section following the one immediately below on the pattern of civil legal aid expenditures, how this decline, combined with a new orientation to federal spending in legal aid, triggered the current policy and research focus on needs in legal aid.

A Brief History of Expenditures in Civil Legal Aid

Up until 1994-95, the federal government contributed to the cost of delivering civil legal aid in provinces through a program called the Canada Assistance Plan (CAP), administered by Health Canada, the federal department responsible for health and social services. Civil legal aid was included under CAP as a form of social assistance, as an item if special need. Figure II shows the history of civil legal aid expenditures, and the federal contribution under CAP. Overall, more is spent on civil legal aid than on criminal legal aid in Canada. Both criminal and civil legal aid are delivered by the same legal aid plans (see Table I). Therefore, as one might expect, the patterns of expenditures for civil legal are similar to those for criminal legal aid.

[13] The National Review of Legal Aid, Department of Justice, Ottawa, December 1993.

Table I: Total National Expenditures on Criminal and Civil Legal Aid. Canada; 1998- 1999

Province/Territory	Criminal Legal Aid Expenditures ($000)	Civil Legal Aid Expenditures ($000)	Total Expenditures ($000)	Percent Civil
Newfoundland	3,489	2,185	5,674	38.5%
Prince Edward Island	405	138	543	25.4%
Nova Scotia	5,665	5,300	10,965	48.3%
New Brunswick	2,386	1,652	4,038	40.9%
Quebec	32,749	58,410	**121,180	48.2%
Ontario	96,017	121,190	217,208	56.1%
Manitoba	6,719	8,441	15,160	55.6%
Saskatchewan	6,341	3,770	10,111	37.2%
Alberta	14,909	7,994	22,903	34.9%
British Columbia	33,646	46,689	80,335	58.1%
Yukon	663	133	**1,033	12.9%
Northwest Territories	2,724	2,483	5,207	47.7%
Canada	**217,873**	**276,484**	**494,357**	**55.9%**

Civil legal aid services cost shared under CAP were eligible for up to 50 % federal funding.[14] In practice, however, CAP contributions were typically less than 30 % of expenditures. This is because CAP covered recipients who were eligible for provincial social services. Since social services levels were typically less than legal aid financial eligibility guidelines, the full 50 % CAP contribution was not met in practice.

A similar restriction to the federal CAP placed on the federal contribution to criminal legal aid was placed on civil legal aid. In 1991-92 the federal government limited the growth of the CAP contributions to three provinces, Ontario, British Columbia, and Alberta, to 5 % annually based on 1988-89 expenditures. CAP was a similar to the Department of Justice criminal legal aid funding program in that the constitutional responsibility for social services rested with the provincial governments. Thus the CAP was primarily a funding program, with a similar distance from service delivery. The funding restrictions placed on the three big provinces reflect the same cost containment emphasis that is evident in the capping of the criminal legal aid contribution.

[14] Civil legal aid services are funded in the territories by the Department of Justice, along with criminal 1egal aid.

In 1995-1996, the Canada Assistance Plan was absorbed into a multi-billion dollar federal block transfer from the federal government to the provinces called the Canada Health and Social Transfer (CHST). The CHST is an unconditional transfer that is not partitioned with regard to specific spending. Thus there is no longer any designated funding for civil legal aid. Slightly in excess of $99 million dollars was transferred to provinces for civil legal aid in the final year of the Canada Assistance Plan.

The Shift in Federal Criminal Legal Aid Policy; From Fifty Per Cent Equals Partnership to a Needs-Based Approach

By the early 1990's, on the part of the federal government, and by the mid-1990's in several provincial jurisdictions, the cost of legal aid was viewed by governments as running out of control. The response was more tactical and reactive than it was strategic and forward looking, employing the fiscal blunt instrument of budget caps and reductions. The prevailing view over this period was that legal aid in Canada was widely believed to be in crisis.[15] However, perception of overspending was based entirely on the pattern of increasing costs. There was no analysis of the amount, the quality, or the effectiveness of legal service for the poor that existing expenditures were purchasing. The institution of legal aid had evolved to a point at which the response to perceived overspending was the simple fiscal reaction of caps and cuts. Most of mainstream legal aid could probably be characterized in the words of a recent Nova Scotia review of legal aid.

> largely fiscally-driven, court-determined, narrowly defined and rigidly rationed through a menu of service. It does not spring from an explicit set of principles. Nor does it respond in any direct way to client needs, except in the limited and reactive way permitted by the menu[16]

Within the federal government, dissatisfaction with the traditional policy objective of paying fifty per cent of legal aid expenditures on a national basis was becoming explicit as the current federal – provincial agreement neared its final year in March 2001. The central agencies began to make it clear that the considered cost sharing programs of the 50/50 equals partnership variety as an old instrument that would not be viewed favourably.

At the same time that this policy discussion was developing, the dramatic declines in expenditures and volumes of service were raising questions about the extent to which the legal aid system was meeting basic needs. For years it was widely acknowledged that legal aid was rationed to the poorest of the poor. Financial eligibility guidelines were for the most part well below official poverty levels established by Statistics

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[15] Legal Aid and the Poor, National Council of Welfare, Ottawa, 1995; Melina Buckley, The Legal Aid Crisis: Time for Action, Canadian Bar Association,Ottawa, 2000; Frederick H. Zemans and Patrick J. Monahan, From Crisis to Reform: A New Legal Aid Plan for Ontario, Osgoode Hall Law School, Toronto, 1997.

[16] Nova Scotia Legal Aid Service Review, Halifax, 1996.

Canada.[17] Coverage of legal matters was widely acknowledged to be limited. The wide gap between the tariff paid to private bar lawyers for certificate work and market value for similar legal services was the basis for the conventional wisdom that many lawyers found legal aid work unattractive, and those who did accept certificates struggled to provide quality service.[18] Against this background, the question arose as to whether the declines in expenditures and volumes of service that occurred during the 1990 s was creating a pool of unmet need on top of what was believed to be a bare minimum service to begin with.

Two lines of thinking began to merge. One emerging line of policy was that the long-standing fundamental legal aid policy objective, sharing fifty per cent of provincial expenditures, was no longer viable. The second was the growing concern that the dramatic declines in expenditures and services provided at least prima facie evidence that needs were not being met.

As this confluence was occurring, ongoing discussions between federal and provincial officials gathered momentum as the end of the current federal provincial agreements on March 31, 2001 drew ever nearer. The provincial position reflected the historical basis for federal involvement in criminal legal aid. The federal contribution had declined from near fifty per cent of expenditures on a national basis at the end of the 1980's to about 33 per cent at he end of the 1990's. More federal funding was required to return the federal contribution to the fifty per cent level.

Officials in the Department of Justice began presenting the view to their provincial counterparts that the traditional blanket approach of fifty per cent cost sharing of provincial expenditures was no longer a viable option. The new federal thinking was that the level of federal funding should be based on sound empirical evidence of the level of need. It was pointed out earlier that there was virtually no empirical evidence about legal aid needs beyond basic data on total and approved applications that reflected demand. Staff lawyer versus judicare delivery models was the issue that dominated debate in legal aid for decades. Through the growth period of legal aid, from the beginning of federal cost sharing until the early- to mid-1990's, it was assumed that there was unmet need. Continuously increasing budgets chased unmet need like the hound chasing the rabbit. Although he may continuously decrease the distance to the rabbit, he never quite catches up.

During the perceived crisis in legal aid that had firmly settled in by the mid-1990's, concern was focused on how to react to stable and shrinking budgets in the face of a relentless set of forces increasing the complexity of the law and of legal aid case work, and increasing cost of providing the service. There was little reason to fix ones attention on meeting unmet needs, rather than as an obvious reality, as an inevitable consequence of budget constraint, and as an argument for increased funding to keep from falling farther and farther behind.

The fact that there was no sound body of empirical research on unmet needs was only one lacunae. The nature of the federal government s involvement in legal aid had never demanded a set of specific policy objectives around which to organize policy

[17] A. Currie and S. Mulder, A Brief Review of Criminal Legal Aid Financial Eligibility Guidelines, Department of Justice, Ottawa, 1995.
[18] Melina Buckley, The Legal Aid Crisis:A Time for Action

research. The high level statements of the rationale for the federal involvement in legal aid that were illustrated above were sufficient for the arms length federal cost sharing program that had been in effect since the 1970's.

Acknowledging the widely held perception of a crisis in legal aid, federal, provincial and territorial Ministers of Justice reached an agreement in September 2000 that the federal government would consider increased funding for criminal legal aid. The agreement was, however, that any increased funding had to be based on sound empirical evidence of the need for increased services for legal aid in the criminal law area. The federal Minister acknowledged the pressing issues in the area of civil legal aid, and indicated that the research program would study issues relating to the delivery of civil legal aid. This less concrete statement on civil legal aid acknowledges the fact that the Constitutional and policy foundations for federal government are less secure than in the area of criminal legal aid.

Refugee legal aid was a particularly contentious issue. In 1998 the Government of Ontario had announced its intention to withdraw from providing legal aid for refugee and immigration matters, on the basis of the argument that immigration is entirely a federal matter determined by federal legislation.

A joint collaborative program of research involving the federal, provincial and territorial governments was begun following the Minister's agreement. The work was to be carried out under a Legal Aid Research Secretariat that would act as a steering body. The Research Secretariat reports to a federal-provincial-territorial body called the Permanent Working Group on Legal Aid (the PWG). The PWG is a collaborative body to discuss legal aid policy issues and to carry out research on matters of mutual interest. The PWG reports to Deputy Ministers.

Soon after the agreement was reached to undertake a joint research program on legal aid needs, the federal government was able to make an offer to renew the agreement for federal funding of legal aid for a two-year interim period, for the period March 2001 to March 2003, in order to allow time to conduct the research. The interim agreement included a substantial increase in funding for the two-year period. The increase amounted to $20 million in each of the two years of the interim agreement, added to the $81.9 million in annual federal funding in the old agreement. The $40 million was sufficient to convince the provinces and territories of federal good faith in efforts to find a fair level for the federal share of national legal aid costs. In addition, the amount of money going into the interim criminal legal aid agreement provided sufficient relief on other pressures on the legal aid plans, such as for refugee legal aid, that no interruption of services was likely.

PART B: PRELIMINARY ASSESSMENT

As the focus of policy research in the federal Department of Justice shifted to the issue of legal aid need, the first task was to examine the limited existing data for evidence of unmet need. The classic typology by Bradshaw provides a very useful starting point for conceptualizing needs in legal aid, and to organize any analysis. Bradshaw distinguishes four types of need.[19]

[19] J. Bradshaw, The Concept of Social Needs, New Society, Vol. 30, March 1972.

Expressed Need. This is need expressed as action, such as making an application. Expressed need is synonymous with demand.

Comparative Need. This type of need is derived by comparing the characteristics and resources of different areas. Comparative need reflects the relative accessibility of services.

Felt Need. This type of need is equated with want. Felt need may be limited, inflated or otherwise altered by the by the perceptions of the individuals experiencing the need.

Normative Need. This is what the expert, the administrator, or the social scientist defines as need, such as the poverty level. Normative needs may vary over time as knowledge and standards change.

Expressed Need in Criminal Legal Aid

Legal aid application data are widely available, and provide a good indicator of expressed need. Data are available for both total and approved applications in a national data base that extends back to 1983-84.[20] The number of total applications is probably the most direct indicator of expressed need. However, the number of approved applications is of equal interest because that indicator registers the extent to which expressed need is being met.

In Canada, falling numbers of total and approved applications for legal aid, paralleling the decline in expenditures described above, triggered the concern about unmet need in legal aid. The table below shows the changes in total and approved applications parallel one another very closely. Approved applications are of special interest in this analysis because of the connection with the production of unmet need.

Table II: Declines in Total and Approved Applications for Criminal Legal Aid. Canada; 1992-93 to 1997-98

	Year		% Change
	1992-93	1998-99	
Total Applications	428,637	248,219	- 42%
Approved Applications	372,548	227,819	- 39%

[20] Statistics Canada, Legal Aid in Canada: Resource and Case Load Data, Canadian Centre for Justice Statistics, 1999

Nationally, the numbers of applications for criminal legal aid increased steadily between the 1970's and the early 1990's. On a national basis, the number of applications peaked in 1992-1993 at 428,637 total applications and 372,584 approved applications. Between 1992-1993 and 1998-1999 the total number of applications declined by 42 % to 248,219. The number of approved applications declined by 39 % over the same period, falling from 372,548 to 227,819.

At the beginning of this period, approximately 145,000 fewer applications for criminal legal aid were approved than in 1992-1993. The immediate question is whether this means that the level of unmet need was increasing.

Returning to the issue of increasing unmet need and the decline of approved applications, the first line of analysis examines the relationship between falling crime rates and falling criminal legal aid applications. During the period between 1993 and 1999, the crime rate in Canada fell by 10.7 %. Demand in criminal legal aid is strongly driven by the criminal justice process. Falling crime rates should explain a great deal of the decline in approved applications for legal aid. The Pearson correlation between offences cleared by charge and approved applications for a series of data covering the period between 1983 and 1997 was .91 using absolute numbers and .93 using rates per 100,000. In the language of statistical analysis this means that changes in offences cleared by charge explains 86 % of the variance in approved applications for legal aid. Offences cleared by charge is a powerful predictor of approved applications.

Approved Applications for Criminal Legal Aid and Offences Cleared by Charge

The table below shows the changes in absolute numbers of offences cleared by charge and approved applications for criminal legal aid.

Table III: Offences Cleared by Charge and Approved Applications for Legal Aid. Provinces and Territories; 1993- 94 to 1998-99

Provincial Territory	Year	Approved Applications	Year	Offences Cleared by Charge
Newfoundland	1993-94	6594	1994	11,611
	1997-98	7137	1998	9276
		+579		-2335
Prince Edward Island	1993-94	1205	1994	2336
	1997-98	1019	1998	1803
		-186		-533
Nova Scotia	1993-94	10,041	1994	20,387
	1997-98	8996	1998	17,306
		-1045		-3081

New Brunswick	1993-94	2125	1994	14,378
	1997-98	1278	1998	12,549
		-847		-1829
Quebec	1993-94	125,487	1994	128,728
	1997-98	78,084	1998	98,728
		-47,403		-30,000
Ontario	1993-94	107,442	1994	235,434
	1997-98	61,250	1998	215,057
		-46,192		-20,337
Manitoba	1993-94	15,065	1994	36,527
	1997-98	8580	1998	34,329
		-7485		-2198
Saskatchewan	1993-94	16,013	1994	38,500
	1997-98	16,971	1998	42,315
		+958		+3815
Alberta	1993-94	27,962	1994	75,832
	1997-98	22,253	1998	76,541
		-5709		+709
British Columbia	1993-94	42,005	1994	88,245
	1997-98	28,043	1998	85,481
		-14,072		-2764
Northwest Territories	1993-94	2353	1994	4545
	1997-98	660	1998	3878
		-1693		-667
Yukon	1993-94	1076	1994	1758
	1997-98	685	1998	1324
		-397		-434
Canada	1993-94	354,666	1994	657,764
	1997-98	228,785	1998	598,587
		-125,881		-59,177

The table shows that overall in Canada, the decline in offences cleared by charge in absolute numbers over the period was 59,177. During the same period the decline in the number of approved applications for criminal legal aid was 125,881. The absolute decline in approved applications exceeding the absolute decline in offences cleared by charge by 66,704. As a first approximation, this an indication of an increasing level of unmet need.

These data are not entirely above suspicion. It is not absolutely certain that the legal aid plans record applications in exactly the same way. In particular, the number of approved applications recorded for Quebec for 1993-94 appears to be very high in relation to Ontario. The Ontario legal aid plan is much larger, but records far fewer approved applications. It is possible that Quebec counts more transactions as approved, possibly brief advice and assistance, compared with Ontario.

Manitoba also warrants special attention. During 1993 - 1995 Legal Aid Manitoba piloted the expanded duty counsel program. This is an intensive disposition model of duty counsel that is designed to dispose of relatively simple criminal cases at the front end of he system without having to issue a certificate or refer the case to a staff lawyer for full service.[21] The following year, Manitoba extended the program province-wide. The number of approved applications in Manitoba therefore understates the amount of service provided when approved applications are used as the measure. Similarly, the Northwest Territories has a "presumed eligibility" program that operates in the same manner as expanded eligibility in Manitoba.

With these caveats in mind, the comparison of changes in the numbers of approved applications and offences cleared by charge presents some interesting variations and patterns.[22] In four jurisdictions, Quebec, Ontario, British Columbia, and the Northwest Territories, the declines in approved applications were greater than the declines in the numbers of offences cleared by charge. Added to that list is Alberta in which approved applications declined while offences cleared by charge increased. And further, added to the list is Saskatchewan in which there was an increase in approved applications, but a much smaller one than the increase in offences cleared by charge.

Three of the Atlantic provinces, New Brunswick, Nova Scotia, and Prince Edward Island, appeared to have held the line during this period. In these jurisdictions, declines in approved applications were less than declines in offences cleared by charge. Finally, it appears that Newfoundland managed to increase the number of approved applications while offences cleared by charge were declining.

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[21] A. Currie, The Legal Aid Manitoba Expanded Duty Counsel Project, Department of Justice, Ottawa,
1995.

[22] Absolute numbers are used rather than percentage declines. This is because the base for offences cleared
by charge is so much greater than approved applications. The same percentage change in offences cleared by charge produces a much larger change in absolute terms than in approved applications.

Again, the reader is reminded that this is a preliminary assessment. More careful attention should be paid to the definitions on which these numbers are based in order to assure comparability.

These comparisons are interesting, but the offences cleared by charge data do not take into account either financial eligibility or coverage provisions. It is possible to use other data for a limited analysis that takes into account the absolute minimum standard of coverage for criminal legal aid. The table below compares charges by type of procedure with approved applications. Unfortunately, the data on charges by type of procedure are available for only that year.

Approved Applications And Charges By Type of Procedure

The table shows the number of charges according to four categories that indicate a rough ordering by degree of seriousness. In Canada, criminal procedure reforms implemented in 1994 created a number of hybrid offences in the Criminal Code. For these offences the Crown may elect to proceed either by indictment, or by way of summary procedure. Proceeding by indictment involves a preliminary hearing and usually a trial by judge and jury. A summary procedure involves trial by judge only.

Table IV

Approved Applications for Criminal legal Aid and Charges by Type of Procedure; Selected Jurisdictions; 1997-98

NEWFOUNDLAND

	Total	Distributed Total	Cummulative Total	Approved Applications
Indictable	972	977	977	
Hybrid Indictable	1,490	1,497	2,474	
Hybrid Summary	4,430	4,451	6,925	7,173
Summary	574	577	7,502	
Unknown	35			

P.E.I.

	Total	Distributed Total	Cummulative Total	Approved Applications
Indictable	259	259	259	
Hybrid Indictable	199	199	458	
Hybrid Summary	1,314	1,315	1,773	1,193
Summary	190	190	1,963	
Unknown	2			

NOVA SCOTIA

	Total	Distributed Total	Cummulative Total	Approved Applications
Indictable	2,594	4,222	4,222	
Hybrid Indictable	1,310	2,132	6,354	
Hybrid Summary	4,338	7,060	13,414	9,718
Summary	2,649	4,311	17,725	
Unknown	6,835			

QUEBEC

	Total	Distributed Total	Cummulative Total	Approved Applications
Indictable	20,211	23,972	23,972	
Hybrid Indictable	9,085	10,775	34,747	
Hybrid Summary	33,820	40,113	74,860	
Summary	4,421	5,244	80,104	77,071
Unknown	12,567			

ONTARIO

	Total	Distributed Total	Cummulative Total	Approved Applications
Indictable	40,568	41,824	41,824	
Hybrid Indictable	13,940	14,372	56,196	54,890
Hybrid Summary	127,909	131,870	188,066	
Summary	24,117	24,864	212,930	
Unknown	6,395			

SASKATCHEWAN

	Total	Distributed Total	Cummulative Total	Approved Applications

Indictable	4,063	4,063	4,063	
Hybrid Indictable	2,615	2,615	6,678	16,550
Hybrid Summary	17,270	17,270	23,948	
Summary	2,526	2,526	26,474	
Unknown	-			

ALBERTA

	Total	Distributed Total	Cummulative Total	Approved Applications
Indictable	8,012	10,255	10,255	
Hybrid Indictable	4,716	6,037	16,292	20,646
Hybrid Summary	28,407	36,361	52,653	
Summary	4,692	6,006	58,639	
Unknown	12,832			

YUKON

	Total	Distributed Total	Cummulative Total	Approved Applications
Indictable	297	373	373	
Hybrid Indictable	119	150	523	693
Hybrid Summary	836	1,051	1,574	
Summary	270	340	1,914	
Unknown	392			

N.W.T.

	Total	Distributed Total	Cummulative Total	Approved Applications
Indictable	699	782	782	
Hybrid Indictable	275	308	1,090	870
Hybrid Summary	1,990	2,188	3,278	
Summary	221	247	3,525	
Unknown	377			

The offence categories are ordered according to level of seriousness, and the unknowns are proportionately distributed across the other categories. Then in column three the cumulative total is summed. In the last column to the right, the number of approved applications is matched with he cumulative total of offences by type of procedure. This gives a rough idea the extent to which the legal plans are meeting the most basic standard of providing legal for those serious offences for which the accused are at risk of imprisonment.

These are very limited data. Summary conviction offences do carry possible terms of imprisonment, in some cases up to two years less a day. Repeat offenders charged with a hybrid offence for which the Crown decides to proceed by way of summary procedure would very likely be at risk of incarceration. However, the data do provide a preliminary view of possible extent of unmet need.

Data are available for only the nine jurisdictions shown in the table. The number of approved applications exceeds the cumulative total of indictable and hybrid indictable offences in seven of the nine. Some service is being provided to persons charged with hybrid offences in which summary procedure applies. Again these may be cases in which the offender has a previous record and is at risk of imprisonment. Saskatchewan and Newfoundland stand out as having a sufficiently high number of approved applications so as to cover a large number of summary offences.

In this particular year, two jurisdictions did not approve a sufficient number of applications to equal he number of charges that very likely carried a risk of imprisonment. These data represent only one year, and conditions may well have changed. As well, it is possible that duty counsel is able to dispose of some of the less complex hybrid summary charges at a stage prior to trial court.

These data are not entirely consistent with the data that relate to offences cleared by charge. The data comparing approved applications and charges by type of procedure suggest that most jurisdictions are meeting the most basic coverage level, the risk of incarceration standard. The unmet need problem my lie in the coverage of summary conviction offences for which the risk is not so clear.

This preliminary analysis suggests that the issue of unmet need may not reside at the fairly gross level of meeting the absolute minimum standards of risk of incarceration for the most serious offences. This is to be expected for two reasons. The law requires

that a lawyer be provided to an accused person who requires legal representation to ensure a fair trial. This applies in matters that are complex, in which there is a risk of incarceration, or where the accused is not capable because of diminished capacities of representing himself. The judiciary is the failsafe mechanism for this standard. It is unlikely in the Canadian justice system that a judge would allow a trial to proceed if in her or his view a lawyer is required for a fair trial, particularly for serious offences that carry a long term of imprisonment.

On the contrary, unmet needs for legal aid may exist in more subtle ways than in lack of representation at trial for people having been charged with the most serious offences. This is similar in some respects to the research findings related to unequal treatment of minorities in the justice system. The research concludes that there is little unequal treatment at the court level, as measured by harsher sentencing for minority group members. The unequal treatment exits earlier in the criminal justice process at the stages that are less visible and where greater discretion is exercised.[23] For instance, Phillip Stenning, et. al. have argued that Aboriginal people, for example, are treated more leniently that the general offender population in Canadian courts.[24]

A few illustrations of more subtle forms of need come to mind. The first relates to coverage for summary conviction offences. In some jurisdictions the number of approved applications for legal aid may not be sufficient to provide coverage for people whose charges are dealt with by summary procedure. Further investigation is required to determine the extent to which legal aid plans adequately assess the risk of incarceration for people charged with hybrid offences where persons charged with summary offences.

A second issue relating to summary offences is the situation of first time offenders who are at risk of receiving a criminal record, rather than a jail sentence. The negative consequences of having a criminal record can be quite considerable. A criminal record might limit a person's employability in certain fields or one s eligibility for bank loans. Moreover, a criminal record means that a subsequent offence may be dealt with much more severely by the courts.

The McCamus Report on the legal aid system in Ontario has criticized what the authors call the negative liberty test.[25] Negative liberty refers to the standard of risk of imprisonment as the basic criterion for criminal legal aid coverage. Research in unmet needs should look not only at the extent to which this basic need is being fully met, particularly where a risk of incarceration exists for charges that are tried summarily, but also for some form of representation for first offenders who are at risk of a criminal record.

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[23] A. Currie, Ethnocultural Groups and The Justice System: A Review of the Issues, Department of Justice,
Ottawa, 1994 chapter 4.

[24] Philip Stenning, Carole LaPrairie, and Julien V. Roberts, Empty Promises, the Supreme Court and the
Sentencing of Aboriginal Offenders, Saskatchewan Law Review, 2001

[25] A Blueprint for Publicly Funded Legal Services: Report of the Ontario Legal Aid Review (the McCamus
Report, Volume 1, 1997. P. 71

Similar to the conclusion from the unequal representation literature that unequal treatment may reside in the early stages of the criminal justice system, it may be that unmet needs for legal aid services may reside in the early stages of the criminal justice process. It has been argued that miscarriages of justice are most likely to occur at arrest and detention. To the extent that this is true, advice and assistance at the arrest stage may be an important and underserviced area within the legal aid system.[26]

There may be unmet needs for higher quality duty counsel service, apart from the issue of coverage per se. It may be true that one of the strongest determinants of entering a guilty plea, even where a legal defence is available, is whether an accused is held in custody. To the extent that this is true, it would be important to assure that duty counsel at first appearance have the resources to prepare proper bail hearings.[27] This may of particular interest to accused who are members of certain minority groups. The Ontario Commission on Systemic Racism in the Justice System provided evidence that Blacks, in particular, are less likely than Whites to be released on bail.[28]

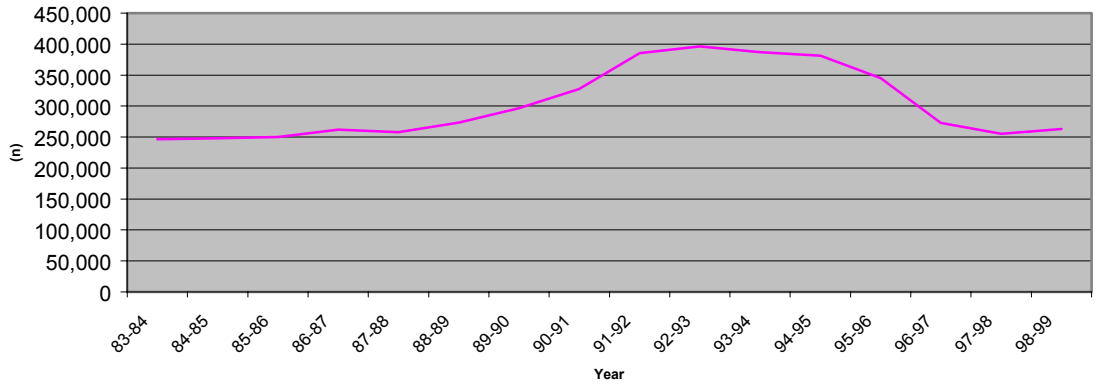
Another important aspect of duty counsel work is speaking to sentence. The vast majority of criminal charges result in guilty pleas. This would suggest that an important aspect of service delivery needs is adequate resources for duty counsel to prepare to adequately speak to sentence.[29]

Expressed Need in Civil Legal Aid

Levels of service in civil legal aid have shown the same pattern of growth and decline as has been the case for criminal legal aid. The Figure below shows approved applications for civil legal aid in Canada since 1983-84.

[26] Commnets by a participant,Osgoode Hall Legal Aid Seminar, November 2000
[27] Ibid.
[28] The Commission on Systemic Racism in the Ontario Criminal Justice System, December 1995. Chapter six.
[29] Commnets by a participant,Osgoode Hall Legal Aid Seminar, November 2000

Figure III: Approved Civil Legal Aid Applications from 1983-84 to 1998-99
Canada



Since 1993-94 approved applications for civil legal aid have declined on a national basis by 26.9 % compared with a decline of 39 % in criminal legal aid.

Table V: Total and Approved Applications for Civil Legal Aid in Canada
1993-94 to 1998-99

	1993-94	1998-99	Per Cent Change
Total Applications	492,779	353,250	-28.2%
Approved Applications	387,201	283,023	-26.9%

Civil legal aid is composed of three main service delivery areas; family legal aid, poverty law or social benefits legal aid, and refugee legal aid. National data representing the separate service delivery areas are not available. As well, the availability of civil legal aid varies widely from one jurisdiction to the next. One or more of the three main areas of civil legal aid service - in family law, poverty law, and refugee and immigration matters - may be virtually non-existent in certain jurisdictions. A descriptive profile of civil legal aid services according to the separate service delivery areas would be a complicated undertaking, and beyond the scope of this paper. Therefore, this brief discussion of civil legal aid will of necessity remain at a very general level.

There is no single major driver of civil legal aid, as in the case of criminal charges and criminal legal aid. However, it is interesting that the declines in expenditures and applications parallel the declines in criminal legal aid. This is no doubt explained by

the strongly budget-driven nature of the legal aid system. Funding from governments declined, and legal aid plans reduced services. To some extent declining crime rates diminished some of the pressure on criminal legal aid. Drivers of demand for civil legal aid such as high divorce rates and increasing levels of poverty suggest no reasons for the decline in civil legal aid other than some combination of funding cuts and increasing unit costs due to such things as the increasing complexity of the law, and tariff increases.

There are no good data on needs for civil legal aid beyond the anecdotal and circumstantial. A recent Canadian Bar Association report on the crisis in legal aid in Canada cites reports of very high percentages of unrepresented litigants in family courts.[30] The problem of unrepresented litigants is no doubt serious, but there is no empirical evidence. It is not known if people tend to get some limited representation for certain stages of a process, or none at all. The same CBA report mirrors much other commentary about the difficulties experienced by legal aid plans in attracting lawyers to do family law work at tariff rates that are one third to one half of market value for legal services, and the constraints faced by lawyers in providing quality service within the hours and rates allowed by legal aid tariffs.[31]

Comparative Need in Criminal Legal Aid

A second type of need is expressed as the difference between accessibility of legal aid service or of levels of service among regions, or possibly non-geographical population groups. Comparative need is a highly relevant type of need in Canada. The objectives of the Canadian federal legal aid program noted above focused largely on equal access to legal aid across the country. The available data, although preliminary, show this to have been an elusive goal.

These preliminary data can only provide indications that accessibility and needs are uneven among Canadian provinces and territories. With regard to relative expenditures, varying conditions such as geographic distances may account for higher costs of providing similar levels of service. Differences in he way in which a case is defined may affect our ability to compare relative levels of approved applications. Given these caveats, there are significant differences among the provinces and territories that should be explored further, particularly, if uniform access to service is a policy issue. In addition, the rankings of jurisdictions on per capita expenditures and approved applications raise some interesting preliminary questions with regard to efficiencies.

[30] Melina Buckley, The Legal Aid Crisis: Time for Action
[31] Melina Buckley

Table VI

Per Capita Expenditures and Approved Applications Per 1000 Population
Provinces and Territories; 1998-1999

Province or Territory	Per Capita Expenditures ($)	Rank	Per Capita Approved Applications (per 1000)	Rank
Newfoundland	6.41	4	12.9	2
Prince Edward Island	2.97	10	7.5	5
Nova Scotia	6.06	6	9.8	3
New Brunswick	3.17	9	1.7	9
Quebec	7.97	3		
Ontario	8.41	1	5.4	8
Manitoba	5.90	7	7.8	4
Saskatchewan	6.19	5	16.6	1
Alberta	5.11	8	7.6	6
British Columbia	8.39	2	7	7
Northwest Territories			9.8	
Yukon	20.98			
Canada	7.19		7.5	

Table VII: Refused Applications as a Percentage of Total Applications Provinces and Territories; 1998-1999 (or latest year)

Province or Territory	Per Cent Refused
Newfoundland	20.9 (97-98)
Prince Edward Island	na
Nova Scotia	6.5
New Brunswick	35.1
Quebec	14.6
Ontario	27.4
Manitoba	7.4
Saskatchewan	5.6
Alberta	18.7
British Columbia	29.0
Northwest Territories	16.3 (96-97)
Yukon	7.8

Comparative Needs in Civil Legal Aid

It was mentioned before that civil legal aid presents a far more complex picture than criminal legal aid. The relative amounts of family, poverty law, and refugee legal aid vary enormously from one province or territory to the next. The delivery systems are different. In New Brunswick most family legal services are provided by a program located in the Department of Justice. A small amount provided by the legal aid plan. British Columbia provides a relatively large amount of poverty law service through a system of clinics called Community Legal Offices and Native Community Legal Offices. Most family and refugee legal aid are provided under the tariff. Similarly, in Ontario, poverty law legal aid is delivered through 70 clinics throughout the province.

Most family and refugee legal aid is provided by the tariff component of the delivery system.

There is no simple way to describe and summarize civil legal aid delivery. Comparable data are not readily available to describe expenditures and services delivered within the basic service delivery areas for each legal aid plan. The meaning of an application, an approved application, and a refused would be very different for clinics than in fee-for-service tariff systems, or conventional staff lawyer systems. Different components of civil legal aid respond to different demands. Per capita data on family legal aid is meaningful. However, per capita data on refugee legal aid is much less so. It follows that global per capita figures describing civil legal aid are problematic. Adequately describing civil legal aid would be an undertaking beyond the scope of this paper, and the national data currently available on expenditures and applications do not adequately represent he varying types of services that exist.

Felt Need

In Bradshaw's scheme, felt need is the type of need that is experienced by the users or potential users of the service. The concept of felt need often carries the connotation of want. This presents some problems making use of this concept of need. Felt needs as wants carries with it the connotation of a bottomless pit of needs. Particularly in the civil justice area, felt needs harbours the perception that the problems and disputes experienced by the public are potentially endless and an emphasis on felt needs carries with it the danger of a form of widening the net that would intrude ever more deeply by using the law, or at least formal dispute resolution processes, in an attempt to address problems that people should solve or avoid on their own.

A second problem has to do with the competence of individuals define their problems, to identify the options, and to play an effective role in the resolution of their own problems. There is a body of opinion that meeting needs first involves people having the information to identify that they have legal right or issue, and can choose the best option, legal or otherwise, to address the situation.[32] Public legal education and information (PLEI) is a major aspect of the access to justice movement that attempts to inform people about the law and how the justice system works so that justice can be a participatory process. However, PLEI is a very small part of the overall access to justice landscape[33], and these objectives are largely unfulfilled. Thus this problem with the concept of felt needs is a practical one, rather than an issue of principle.

There are at least two ways in which the concept of felt need may be useful. Recent research by Hilary Somerlad has shown the importance of paying careful attention to client perceptions with respect to quality of service.[34] Making the client feel as if their version of the story has been heard and taken into account is important beyond

[32] The Royal Commission on Legal Services in Scotland (The Hughes Commission) cited in Pascoe Pleasance, et. al., p. 14 and 15.

[33] A. Currie, Some Aspects of Aspects to Justice in Canada, in Expanding Horizons: Rethinking Access to Justice in Canada, Proceedings of a National Symposium, Department of Justice, Ottawa, 2000.

[34] Hilary Somerlad, The English Perspectives on Quality: the Client-Led Model of Quality - A Third Way, Paper presented at the Meeting of the Working Group on the Legal Professions, Onati, Spain, July 1998

making he client feel good about the service. A failure on the part of a lawyer to take the time to hear the client out and establish a proper rapport with the client might diminish the ability of the lawyer to choose the best course of action, or to secure the best outcome for the client, because the lawyer does not take the time to absorb all the facts of the matter.

A second, and quite different, aspect of felt needs relates to actually using client or user information to identify areas of unmet need, as well as strategies for dealing with them. This arises in progressive clinic-based approaches that employ community development strategies as a part of the overall delivery approach. The Parkdale Legal Services Clinic is a good example. The Parkdale clinic is organized into teams that deal with family, refugee, and poverty law services. Each team includes a community worker. The community worker carries about a number of community liaison functions. One of them involves holding meetings with client groups to learn about the problems facing them. This community development function is an important part of the process of identifying the needs of client groups, and setting priorities.[35]

A community-based approach like the one used at the Parkdale clinic is a way of meeting the felt needs of clients in another way. Addressing the problems of clients in a holistic way, combining legal and social services is a part of this approach to providing service.

Normative Need

Normative needs are needs as defined by the experts. In a highly technical field such as the law, in particular in meeting legal needs, a normative approach to needs is intuitively attractive. It will be proposed in the following section that the normative approach is useful for studying needs in criminal legal aid, although possibly less so in the area of civil legal aid. However, it is important to register a few qualifications about the normative approach to needs in legal aid at this point.

It has already been pointed out that early on in the development of institutions of access to justice in common law countries, the legal profession gained hegemony. Access to justice by and large meant access to the courts, and problems tended to be defined largely in legalistic terms. Legal aid has become lawyer dominant, providing the services normally available from a lawyer. Further, legal aid occupied most of the terrain of access to justice. Other aspects of access to justice received far fewer resources.

Ideas about the nature of justice and access to justice are changing. In Canada, at least, the recent rebirth of the restorative movement[36] has been accompanied by a widespread disaffection by both justice system professionals and the public from what is seen to be an expensive and ineffective system of justice. Restorative justice, along with outer forms of holistic approaches, are moving from the margins to the mainstream of the justice system. The main features of this rethinking have been described elsewhere.[37] Much of the new thinking about justice and access to justice

[35] Dianne Martin, A Seamless Approach to Service Delivery in Legal Aid: Fulfilling a Promise or Sustaining a Myth?, department of Justice, Ottawa, forthcoming
[36] The first was the victim-witness reconciliation movement of the 1960 s.
[37] Expanding Horizons: Rethinking Access toJustice in Canada, Proceedings of a National Symposium,

reflects a recognition that the justice system is ill-equipped to deal effectively with the problems that are thrown upon its doorstep. The current system is viewed as ineffective at best, and at worst having iatrogenic qualities, exacerbating the very problems that bring people before the courts in the first place.

The main features of the new justice are; a solution–oriented approach being grafted on to the traditional paradigm emphasizing the protection of rights, and a preference for multidisciplinary approaches as a way of providing more effective and durable solutions. These idea are not new in the access to justice literature. What is new is the degree to which these ideas are becoming a part of mainstream justice. The new justice is a more demanding form of justice. It poses a challenge to a normative approach to legal needs. It poses a challenge for legal aid, to assess its role in these emerging forms of justice.[38]

PART C: THE PROGRAM OF RESEARCH

The final part of the paper briefly lays out the proposed program of research for studying legal aid needs in Canada. The rationales for the research approach in each of the main areas, along with an indication of the types of studies to be carried out. The methodologies for each study are not discussed.

The program of research will encompass both criminal and civil legal aid. The greatest emphasis will be on criminal legal aid. This is because the framework for federal - provincial/territorial cooperation and joint funding is well-established. There is a clear Constitutional foundation for federal involvement in providing criminal legal aid, and there is a long-standing federal funding program.

Even though it is probably true that the greatest level of unmet need exists in the family legal aid area, there will be less emphasis in civil and family legal aid. For reasons described above, there is no unequivocal general constitutional foundation for federal government involvement in the provision of civil legal aid, from the point of view of legal aid as an aspect of the administration of justice.[39] Further there is considerable uncertainty surrounding the extent to which federal funds are already provided for civil legal aid within the block transfer of funds called the Canada Health and Social Transfer.

Within the civil legal aid area, refugee legal aid will receive special attention. The federal government has a special interest in refugee legal aid, because the refugee process and related legislation are entirely federal. Traditionally, legal aid in immigration appeal and refugee determination processes have been provided by the provinces and territories, as part of their civil legal aid programs. Recently, because of mounting pressures in this area arising from increasing numbers of refugee claimants,

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Department of Justice, Ottawa, 2000

[38] A. Currie, Riding the Third Wave: Rethinking Criminal Legal Aid Within an Access to Justice Framework, Department of Justice, Ottawa, 2000.

[39] One recent judgement by the Supreme Court of Canada, J.G. versus The Minister of Health and Community Services of New Brunswick, SCC, 1999 upholds a Charter right to legal representation in cases of child apprehension only.

the provinces receiving the largest number of refugees have pressured the federal government to playa greater and more direct role in funding legal aid in this area.

A Note on Policy Research

This paper reports on a program of policy research. There is a great deal of research that is of interest to policy, but it is not policy research. In order to appreciate better why this program of research asks some questions and not others, and emphasizes some areas of probable need in legal aid over others, a brief discussion of the nature of policy research might be useful. The basic characteristic that distinguishes policy research is that it is an integral part of the policy process. Empirical policy research is one of the several main dimensions of the policy process, and the influence of empirical research findings on the shape of the policy process may vary in relation to the importance of the other aspects.

Policy research shares with research more generally, the same body of methods and data analysis technique. More to the point, it shares the same body of theory and substantive knowledge in the literature of the subject matter. The questions that are addressed in basic academic literature flow from the gaps in the literature, and the ultimate objective is to build the stock of knowledge. Policy research brings into the policy process the body of knowledge from the broader literature. This knowledge will hopefully influence the formulation of policy questions. However, the policy issues are shaped by a host of other factors, and policy research is shaped by the policy issues and not by the issues of the broader literature.

Multiple Strategies for Research on Unmet Needs

The legal aid initiative, of which this research is a part, has two components that can be incorporated into the research program along with basic research. Funding will be available for pilot projects. Pilot projects are potentially powerful research tools, As well, with respect to criminal legal aid, $20 million in interim funding will be provided to provinces and territories over two years to maintain or implement services in priority areas. This should provide an important body of information about needs.

The basic research will, itself, be designed with quantitative and qualitative components that will address various aspects of unmet needs. The qualitative components will be able provide information about such issues as the consequences of not providing services or possible ways of meeting unmet needs, or client perspectives generally.

The pilot projects will yield two kinds of information. An innovative pilot project identifies an unmet need, by definition. This may be either a need that is not being served at all, or one that is being served poorly. In addition, the pilot project will, again, of necessity, identify a proposed way of meeting that need that may be superior to the traditional approach in any number of ways.

The choices made by legal aid plans as to what services to provide using the interim funding that is part of the legal aid agreement introduces another way to identify priority needs. One aspect of the research program will describe the service and provide reasonably easily available information on impacts.

In the criminal legal aid component, all three of these strategies are present to combine in an effort to understand the complex picture of unmet needs. One thinks of triangulating on the subject of needs. Perhaps the notion of triangulating on unmet need conveys a false sense of precision, given the uncertain nature of the pilot projects that will be proposed and the services that will be put implemented by the legal aid plans. Nevertheless, the information from the results of the three broad strategies will be combined in the end to provide as comprehensive a picture as possible.

Only two strategies, pilot projects and basic research, will be available in the civil legal aid components. However, in a similar fashion to criminal legal aid, the results will be combined to provide a picture of unmet needs, priorities, and ways of meeting those needs.

Research in Unmet Need for Criminal Legal Aid

The various components of the research are described briefly below under the research issues that will be addressed. The various studies described below are still in the very early stages of conceptualization and development. Some studies are in the design phase. Some are at the concept level. To use a puzzle analogy, both the shapes of the pieces and the way they will fit together are changing, almost as the words are typed on this page.

BASIC RESEARCH

One of the three tools to look at needs is basic research. The next section describes the research projects as they have been developed to this point.

Issue: Unrepresented Accused

The most highly visible issue that emerged as the legal aid needs moved to the center of the policy agenda was unrepresented accused. Within the discourse about the "crisis" in legal aid, there were many reports of about increasing number of unrepresented accused and unrepresented litigants in the courts, ostensibly resulting from legal aid cutbacks. The evidence was entirely anecdotal, and it is often unclear whether commentators are distinguishing between unrepresented litigants in family court and unrepresented accused in criminal courts.

It was, in large measure, the recent declines in expenditures and in levels of service that have driven the concern about unmet need. The most important perceived consequence of reduced funding has been increasing numbers of unrepresented accused, at risk of imprisonment, and facing trial without legal counsel. Increasing numbers of unrepresented accused, and as a consequence increasing numbers of court appointed counsel where judges may, in some cases, override normal legal aid financial eligibility guidelines and coverage rules, has occupied most of the discussion.

The preliminary analysis discussed in Part B of this paper did confirm unrepesented accused as a potential issue. However, these data are very inconclusive. A major part

of the criminal legal aid research will focus on the existence of unrepresented accused in the criminal courts, *who should be receiving legal aid.*

The original intention was to address this issue through a national rejected applicant study, drawing samples from each of the provincial and territorial legal plans. However, funding for the research did not become available early enough to complete the research within the required time frame. This research would have to have been longitudinal in order to follow rejected applicants through the court system. It can take many months for cases to proceed to completion through the courts. The research would have required a prospective design, because, in all likelihood, it would have been necessary to get client consent at time of application. As well, conducting research with this clientele, criminal accused, is notoriously difficult. They may be highly mobile and very difficult to track through a longitudinal study. Also, they may be rather uncooperative. It was necessary to have results within the first eighteen months of the two year interim period. Therefore, rejected applicants research was not feasible.

As well, it is possible that some number of accused who are eligible for legal aid may by-pass the legal aid application process altogether. It is possible that these people are not seen by duty counsel and referred to a legal aid office, and proceed through the criminal justice system. Rejected applicant research would not detect this possible body of accused persons. Some court-based research would be required to capture this segment of the population.

1. Court Studies

Given the difficulties described above, a number of court site studies will be conducted as the basic research tool to address the unrepresented accused issue. The demand for criminal legal aid is very court-driven. Unless an accused is diverted into a pre-charge alternative measures program, she or he will appear in court to answer a criminal charge. Court based studies provide the ability to identify subsamples of criminal accused who applied for legal and were refused, who are represented and not represented, and people who are represented by legal aid. Court studies can study issues for these categories of accused with respect to both first appearance and trial. Lawyers who are providing duty counsel and representation at trial can be interviewed concerning their perceptions of needs and possible solutions. Judges and court staff can be interviewed with regard to the same issues.

A number of courts in different settings will have to be included to capture as well as possible the range of conditions and contexts that might affect unmet needs. Including only a few court sites will nonetheless make this component of the study very large; possibly two or three big city courts, two or three courts in smaller cities, or in rural areas, and two or three circuit courts. This would be a major effort. While this approach would potentially yield a great deal of information, it will not be generalizable to all jurisdictions. No reasonable research budget would permit court studies in all provinces and territories. This is a limitation in view of the apparent variations in levels of service among jurisdictions need to address issues of comparative need.

2. Key Informant Research

The court site studies will be not be generalizable to the entire country. Indeed, in a country like Canada, with justice systems in the provinces and territories that are affected by different conditions, and that operate somewhat differently, there is no single national entity. At this point what is being considered is a national key informant study that would be linked to the results of the court site studies. The key informant study would have two potential purposes. First, it would provide a national view.

Second, the key informant study could be used to confirm the results of the court site studies. In criminal legal aid, a good argument can be made for the value of key informant research to identify unmet need. A defining feature of criminal legal aid is that the demand for service is largely driven by the criminal justice process. The criminal justice process is very highly structured. The laying of a criminal charge sets in motion a process at which decisions of enormous consequence for individuals are made. Guarantees of substantive and procedural rights to guard against wrongful conviction are essential parts of the process. This is a highly formal mal and technical process. Unlike many civil disputes, the accused does not have the basic choices available, to neglect the problem, or to deal with the problem in some other way.

The highly technical and structured nature of the process that drives the demand for criminal legal aid suggests that experts working in the field may be a good choice as viewing legal aid needs as normative needs makes sense. It follows that some form of key informant research would be useful way to identify unmet needs. This kind of research can tap into the knowledge and experience of a number of actors within the criminal justice system. It can ask questions that range across all of the key points in the criminal justice process. It also opens the possibility of asking about possible solutions.

However, on the other hand, the data from key informant research is still qualitative and impressionistic. There is a danger that key informant research might largely confirm the "crisis mentality" and conventional wisdom about the problem. This potential problem might be addressed in part by linking the key informant research to the results of the court site studies. Key informants could be asked to confirm for their part of the country, or base their comments on the quantitative findings from the court studies. The key informant research and its possible link to the court studies are currently being considered.

Unmet Needs Relating to Federal Priority Groups

Three studies will examine unmet needs in three areas that have been designated as federal priorities. The methodologies will vary, and they cannot be described in much detail within the scope of this paper. The concerns here go beyond unrepresented accused to encompass a range of issues relating to improved levels of service.

4. Accessibility if Legal Aid for Official Languages Groups. Canada is an officially bilingual country. This bilingual and bicultural character of the country was recognized in the Constitution of 1981 to respect the roles of both the French- and British-origin populations as the founding peoples of Canada, and to protect the position of the French-speaking population. Federal legislation guarantees the rights

to the use of both official languages in federal public institutions, in particular in the justice system. The use of the French and English languages are very uneven within Canada. French is the "lingua franca" in Quebec. It is used in daily life by a significant proportion of the population mainly in northern New Brunswick (Canada's only officially bilingual province), in parts of eastern Ontario, and in parts of Manitoba and Saskatchewan. The areas outside of Quebec are bilingual in character.

However, people are guaranteed the right to court proceedings in the official language of their choice. This extends to legal aid services. One project will examine the accessibility of legal aid services for official languages groups. The study will assist legal aid plans to determine how accessibility can be achieved for all services from intake to representation at trial, and determine the level of resources required to do so.[40]

5. The Legal Needs of Penitentiary Inmates. Inmates require assistance for a number of matters such as disciplinary hearings and transfers to other facilities. The majority of the demand for these services relates to inmates in federal institutions who are serving longer terms of imprisonment. Research will be carried out to determine the nature and extent of unmet need for prison law services in federal institutions.

6. Legal Aid Needs of Aboriginal People. There is ample evidence that Aboriginal people are disproportionately over-represented in the justice system.[41] A fair amount is known about the problems of Aboriginal people in conflict with the law; for instance that the problem seems not to be related to differential treatment in the courts with respect to sentencing, but rather greater Aboriginal rates of offending, greater susceptibility to criminal justice processing, differential policing, and in particular factors that lie entirely outside of the justice system – poverty, unemployment, greater youth population, and alcohol abuse including fetal alcohol syndrome.[42] The role that legal aid can play in meeting the needs of Aboriginal people needs to be examined and understood more clearly. For instance, recent research has shown that an intensive Aboriginal-specific duty counsel program appears to improve legal aid service to Natives.[43] Research will be carried out to identify ways in which legal aid services for Aboriginal people can made more effective.

Issue: Equal Access to Legal Aid Services

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[40] The impediments to accessibility of legal and the needs of members of immigrant groups do not speak English or French well enough to understand the justice process or to communicate effectively with their lawyer will be dealt with in the key informant and court site studies.

[41] Michael Jackson, Locking Up Natives in Canada: A Report to the Canadian Bar Association Committee on Imprisonment and Release, University of British Columbia, Vancouver, 1988.

[42] Carol La Prairie, The Role of Sentencing in the Over-representation of Aboriginal People in Correctional Institutions, Canadian Journal of Criminology, 32, 1990 and Phillip Stenning, Carol LaPrairie, and Julian V. Roberts, Empty Promises: Parliament, The Supreme Court and the Sentencing of Aboriginal Offenders, Saskatchewan Law Review, (January) 2001.

[43] A. Currie, An Evaluation of the New Brunswick Aboriginal Duty Counsel Program, Department of Justice, Ottawa, 2000.

The data on comparative need discussed above suggested that access to legal was far from uniform in all jurisdictions across the country. Unfortunately, the court site studies will not be able to cover all jurisdictions, and the qualitative data from the key informant study, while it will be national, will not provide definitive evidence.

Three related studies focusing on financial eligibility guidelines and coverage provisions will be carried out. These will examine the extent to which these basic filters that operate at the intake stage create unequal access to legal aid services.

7. Comparative Study of Financial Eligibility Guidelines

However, the issue of potentially uneven services and associated unmet need remains. In order to address this issue with research that can be done to produce timely results, three related studies will be carried out. One is a study of financial eligibility guidelines in each bjurisdiction. The objectives of the study would be to compare the various financial eligibility guidelines against a national standard such as the Statistics Canada low income cut-offs, and then to estimate the impact of increasing financial eligibility guidelines to some national standard.

8. Comparative Study of Coverage

A second study would compare the legal aid coverage available across provinces and territories. This study will compare coverage policies that may exclude certain categories of offences, such as summary conviction matters.

9. Scenario Study of Financial Eligibility and Coverage

A third study would construct a number of scenarios combining client and case characteristics of hypothetical offenders. These scenarios would be assessed according to the existing financial eligibility and coverage provisions of legal aid plans in order to assess the likelihood of receiving legal aid under the various legal aid programs. This would allow a limited analysis of the some of he issues that applicant studies could address.

Issue: The Impact of Key Federal Legislation

Federal policies and legislation can be major drivers of demands for legal aid and of increased legal aid costs. If these impacts are not anticipated when federal legislation and policy are being developed and implemented, these costs may fall on the provinces and territories with out any increase in federal funding. Unintentional offloading of costs does not represent good federal policy. Three areas in which impacts of new legislation may impact on legal aid will be examined.

12. Youth Justice

The Canadian government will soon enact a Youth Justice Act to replace the Young Offenders Act. The new legislation continues the emphasis on alternative measures to divert youth from formal court proceedings. This should limit the use of legal aid. On the other hand, the new legislation increases the number of formal stages of hearings that young offenders may employ. This would increase the demand for legal aid since

youth are automatically entitled to legal representation upon request. Research will be undertaken to monitor the impact of the new legislation.

13. Drug Prosecutions

The federal government responsible for the prosecution of drug offences in Canada. While there are no anticipated changes in legislation, it is widely felt that the policies and behaviour of federal Crown prosecutors are important drivers of legal aid costs. Second, drug cases that involve multiple charges, in particular charges of conspiracy, and multiple co-accused often become extraordinary high cost cases that strain the financial resources of legal aid plans. Research will monitor the impacts of drug prosecutions on legal aid costs.

14. Organized Crime

Organized crime is another area that falls under federal legislation, and is prosecuted by the federal Crown. Organized crime cases produce high cost legal aid cases. Cases are complex because of multiple charges and multiple co-accused, and because the legal arguments are complex. This is another area in which the research program will monitor the impact on legal aid costs.

TRACKING OF SERVICES INTRODUCED WITH INTERIM FEDERAL FUNDING

10. Monitoring the Services Implemented With the Interim Funding

The interim agreement between the federal government and the provinces and territories that was put in place to allow the research to be carried out, involves an additional $ 20 million over two years for criminal legal aid. This will be used either to enhance services or to maintain or reinstate services that would be cut due to budget reductions. Research to monitor the use of the interim funding opens another avenue to identifying priority and possibly unmet needs.

It was discussed earlier that the normative concept of needs is useful with regard to criminal legal aid. What follows from a normative concept of needs is what has been termed a stipulative approach to identifying unmet need.[44] Rooted in a normative concept of needs a stipulative approach relies on experts to identify what needs should be met and how best to so. This is what will happen with the additional legal aid funding. The managers of the legal aid plans will apply their expertise in determining what the priority needs are, and how to meet them. The appropriate research would then attempt to assess how well these needs are being met.

This will be done for each jurisdiction, within the limits of the research budget and the data that are reasonably accessible. This is a very uncertain process. The provincial and territorial governments and legal aid plans will have complete discretion as to how to use the interim funding. They may use the additional money to save services that may be cut due to budget reductions, or to introduce new services. However, the situation presents both the necessity to audit how the money is being used and the opportunity to test out this research strategy.

PILOT PROJECTS

Funding will be made available to provinces and territories to implement pilot projects. This funding is intended to allow provinces to experiment with innovative approaches to meeting needs. Pilot projects proposed by legal aid plans can be viewed an important aspect of a normative/stipulative approach to identifying and meeting legal aid needs. It cane be argued that the pilot projects will be developed by the legal aid plans signal priority needs, existing or new, that are not being met or not being met adequately. Second, pilot projects by their nature propose innovative and often cost effective ways to meet those needs.

[44] Suggested by Alan Paterson, Presentation on Studying Needs in Criminal Legal Aid, Osgoode Hall Legal
Aid Seminar, November 3, 2000

Research on Issues in Civil Legal Aid

It is widely acknowledged that the greatest pressure on the legal aid system is in the area of family law.[45] Some jurisdictions provide more services in civil than on criminal legal aid. However, judging from all reports, the need apparently far outstrips the level of service available. Some jurisdictions provide relatively little legal aid for non-criminal matters, and the level of need in those jurisdictions may be all the greater. However, this program of research gives much greater emphasis to criminal legal aid. In this situation it is the federal policy constraints that limit the scope of the research.

The Policy Context Shaping Research in Civil Legal Aid

As was described above, the federal government funded civil legal aid directly through the Canada Assistance Plan (CAP) until 1994-95, at which time the entire CAP program was absorbed into a huge block transfer program, the Canada Health and Social Transfer (CHST). The federal view is that the $99 million that was paid to the provinces to support civil legal aid under the CAP during the last year of its existence is still available to the provinces within the CHST. The provinces take the view that the CHST is a general transfer payment that does not contain designated funding for any service, and that new federal funding for civil legal aid would not, by definition, constitute a double draw on federal funds. There is, however, no appetite on the part of the federal government to develop any new funding programs.

The federal government has a major interest in legal aid provided at refugee determination hearings, and in other immigration matters. The provincial legal aid plans provide legal aid for refugees appearing before the Immigration and Refugee Boards seeking permission to remain in the country. The IRB's are federal administrative tribunals, operating under federal legislation. However, the smooth operation of the IRB's depends in large measure on the legal aid provided through the legal aid plans. Provinces have been pressuring the federal government to provide direct funding for refugee and immigration legal aid. Funding in this area was part of the Canada Assistance Plan, and is drawn into he funding debate described above concerning the Canada Health and Social Transfer.

The policy context has the effect of limiting the research to what will be a largely exploratory effort. However, that may not be a disadvantage in the longer term. Civil legal aid presents a much greater scope for innovative approaches to service delivery. Mainstream legal aid remains largely court-focussed, even in civil legal aid. A concentration on exploring some fundamental issues in civil legal aid may be a luxury that would not be available if the policy directions were more clearly set.

The literature on meeting civil legal needs, and legal aid needs, although it is decades old, is considerably out ahead of mainstream legal aid in terms of addressing the problems facing clients. To use Cappaletti s familiar analogy of waves of access to justice[46], legal aid seems for the most part to have remained a first wave reality. This

[45] Melina Buckley, The Legal Aid Crisis

[46] M. Cappelletti and B.Garth, (eds.), Access to Justice: A World Survey, Sijthoff and Noordhoff, 1978. It is acknowledged that access to justice is only one rationale for legal aid, but the one that has been

is in contrast with the broader justice system that has moved significantly toward Cappelletti's third wave, with the use of non-litigious strategies for solving problems and disputes. These represent alternative modes of service delivery have been proposed in the literature for years[47], but have more rarely been put into practice[48].

It is a basic principle of good policy research that the research has to be strategic. It is an integral part of the policy process and should be designed as much as possible to achieve particular policy ends. The constraining policy context described briefly above makes a response somewhat difficult. More to the point, the policy context makes policy research, designed to achieve a specific objective, rather difficult. In addition, the fact that the literature that has now become familiar is so far ahead of mainstream legal aid presents difficulties for a second important principle of policy research, that good policy research can never get too far ahead of the reality in which it is operating.

However, the policy process itself progresses through stages from an exploratory phase of issue development, to a phase of examining options and determining the organization's policy position, to a third stage of policy implementation. Similarly, policy research can be defined in parallel stages: an exploratory phase in which research takes a proactive role in identifying issues; a reactive stage in which research responds to more specific information requirements of policy makers as they choose among options and refine policy positions; and finally an implementation monitoring stage at which policy research can track the early stages of the implementation of policy, often through pilot projects, and provides feedback to enable policy managers to respond to unanticipated consequences.

The policy research that can be done in the areas of civil legal aid within the current research program is clearly of the early stage exploratory variety. The pilot project components of the overall research strategy will be particularly important.

A Selective Look at the Literature on Civil Legal Needs

While there is no firm policy context in which to ground the research, there is nonetheless, an interest to use research resources to identify and examine some priority issues relating to needs for assistance in civil law matters. The brief discussion about policy research noted that a role of policy research is to introduce the general literature in the field into the policy process.

Studying the need for civil legal aid is much more complex than for criminal legal aid. Generally, the nature of needs in civil matters lacks the structure imposed by the criminal justice process on criminal legal aid. There are some exceptions, such as refugee legal aid (that will be discussed below) and certain aspects of family legal aid, such as child apprehension matters, for example. And, more generally, services

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predominant since about 1950; see Richard Able, Legal Aid Under Advanced Capitalism, UCLA Law
Review, 32, 1985.

[47] Edgar S. Cahn and Jean C. Cahn, "The War on Poverty: The Civilian Perspective, Yale Law Journal, Vol. 73, No. 8,july, 1964.

[48] Dianne Martin, A Seamless Approach to Service delivery in Legal Aid: Fulfilling a Promise or Maintaining a Myth?, Department of Justice, Ottawa, forthcoming 2001

provided by most legal aid systems may be highly rationed so that in reality only the most serious and urgent matters requiring the services of a lawyer in court may be covered in any case.

However, at least to begin, it seems best not to limit the research to the services that are currently provided by mainstream legal aid plans. Since we are interested in examining the nature and extent unmet needs, it seems best to start with a recognition of the some of the very basic conclusions from the broader literature on unmet needs.

The earliest literature on unmet needs asked questions about needs for legal services on the basis of predetermined categories of problems. The problem categories were legal in nature, and it was not surprising that the early research uncovered large untapped reserves of unmet need for *legal* services. The dominant line of criticism that emerged was that the research on legal needs presupposed legal definitions of people s problems, and legal solutions to them. Phillip Lewis posed the question: if a tenant has a leaking roof, does she need a lawyer or a ladder.

> ….if certain problems are spoken of as legal ones….that is to take and official support is given to legal methods of solving them, that is to take a particular attitude to problems of that kind, problems which may be capable of solution in some other way…[49]

Since Lewis work, many critics have agreed that so-called legal problems are simply problematic situations for which legal solutions are only one option for solving the problem.[50]

Similar streams of thought have emphasized the fact that problems that present themselves as legal problems in reality reflect complex underlying social, psychological, or other dimensions. Traditionally, the courts and the justice system generally has been ill-equipped to deal effectively with the problems thrown on its doorstep.[51] Mainstream legal aid is largely fashioned in the image of the legal profession. The problems that get the attention are legal ones, or the solutions that are favoured are those services that are normally provided by a lawyer.

The effectiveness and appropriateness of the services provided by mainstream legal aid have been the subject of criticism.[52] The fact that services tend to be rationed according to a rigid schedule of services, and remuneration under the tariff is often not adequate for the prescribed legal actions, suggests that there may be little incentive or capacity for lawyers to be creative problem solvers. Holistic and multidisciplinary approaches that combine legal and other services to offer more effective and durable solution to problems have long been proposed as more effective approaches.[53] With regard to the legal aspects of solutions, this may mean providing

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[49] P. Lewis, Unmet Legal Needs, in P. Morris, R. White, and P. Lewis, Social Needs and Legal Action, Oxford, 1973.

[50] Pascoe Pleasance, et. al., Local Legal Need, Research Paper 7, Legal Services Research Centre, 2001,
page p. 12.

[51] Kayleen Hazelhurst, Migration, Ethnicity, and Crime in Australian Society, Australian Institute of Criminology, 1987, pp. 128 and 142-144.

[52] Dianne Martin, A Seamless Approach

[53] Ibid.

a service that cuts across the traditional service delivery areas within civil legal aid, combining family law and poverty or social benefits law.

The Research in Civil Legal Aid

BASIC RESEARCH

1. A Profile of Civil Legal Aid Services. The discussion in Section B, above, drew attention to the lack of comprehensive data and related information about service delivery to describe in detail the current state of civil legal aid in Canada. One project will create a comprehensive profile of civil legal aid services. This will provide a necessary foundation for any continued work in the area.

2. A Study of Civil Legal Aid in Areas of Federal Law. It was explained above that the Canadian Constitution places responsibility for most forms of civil justice under the responsibility of the provinces and territories. There are federal areas of responsibility in civil justice, and these do touch on civil legal aid.

Several provinces provide a significant amount of legal aid in areas of poverty law or social benefits law. A very preliminary investigation in one jurisdiction indicated that about half of the categories of legal matters under poverty law either were matters of federal law or at least included aspects of federal law. Base on that on that observation, a study will be conducted to determine that amount of civil legal aid relating to federal law currently being provided by legal aid plans.

3. Reciprocal Impacts Immigration and Refugee Board Processes on Legal Aid Delivery. Early discussions with both legal aid plans and with regional Immigration and Refugee Boards have provided suggestions that legal aid impacts on Board processes and legal aid delivery approaches affect the Boards. There are regional differences. The Immigration and Refugee Boards operate somewhat differently in different cities. On the other hand, the policies and delivery approaches of legal aid plans vary from one jurisdiction to the next. Our principle concern, the cost and efficiency of legal aid, may be affected by the nature of Board processes. A key informant study will be carried out to identify these impacts.

4. Comparison of Legal and Non-Legal Assistance to Claimants in the Refugee Process. Some claimants appearing before Immigration and Refugee Boards are represented by non-lawyers from refugee assistance organizations. The effectiveness and the cost of legal and non-legal representation will be examined

PILOT PROJECTS

As discussed above, pilot projects can be very versatile research tools. To a certain extent they serve to identify needs. Through whatever mechanisms; consultations with users or other service providers, examining the experience of legal aid service providers, or examining legal aid management information data, the experts, legal aid managers, identify a set of needs. The pilot project is the expression of those needs. As well, at the same time, the pilot project is the proposal for the most cost effective of meeting those needs.

The pilot projects will be proposed by the legal aid plans or other service delivery organizations. They will hopefully represent the innovative thinking of the legal aid plans. The pilot projects will serve another broader function. It was suggested above that mainstream legal aid lags behind the thinking reflected in the literature. Thus the pilot projects will identify in a concrete way the extent to which suggestions for innovative service delivery in the literature have migrated from the margins to the mainstream, and what this looks like when confronted with the realities of service delivery. The broader function is one that might be termed innovations mapping – locating innovative thinking on the practical terrain of service delivery.

Concluding Remarks

This paper does not lend itself to a conclusion. It describes the beginning of a research process, not the results. The brief concluding remarks are not so much about research as they are about what the emphasis on needs might mean for legal aid.

The concern about unmet needs for legal aid comes at the end of an era in the history of legal aid. This was an era characterized by a rate of growth that probably could not be sustained in the long run, even if a great deal of unmet need remains to be addressed. In Canada, criminal legal aid expenditures grew by 653 per cent in the first decade from 1973-74 to 1983-84. In the second decade (plus one year), from 1983-84 to 1994-95, when expenditures peaked, criminal legal aid expenditures grew by 200 per cent. Over the entire period for which data are available, criminal legal aid expenditures grew by 1670 per cent. For the period over which data on civil legal aid expenditures are available, 1983-84 to 1999-00, expenditures grew by 381 per cent. Like an accident waiting to happen, this was quite possibly a trend that was waiting for something to come along to bring it to an end.

A by now familiar story, the grim fiscal realities of the 1990's, and the blunt instruments of cost controls did bring this era to an end. We are now into what Douglas Ewart has termed the era of hard-capped budgets.[54] In retrospect, legal aid may have been a weak institution with respect to facing these pressures. An economist, Stephen Easton, has pointed out that legal aid did not have the data to show the extent to which it was meeting crucial needs, and doing so in a cost-effective manner.[55] Legal aid was defenseless when the cost cutting agenda came.

Cost control is central on the agenda of what is generally termed the "new public management". The new public management has exerted its influence on legal aid around the world. Richard Moorhead has described how the new public management is the driving force behind the access to justice agenda and the restructuring of legal aid in the United Kingdom.[56] Research by Hilary Somerlad has shown how the new

[54] Doug Ewart, Hard Caps, Hard Choices: A Systemic Model for Legal Aid, in Frederik H. Zemans, Patrick J. Monahan, and Aneurin Thomas (eds), A New Legal Aid Plan for Ontario: Background Papers, Osgoode Hall Law School, Toronto, 1997.

[55] Stephen Easton, More or Less? The Economic Perspective, Expanding Horizons: Rethinking Access to Justice in Canada. Proceedings of a national Symposium, Department of Justice, Ottawa, 2000

[56] Richard Moorhead, The Community Legal Service, Joined-Up Government and Partnership: Professionalism and Regulation Redefined, Paper Presented at the Working Group on the Legal Professions, Peyresq, France, July 2000

public management may be impacting negatively on the quality of civil legal aid services in Britain.[57] Don Fleming has described how the new public management is bringing to a close an era in which Australian legal aid has been an expression of the ideals of the welfare state.[58] The new public management is also exerting its influence on legal aid in Canada, with an emphasis on clear and measurable program objectives, and accountability frameworks.[59]

However, a weakness of legal aid is precisely that it has been predominantly fiscally driven. Too fiscally driven and not sufficiently focussed on client needs according to the review of legal aid in Nova Scotia.[60] Because of a lack of good data, or in some respects any data at all, too vulnerable to cost cutting agenda's in the view of the economist, Stephen Easton. The emphasis on legal aid needs is emerging in Canada, as it is in other countries, at the same time as the requirements of the new public management. A hopeful observation, to conclude this paper, is that solid research that will develop a needs-based approach to legal aid, along with innovative and cost-effective approaches to service delivery, will be the companion to the new public management as we rethink legal aid in the new century.

Ab Currie
May 2001

[57] Hilary Somerlad, The English Perspectives on Quality: the Client-Led Model of Quality - A Third Way,
Paper presented at the Meeting of the Working Group on the Legal Professions, Onati, Spain, July 1998

[58] Don Fleming, Australian Legal Aid Under the First Howard Government, Paper presented to the Third
International legal Aid Conference, Vancouver, June 1999.

[59] Colin Meredith and Russell Robinson, Evaluation of the Department of Justice Legal Aid Program, Department of Justice, Canada, Ottawa 2001.

[60] Nova Scotia Legal Aid Service Review