Legal Aid in Ontario: More of the Same?

Larry Taman*

In December, 1973, the Government of Ontario charged the Honourable Mr Justice Osler of the Supreme Court of Ontario and six other members with the formation of a Task Force on Legal Aid. They were to "review in depth" the Ontario Legal Aid Plan and to "determine the parameters of the future direction and development in order to ensure that it has the capacity to meet its objectives in the years ahead".[1] Their report appeared in March, 1975[2] and is the subject of this comment. I shall begin with a brief history of legal aid in Ontario with particular reference to the background to the Task Force.

1. Background to the Task Force[3]

Prior to 1951, there was no statutory legal aid scheme in Ontario. Capital offences apart, the accused, even in the gravest criminal matters, would often go unrepresented. "The so-called 'dock brief' said to exist in England, involving the appointment of counsel then present in Court to represent indigents, did not ... exist to any great extent in Ontario."[4] It may be assumed that, notwithstanding the generosity of some individual members of the bar, legal services in civil matters were generally unavailable to those unable to pay.

No doubt reassured by the appearance in Great Britain of the *Legal Aid and Advice Act, 1949*,[5] the Law Society of Upper Canada

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* Associate Professor of Law, Osgoode Hall Law School of York University.

[1] *Report of the Task Force on Legal Aid*, Toronto: Queen's Printer (1974) (hereinafter referred to as *Report*).

[2] Notwithstanding the *Report's* submission to the then Minister of Justice and Attorney General on November 29, 1974, it was not made public until March, 1975.

[3] The following material on the background of the 1966 Plan was originally gathered for an earlier essay: I. A. McDougall and L. Taman, *Legal Aid in Ontario: A Study in Symbolic Reassurance*, Osgoode Hall Law School, Toronto (1969) (unpublished).

[4] *Report of the Joint Committee on Legal Aid*, tabled in the Legislative Assembly, April 14, 1965, 10.

[5] 12, 13 & 14 George VI, c.51 (U.K.).

embarked on a programme of locally administered legal aid clinics.[6] Lawyers volunteered their services to those clients who passed a stringent eligibility test.[7] Naturally, following the English precedent, the administration of the plan was entrusted to the profession. This feature of legal aid in Ontario was not to be seriously contested for almost twenty-five years. On the other hand, the *voluntary*, unremunerated provision of legal services represented a marked departure from the British example.

It quickly proved difficult to provide legal services to large numbers of applicants on a charitable basis.[8] By the early Sixties, the task appears to have approached imposssibility. A series of devastatingly critical articles appeared in the Toronto *Globe and Mail*:

> In practice, [the Plan] is outmoded, discriminatory, inadequate. It certainly does not defend every person in this province who cannot afford a lawyer.
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> Legal Aid in Ontario is still a charity given to those who, in the discretion of the executive or local director of the Legal Aid Plan, are worthy of it.... ... of 2,000 members of the bar who practice in Mctropolitan Toronto, only 100 give legal aid on a regular basis.[9]

These and other pressures culminated in the appointment of a blue-ribbon committee — the Joint Committee on Legal Aid.[10] Composed of lawyers and civil servants, the Committee, like its heir ten years later, stumped the province, then the continent, in search of information. Their final report, tabled in 1965, eventuated in the *Legal Aid Act*[11] of 1966 which, in substantially unaltered form, has served to the present day.

The Plan's salient features are, first, its administration by the Legal Aid Committee of the Law Society of Upper Canada. Second, the Plan is built on a principle of freedom of choice which entitles the qualified applicant to take his legal problem to any lawyer who is prepared to act for him on a legal aid certificate. The lawyer, in turn, is remunerated by the Plan on a fee-for-service basis. The Plan

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[6] *The Law Society Amendment Act, 1951*, S.O. 1951, c.45.

[7] See *supra*, note 4, 10-21 for a description and evaluation of the 1951 Plan.

[8] As early as 1955, Joseph Sedgwick, a prominent Toronto counsel, was quoted as recommending compensation for the (predominantly) younger lawyers who were donating considerable services to the Plan.

[9] *The Globe and Mail*, February 8, 1963.

[10] The County of York Law Association may have been particularly influential in the result; in May, 1963, it had recommended the appointment of a Royal Commission to investigate legal aid.

[11] R.S.O. 1970, c.239.

employs no full-time lawyers to render professional services.[12] Duty counsel are retained to represent the unrepresented in the Provincial Courts (Criminal and Family Divisions).

This fee-for-service, profession-administered model, has been subjected to searching criticism in Canada and elsewhere.[13] It is said to be the most costly delivery model available, heavily biased in favour of litigation and against preventive services, largely incapable of the kind of outreach which is necessary to attack the unmet need for legal services, too diffused to husband limited resources by developing energy-saving strategies of test cases and community education, and too inflexible to respond to the demands of changing circumstances.

Although legal services has never been a major public issue in Ontario, a number of forces combined to create the climate which ultimately gave birth to the *Osler Report.* The student legal aid societies at the various law schools were important centres of criticism and innovation from early on in the piece.[14] Parkdale Community Legal Services in Toronto, first funded[15] in 1971 became, under its first director, Professor Fred Zemans, a vocal public critic of the existing Plan and a successful model of an alternative ap-

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[12] The lawyers who do the initial interviews for the purpose of establishing entitlement to assistance do, of course, often give legal advice to applicants.

[13] See L. Taman, *The Legal Services Controversy: An Examination of the Evidence,* National Council of Welfare, Ottawa (1971) for a summary of the writing to that date. The essay contains a more detailed examination of the Ontario Plan than is possible here. Of course, there are a number of seminal works which heavily influenced the critique of the fee-for-service delivery model: E. and J. Cahn, *The War on Poverty: A Civilian Perspective* (1964) 73 Yale L.J. 1317; *What Price Justice: The Civilian Perspective Revisited* (1965-66) 41 Notre Dame Law. 927. Perhaps the first detailed critique of the Ontario Plan was I. A. McDougall, *Brief to the Special Senate Committee on Poverty: Legal Assistance of the Poor and the Principle of Equality Under the Law* (1970), Proceedings, no.27, p.132, Appendix C.

[14] *E.g.,* I. McDougall's work, *ibid.,* was born in the work of the Community and Legal Aid Services Programme of Osgoode Hall Law School of York University. The Students' Legal Aid Society at the University of Toronto was also a potent force and later made strong representations to the Task Force. The same can be said of the other student legal aid organizations in the Province.

[15] This crucial seed money came from the federal Department of National Health and Welfare, the Council for Legal Education on Professional Responsibility (a Ford Foundation subsidiary), and York University. The same grant funded Saskatoon Legal Services, Pointe St Charles Legal Services (Montreal) and Dalhousie Legal Services (Halifax), each of which had a catalytic effect on events in its own province.

proach. Many other predominately neighbourhood-based legal services organizations sprang up after 1971. Each of these took a continuing, professional interest in changing the system.

Two other factors, perhaps the most telling, need to be mentioned. First, the Ontario Plan, much vaunted as the leading Canadian model, was not slavishly followed as new policies developed in other provinces;[16] Manitoba, Nova Scotia, Saskatchewan and Quebec all determined to devote considerable resources to the neighbourhood-based model, employing full-time legal and para-legal professionals. Saskatchewan opted for a near exclusive use of salaried lawyers.[17] Saskatchewan and Quebec each saw fit to depart from Law Society administration and to create quasi-governmental administrative structures. These policy initiatives made the value of profession-administered fee-for-service plan suspect, if not *passé.*

Second, and perhaps most importantly, rapidly rising costs fueled by inflation and new demands on the Plan must have helped trip the government trigger which created the Task Force. The 1965 *Report of the Joint Committee* proved prescient in declaring that "no meaningful estimate of the cost of a legal aid programme ... can be made".[18] The cost to the province went from approximately seven million dollars for the year ending in March, 1969[19] to over seventeen million for the 1974-75 fiscal year.[20] This last figure represents an increase of approximately one-third over the previous year. Even more to the point, the costs of the fee-for-service programme are inherently open-ended, proving difficult to predict and to control. While neither party is particularly forthcoming about matters of this kind, it appears likely that the Law Society has been under Government seige for a number of years over the issue of rising costs. The Law Society has probably stoutly resisted Govern-

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[16] For useful descriptions of the various provincial and territorial programmes see I. Cowie, *The Delivery of Legal Aid Services in Canada,* Department of Justice, Ottawa (1974); R. Brooke, *Legal Services in Canada - 1975* (forthcoming, Modern Law Review). This excellent work is due to appear very shortly.

[17] See *The Community Legal Services (Saskatchewan) Act, 1974,* S.S. 1973-74, c.11.

[18] *Supra,* note 4, 93.

[19] The Law Society of Upper Canada, *Ontario Legal Aid Plan: Annual Report, 1969,* 6 and Appendix B.

[20] *Ibid.* Note that the actual cost to the province was reduced in 1974-75 by the federal contribution of four million dollars to the criminal legal aid programme. Federal cost-sharing in criminal legal aid began in 1973.

ment pressure to limit costs by various administrative expedients,[21] insisting no doubt that changes in the level of service ought to come from explicit Government policy, publicly determined. At approximately the same time, new sources of revenue (from lawyers' trust funds and from federal cost-sharing in criminal legal aid) became available. These factors must have combined to make a reassessment of the Plan and its priorities seem particularly appropriate.

2. The Report

Reading the *Report* is like watching an experienced tightrope walker. There is exhibited a natural anxiety in the face of the waiting unpleasantness should one lean too far to one side or the other, counterbalanced by the professional's easy confidence in his ability to complete the task without mishap. The result is a *Report* which, at least to the casual onlooker, is scrupulously balanced in tone, comprehensive in its coverage and yet perhaps a touch too jittery in formulating its recommendations.

The finely balanced approach might be traced to a number of factors. First, one expects that on a committee of a Supreme Court judge, two Benchers of the Law Society of Upper Canada (one of whom was vice-chairman of the Legal Aid Committee), a social worker, a journalist, a former chairman of the Ontario Human Rights Commission and a law professor, there might be certain differences of approach and degree of commitment to the *status quo* which would dicate compromise as the price of unanimity. Secondly, as indicated by Appendices C and D to the *Report* the Task Force received inputs of the widest variety. Initial meetings with Andrew Lawson, the Director of the Plan, gave way to attendance by some members at Parkdale Community Services Clinic. A submission by Sydney L. Robins, then Treasurer and chief elected official of the Law Society of Upper Canada (now a Justice of the Ontario Court of Appeal),[22] which the Task Force must have found more defensive than helpful, had somehow to be balanced against the concerns expressed by groups like the Sarnia Anti-Poverty Coalition, the Ha-

[21] For example, in 1972, the Plan, with only dubious legislative sanction, began refusing applications for divorce certificates to those without plans for immediate remarriage. While the pressure for this expedient of doubtful legality probably came from the cost-conscious Government, the public criticism came to the Law Society, which ultimately withdrew the "remarriage" limitation.

[22] An adaptation of the presentation is found in S. L. Robins, Q.C., *The Ontario Legal Aid Plan* (1973) L. Soc. Gaz. 211.

milton North End Residents' Organization and the Thunder Bay Indian Friendship Centre. In all, there were 285 written submissions and 105 oral submissions in the three months of hearings in ten different centres throughout the province. Lastly, one asumes that the need for future cooperation among the Law Society, the Legal Aid Plan, the profession, citizens' groups and others determined the Task Force to try to say something generous about all concerned.

The Law Society, for example is praised for its efforts numerous times throughout the *Report*, albeit occasionally with overtones of the left-handed compliment:

> ... it is enough to say that our inquiries have led us to have nothing but admiration for the founders of the Ontario Plan. We find that it has been conscientiously and energetically administered by The Law Society and that, particularly in the more recent years, a degree of imagination has been brought to bear upon its administration. While it is a reasonably comprehensive Plan, it is not sufficiently comprehensive for today.[23]

Student legal aid societies[24] and others[25] are congratulated for their innovative endeavours, while lip service is paid to the conventional wisdom that " it is important to recall that many 'poverty law' problems are not primarily legal problems".[26]

Yet beneath the finely measured tone, the criticism of the existing Ontario Legal Aid Plan is remarkably pointed. The application procedure is said to be:

> ... so complicated and prolonged that it produces in the lower courts additional appearances and adjournments and therefore delays in the whole court process and makes expensive demands upon the time of judges, court personnel and witnesses.[27]

The supposedly representative nature of the Area Committees is debunked.[28] The applicant's vaunted freedom to choose his own solicitor, said to be a hallmark of the fee-for-service model, is found in the event to be "somewhat illusory".[29] The reputedly enthusiastic participation in the Plan of practising lawyers is shown to be rather desultory in some areas,[30] including York County, the province's largest. "The concept of Legal Aid as 'litigation' is now clearly seen as inadequate",[31] while it is said with delicate understatement to be

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[23] *Report, supra,* note 1, 22.
[24] *Ibid.,* 77 *et seq.*
[25] *Ibid.,* 55.
[26] *Ibid.,* 40.
[27] *Ibid.,* 4.
[28] *Ibid.,* 5.
[29] *Ibid.,* 12.
[30] *Ibid.,* 11-12.
[31] *Ibid.,* 21.

"apparent that the full potential of the Plan with regard to advice and assistance has not been realized".[32] The complaints of applicants who have been unfairly assessed as being able to repay part or all of the cost of services rendered appear vindicated by the conclusion that "[i]t is apparent that unrealistic contribution targets have been set with respect to many clients".[33] The considerable inadequacy of the York County facilities, responsible for about one-half the work in the province, is set out in a particularly dismal passage.[34] The well-merited praise for "[t]he ingenuity of Mr. Donkin (the Area Director) and his staff in confronting these myriad difficulties"[35] ought perhaps to have been juxtaposed with a blunter criticism of the Plan's senior administrators and policy makers who have made no progress in dealing with the problem for many, many years.

It is not possible fairly to summarize the wide range of recommendations made by the Task Force.[36] Detailed recommendations would streamline the application procedure and liberalize the financial eligibility criteria. Important recommendations for changes in the Plan's coverage would extend entitlement as of right to include proceedings before administrative tribunals and would provide for the first time for the funding of class actions in appropriate cases. The duty counsel system would be extended to Small Claims Court, to landlord and tenant matters in the County Court and to areas of special need like psychiatric hospitals, prisons and airport immigration centres. Advertising and information dissemination, directed not only to publicizing the Plan's availability but also to enhancing public awareness of legal rights and remedies, would assume a higher priority. The charitable 25% fee reduction presently endured by participating lawyers would be eliminated, to be replaced (rather oddly) by a 10% reduction "to account for the fact that there will be no 'bad debts' ".[36a] These and a host of other recommendations are sweeping in scope and forceful in presentation. Unfortunately, one must hesitate to offer the same unreserved praise to the two most important and, as so, most contentious recommendations.

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[32] *Ibid.*, 10.
[33] *Ibid.*, 85.
[34] *Ibid.*, 15.
[35] *Ibid.*, 108.
[36] See "Summary", *ibid.*, 119 *et seq.*
[36a] *Ibid.*, 92.

The controversy in Ontario between the fee-for-service delivery model and the neighbourhood legal services model has sometimes reached the emotional intensity of holy war. The *Report* succeeds in cooling out the debate, coming up with a series of quite detailed recommendations [37] for the implementation of neighbourhood law offices.

> We do not, therefore, see the private office, the staffed neighbourhood legal aid clinic or the rotating panel as competing but rather as complementary models, all of which are designed to remedy the chronic under-utilization of the profession and the law by the poor. Clinics, it seems to us, may be appropriate where the presence of Legal Aid in a forthright and obvious way is desirable in the interests of the poor of the community and where the patterns of private law practice have created a sense of psychological and physical inaccessibility. What we seek is not to maximize the use of one technique or the other, but rather to maximize the chance that the Plan will be used by its intended beneficiaries.[38]

How perfectly sensible! Yet the *Report* fails to give us, and presumably the waiting policy-makers, any sense of the kind of mix it has in mind. Some of the recommendations indicate a substantial understanding of the peculiar problems of neighbourhood legal services clinics. For example, specific reference is made to the desirability of allowing clinics to specialize in certain areas of priority as an answer to the inevitable caseload crisis. Given this level of interest and insight, one wonders why the failure to give some advice on the appropriate mix.

This matter is of crucial importance in policy-making in the area. On the one hand, there exists the danger that, should conservative interests continue to dominate, only token funding would go to neighbourhood law offices, leaving the existing, highly unsatisfactory situation quite intact. The no less frightening Charybdis, of course, is a policy which would shift the bulk of the existing programme to overworked, underpaid clinic lawyers and para-professionals. This could be done on the supposition that the programme would then be less costly. It might not be realized, and would certainly not be publicly declared, that the likely result of an overbalancing to clinics would be that the Plan as a whole could be crushingly overburdened with criminal and domestic matters, leaving even *less* energy than at present for the kind of preventive and organizing work that the neighbourhood law office does best.

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[37] *Ibid.*, 51 *et seq.*
[38] *Ibid.*, 25.

This is a dilemma on which policy-makers could probably have used more direction than they received.

Secondly, the Task Force made the quite unexpected recommendation that the administration of the plan be taken from the Law Society of Upper Canada to be entrusted to a statutory non-profit corporation named Legal Aid Ontario.[39] The rationale for the change is explained in the delicate prose characteristic of the *Report*:

> A number of briefs were delivered and submissions made to us representing that the position of The Law Society under the present scheme involves a conflict of interest. The public good must be the sole purpose of the Legal Aid Plan, whereas The Law Society is by statute the governing body of the legal profession and must be primarily concerned with its welfare. The term "conflict of interest" may not be one appropriate in the circumstances, and we state emphatically that no suggestion was made to us at any time that The Law Society or its Legal Aid Committee has in fact permitted such a conflict to develop. Nevertheless, it is impossible to perceive the direction of the Legal Aid Plan as being sufficiently single-minded if it is left in the hands of a Committee of The Law Society, reporting to Convocation, the governing body of that Society, both groups being composed overwhelmingly of lawyers.[40]

The proposal which follows[41] is styled "a partnership between The Law Society and the public, though we must recognize that the public will be represented by those whom government nominates for this purpose".[42]

Given that the goal was a functioning organization independent insofar as can be managed of both the profession and the government, the *Report*'s proposal is as unsatisfying as can be imagined. Firstly, was it necessary to give the profession *at least* ten representatives on a twenty-person board of directors? While there can be no doubt that representation from the profession is both necessary and desirable, representation begins to look like control when it reaches fifty percent. Surely the very arguments employed to justify shifting control from The Law Society militate against the proposed arrangement. One hopes that when Legal Aid Ontario is finally put in place, representation from the profession will be rather less formidable. Secondly, rather more imagination might have been used to protect Legal Aid Ontario from government domination through its nominating powers. For example, the new Area Committees, which are intended to be more broadly repre-

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[39] *Ibid.*, 27 *et seq.*
[40] *Ibid.*, 23.
[41] *Ibid.*, 27 *et seq.*
[42] *Ibid.*, 24.

sentative, could have been given a certain number of seats on the Board of Directors. Or again, it would have been desirable to have reserved positions for representatives of the neighbourhood law offices' community advisory boards. Other constituencies — the student legal aid societies, the law teaching profession, the professional social worker associations — might have been given nominating rights to ensure a measure of diversity. As the proposals stand, the representation of the public interest in the development of legal services policy is far from guaranteed.

Lastly, the *Report* makes the essential recommendation that Legal Aid Ontario be funded on a "global" basis, remaining free to allocate priorities as it sees fit. While this is certainly desirable, there is another crucial aspect of funding which went unexamined. The Task Force ought, I think, to have strongly recommended a system of guaranteed funding for periods of years. If the Legislature were required to commit itself to given levels of support for each of the next, say, five years, the often expressed concern about the potential for government interference in the programme could be effectively met. The concern is not, of course, without foundation. As the largest single litigant in legal aid matters, the Government ought to be encouraged by every structural device possible to live by its finer instincts. It has not been unknown for governments, harrassed and embarrassed by energetic legal service lawyers, to cut down the pressure by simply cutting down the lawyers.[43]

3. More of the same?

The *Osler Report* was in the hands of the Government on November 19, 1974. It was not released for public view until March, 1975. As of the date of this writing (August, 1976), twenty months after submission of the *Report*, there has been no policy response from the Government of Ontario.

Changes have been made. The Legal Aid Committee of the Law Society, for example, has been expanded to include the kind of lay representation the *Report* envisaged for the proposed directorate of Legal Aid Ontario. Through what appears to have been considerable efforts on the part of the Attorney General of Ontario, interim funding has been extended to a number of existing neighbourhood legal services organizations which would otherwise have gone under

[43] T. Branch, *The Ordeal of Legal Services: How Poor People Won in Court But Lost in OEO*, January, 1971, The Washington Monthly 3, 5.

for want of funds. These steps are not without importance. Yet the *Report,* with characteristic indirection, was unequivocal in assessing the complete inadequacy of the existing Plan. It holds not only that there are many people whose legal rights are, for a variety of reasons, at present going wholly by default but equally that there are considerable areas of the law, notably those relating to housing, landlord and tenant matters and welfare benefits, where expert advice and assistance is urgently needed but is often hard to come by.[44] That this is an accurate evaluation of twenty-five years of legal aid in Ontario is a great disappointment. That the Government is apparently ready to tolerate the situation is a disgrace.

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[44] See *Report, supra,* note 1, 19-20.