

5-1-1999

## Legal Aid and Right to Counsel Under Canada's Charter of Rights and Freedoms

Dorothy Nicole Giobbe

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

---

### Recommended Citation

Dorothy Nicole Giobbe, *Legal Aid and Right to Counsel Under Canada's Charter of Rights and Freedoms*, 25 Brook. J. Int'l L. (1999).  
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol25/iss1/8>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

# LEGAL AID AND RIGHT TO COUNSEL UNDER CANADA'S CHARTER OF RIGHTS AND FREEDOMS

## I. INTRODUCTION

Publicly-subsidized legal services for indigent citizens are considered a critical element of modern Democratic legal systems.<sup>1</sup> Subsidized legal assistance is predicated on notions of fundamental fairness and on the principle that equality of justice is meaningless without access to justice.<sup>2</sup>

In recent years, federal funding cutbacks to the provincial legal aid plans in Canada, particularly in Ontario, have forced service restrictions to the many low-income Canadians the plans serve.<sup>3</sup> As the effects of the cutbacks have been absorbed throughout the system, news reports have described a court system in chaos.<sup>4</sup> While the Canadian legal aid system struggles to reconcile its mandate of legal help to the poor with a new era of reduced funding, questions persist about the ability of the legal aid programs to meet the basic legal needs of poor Canadians.<sup>5</sup>

In response to the funding and service crisis, the Canadian Government is working toward a complete overhaul of the legal aid system with an eye towards permanent reform.<sup>6</sup> Although the proposed measures are aimed at solving pressing

---

1. See generally MARK KESSLER, *LEGAL SERVICES FOR THE POOR: A COMPARATIVE AND CONTEMPORARY ANALYSIS OF INTERORGANIZATIONAL POLITICS* (1987); EMERY BROWNELL, *LEGAL AID IN THE UNITED STATES: A STUDY OF THE AVAILABILITY OF LAWYERS' SERVICES FOR PERSONS UNABLE TO PAY FEES* (1951).

2. As one commentator recently noted, "[a]ccess to the legal system currently requires having the ability to speak the language of the system, to translate one's story into legal language, to know the extent of one's own rights and the extent of the rights of others." Patricia Hughes, *Changes to Legal Aid: New Brunswick's Domestic Legal Aid System: New Brunswick (Minister of Health and Community Services) v. J.G.*, 16 WINDSOR Y.B. ACCESS JUST. 240, 249 (1998).

3. See *infra* Part II.

4. See *infra* notes 69, 74, 80, and 87.

5. See *infra* Part II.

6. See *Attorney General Announces Comprehensive Review of Legal Aid*, CAN. NEWSWIRE, Dec. 13, 1996, available in LEXIS, News Library, Curnws File; Barry Brown, *Report Proposes Radical Reforms in Ontario's Legal Aid System*, BUFFALO NEWS, Sept. 16, 1997, at D11.

budgetary concerns, debate continues concerning the possible impact on people left without access to legal aid.<sup>7</sup> As the entire legal aid program is reconstructed, observers remain deeply concerned about the ability of the struggling system to meet the needs of indigent citizens who may no longer qualify for aid.<sup>8</sup>

The funding restrictions and service cutbacks to legal aid also raise serious questions of Constitutional validity under Canada's Charter of Rights and Freedoms.<sup>9</sup> This Note considers the existence of a right to government-funded counsel at trial under the Charter, rather than under the Canadian Bill of Rights.<sup>10</sup> The Charter is thought to be stronger at guarding civil liberties than the Bill of Rights, in part because the Charter is part of the Constitution of Canada, whereas the Bill of Rights is "merely a statute."<sup>11</sup> In order to amend the Charter, for example, complex constitutional amendment procedures must be followed, whereas the federal Parliament has the power to repeal the Bill of Rights any time it chooses.<sup>12</sup> Further, although the Bill of Rights applies solely to the federal government, the Charter applies to the federal, provincial, and territorial governments.<sup>13</sup>

Canada's Charter of Rights and Freedoms does not, in express terms, guarantee the right of low-income Canadians to government-funded legal representation at trial, and the Canadian Supreme Court has not yet ruled on the issue. However, several Ontario provincial courts have held that, although the

---

7. See *Ontario's Legal Aid Plan to Provide Fewer Legal Services for the Province's Poor*, CAN. NEWSWIRE, Mar. 11, 1996, available in LEXIS, News Library, Curnws File. For a criticism of the focus on controlling costs in the legal aid system, rather than a concentration on meeting the needs of the nation's poor, see generally Mary Jane Mossman, *From Crisis to Reform: Legal Aid Policymaking in the 1990s*, 16 WINDSOR Y.B. ACCESS JUST. 261 (1998).

8. See Elizabeth Payne, *Legal Aid: Lawyers Fear Drastic Changes Are in Store*, OTTAWA CITIZEN, Dec. 24, 1991, at A1.

9. Canadian Charter of Rights and Freedoms, Constitution Act, R.S.C. ch. 11, sched. B, app. II, no. 44. (1985) (Can.).

10. Canadian Bill of Rights of 1960, R.S.C., app. III (1985) (Can.).

11. See BERNARD W. FUNSTON & EUGENE MEEHAN, CANADA'S CONSTITUTIONAL LAW IN A NUTSHELL 154 (1994); PETER W. HOGG, CONSTITUTIONAL LAW IN CANADA 800 (1997).

12. See FUNSTON & MEEHAN, *supra* note 11, at 154; HOGG, *supra* note 11, at 800.

13. See FUNSTON & MEEHAN, *supra* note 11, at 154; HOGG, *supra* note 11, at 801.

right to government-funded counsel is not specifically provided for in the Charter, such a right may be inferred through sections 7, 10(b), and 11(d) of the Charter.<sup>14</sup> In the current era of service restrictions, these Charter sections may form the basis for a successful challenge to the cutbacks where they infringe on a poor citizen's right to a fair trial. The relevant Charter sections read:

Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.<sup>15</sup>

Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.<sup>16</sup>

Any person charged with an offense has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.<sup>17</sup>

In the context of the current legal aid crisis, determination of a right to funded trial counsel for impoverished Canadians takes on enormous weight. With the current restrictions precluding legal aid assistance in large numbers of cases, the right to a fair trial under section 11(d) and the concept of fundamental justice under section 7 are in danger of becoming increasingly inaccessible for large groups of low-income citizens.

This Note examines the right to government-funded counsel at trial for poor citizens in Canada through the guarantees of the Charter. The right to counsel in the province of Ontario

---

14. See *infra* Part III.

15. Canadian Charter of Rights and Freedoms, Constitution Act, R.S.C. ch. 11, § 7, sched. B, app. II, no. 44 (1985) (Can.).

16. *Id.* § 10(b).

17. *Id.* § 11(d). These sections were conceived to protect people who become involved in the criminal justice process. Most of the rights provided for in these sections existed at common law, prior to the Charter, or were codified in the Canadian Bill of Rights. "Entrenchment in a constitutional document, however, has given much more force to these rights and prevents Parliament from overriding them by legislation." FUNSTON & MEEHAN, *supra* note 11, at 169.

is examined in particular, as Ontario is Canada's largest province and generally is recognized as having one of Canada's most comprehensive legal aid programs.<sup>18</sup> This Note argues that although the Charter of Rights and Freedoms does not explicitly provide low-income Canadians with the right to government-funded counsel, such a right may be inferred from the broad guarantees that the Charter confers upon all citizens.

Part II of this Note traces the origin and recent history of the Ontario Legal Aid Program (OLAP), and examines the funding cutbacks to Ontario's legal aid system, as well as the resulting hardship on the low-income population in Ontario. Part III of this Note examines a series of cases in the provincial and appeals courts of Ontario that have found a right to counsel existing in sections 7, 10(b), and 11(d) of the Charter in limited circumstances. The Note also examines recent Canadian Supreme Court cases where the Court considered related section 10(b) right to counsel issues. Part IV of this Note argues that the provincial Ontario courts have provided a reasonable interpretation of the relevant Charter protections. This interpretation forms the basis for a successful challenge to many of the current legal aid restrictions when the issue eventually reaches the Supreme Court of Canada.

## II. THE SYSTEM OF LEGAL AID IN ONTARIO

Historically, the supervision of Canada's provincial legal aid programs has functioned independently from the federal government.<sup>19</sup> Although federal funds comprise the largest source of funding for the provincial plans, regional authorities control the administration of the plans.<sup>20</sup> In addition to the federal government's contribution (which varies annually), other revenue sources for the provincial legal aid plans include contributions from clients, levies collected from lawyers, as well as grants and donations.<sup>21</sup>

---

18. See William W. Horne, *Canada's Cadillac*, AM. LAW., Jan./Feb. 1993, at 62.

19. Canada has a federal government, 10 provinces, and two territories. See THE WORLD ALMANAC AND BOOK OF FACTS 773 (1999).

20. See NATIONAL COUNCIL OF WELFARE, LEGAL AID AND THE POOR 12 (Winter 1995) [hereinafter LEGAL AID AND THE POOR] (on file with author).

21. *Id.* at 14; LAW SOCIETY OF UPPER CANADA, 29TH ANNUAL REPORT OF THE ONTARIO LEGAL AID PLAN 8-10 (1996) [hereinafter LEGAL AID PLAN ANNUAL REPORT] (on file with author). According to the report, in 1996, the total contribution

Canada's legal aid plan generally is considered one of the most comprehensive systems in the world, and Ontario's plan, in particular, is recognized as one of the best examples of the entire system.<sup>22</sup> OLAP was established in 1967, and operates on the concept of "judicare"<sup>23</sup> through a mixed-model of legal services.<sup>24</sup> OLAP is financed through the Ontario Ministry of the Attorney General, the federal government, and the Law Foundation of Ontario through interest collected on lawyers' trust accounts.<sup>25</sup> Additionally, OLAP receives funding from Ontario's lawyers, each of whom pay an annual fee to OLAP.<sup>26</sup>

Although the majority of OLAP's funding comes from the federal government, the Legal Aid Committee of the Law Society of Upper Canada (LSUC)<sup>27</sup> plays a significant role in the administration of OLAP.<sup>28</sup> The LSUC has authority, through the Legal Aid Act,<sup>29</sup> to establish and administer legal aid in the province.<sup>30</sup>

---

to the plan was \$295.9 million. Of that amount, the province of Ontario contributed \$192.1 million to the plan, and the federal government contributed \$59.7 million. Other contributions to the plan came from a levy paid by all Ontario lawyers, interest that accumulated in lawyers' mixed trust accounts, as well as client contributions and recoveries. The total cost of running the plan in 1996 was \$315.6 million. *Id.*

22. See Horne, *supra* note 18, at 62; Frederick H. Zemans & Lewis T. Smith, *Can Ontario Sustain Cadillac Legal Services?*, 5 MD. J. CONTEMP. LEGAL ISSUES 271, 297 (1994).

23. See LAW SOCIETY OF UPPER CANADA, ACCESS TO JUSTICE: LEGAL AID IN ONTARIO 7 (1997) [hereinafter ACCESS TO JUSTICE] (on file with author) (a submission to Government review panel). The term "judicare" is explained *infra* Part II(A).

24. "Mixed-model" means that Ontario has no single method for delivering legal services to the needy. Rather, it relies on a combination of different methods, which are discussed in this section.

25. See LEGAL AID PLAN ANNUAL REPORT, *supra* note 21, at 8-10.

26. *Id.*

27. The LSUC, one of the oldest Canadian Law Societies, was created in 1797 and incorporated in 1822. The LSUC is responsible for the education, licensing, supervision and discipline of Ontario's lawyers. See *Introduction to LAW SOCIETY OF UPPER CANADA, 1996 ANNUAL REPORT* (1997) (on file with author).

28. See Horne, *supra* note 18, at 62. This control over the plan by the Law Society is not without its critics, who argue that allowing the Law Society to control the plan results in waste and mismanagement. See Neal Hall, *Lawyers Advised Not to Control Legal Aid*, VANCOUVER SUN, Aug. 29, 1996, at B1.

29. Legal Aid Act, R.S.C., ch. L-9 (1990) (Can.).

30. *Id.* § 2.

### A. Major Service Delivery Components

OLAP is comprised of a multi-part system of legal services.<sup>31</sup> The largest and most important segment is the certificate (or judicare) system.<sup>32</sup> Certificates are similar to vouchers—clients in need of legal services apply directly to OLAP for a certificate at a local OLAP office. The client must provide documentation of income or other financial resources. If the client meets certain financial eligibility criteria,<sup>33</sup> the certificate is approved, and the client may then take the certificate to any member of the private bar who is a member of the local legal aid panel. If the lawyer chooses to accept the case (with complete discretion over the decision), he or she performs work on the case and then sends a bill to OLAP.<sup>34</sup> The lawyer is reimbursed by OLAP according to a set fee scale.<sup>35</sup> Certificates are available for legal work in criminal and civil, as well as refugee and immigration cases.<sup>36</sup>

One of the most coveted aspects of the judicare, or certificate model, is the degree of control that clients have over choice of representation. Because clients have discretion in their selection of a lawyer, the certificate system is thought to possess a unique quality of confidence between client and lawyer.<sup>37</sup> Additionally, the LSUC asserts that the certificate system enhances the entire legal system—because private lawyers participate in handling legal aid cases, the stigma of legal aid clients as less desirable than private clients with more resources may be lessened.<sup>38</sup> Finally, approximately 45% of the lawyers who participate in the certificate system have more than twelve years of experience, ensuring that clients are represented by experienced counsel.<sup>39</sup>

In 1996, of the 171,741 individuals who applied for a cer-

---

31. ACCESS TO JUSTICE, *supra* note 23, at 32-34.

32. *Id.* at 32.

33. As of late 1997, the most a person could earn in Ontario and still qualify for legal aid was (Can.) \$15,800. See Rae Corelli & Dale Eisler, *The Right to a Lawyer*, MACLEAN'S, Nov. 24, 1997, at 120, 125.

34. See ACCESS TO JUSTICE, *supra* note 23, at 32.

35. *Id.* The fees are set by the LSUC, and may vary annually. See Legal Aid Act, R.S.O., ch. L-9, § 22 (1990) (Can.).

36. See ACCESS TO JUSTICE, *supra* note 23, at 32.

37. *Id.* at 38.

38. *Id.*

39. See LEGAL AID PLAN ANNUAL REPORT, *supra* note 21, at 11.

tificate from OLAP, 129,683 met eligibility requirements.<sup>40</sup> In 1996, the average cost for fees incurred on a client's behalf in a criminal case was (Can.) \$1338, compared with \$1240 in 1995.<sup>41</sup> Civil case costs were higher, with an average in 1996 at \$1652, up from \$1565 in 1995.<sup>42</sup>

A second part of OLAP is comprised of a network of local legal clinics. Through about seventy local clinics in Ontario, indigent clients receive legal services and assistance from OLAP staff lawyers.<sup>43</sup>

Duty Counsel assistance comprises a third part of OLAP's services. Duty Counsel are lawyers stationed in criminal intake, family, and youth courts to provide immediate legal service for initial court appearances and bail hearings. Duty Counsel also staff a twenty-four hour hotline to advise recently arrested people of their legal rights.<sup>44</sup> Duty Counsel is staffed mainly by members of the private bar who work and are paid based on a per diem rate.<sup>45</sup> People recently arrested or brought into court on a civil matter are often overwhelmed, confused and may not be aware of the importance of the courtroom proceedings. In this way, Duty Counsel can help to protect individuals when they are most vulnerable in the court system.<sup>46</sup> However, although Duty Counsel is critical at the initial phase of the legal process, there is no time to form any meaningful type of professional relationship with the clients who use the service. Often, client contact with Duty Counsel is short, rushed, and in all cases is limited to the day of the client's court appearance.<sup>47</sup> For that reason, the LSUC has strongly emphasized that the public should never regard Duty Counsel as a substitute for the certificate system.<sup>48</sup> Historically, clients did not have to meet financial eligibility guidelines to access Duty Counsel services, but the recent funding cut-

---

40. *Id.* at 6.

41. *Id.*

42. *Id.*

43. See ACCESS TO JUSTICE, *supra* note 23, at 32.

44. See LEGAL AID PLAN ANNUAL REPORT, *supra* note 21, at 6-7.

45. See ACCESS TO JUSTICE, *supra* note 23, at 33.

46. See Pauline Tam, *Legal Aid Cuts Access To Counsel: Courthouse Lawyers Must Conduct Means Test Before Providing Services*, OTTAWA CITIZEN, Mar. 15, 1997, at C3.

47. See ACCESS TO JUSTICE, *supra* note 23, at 33.

48. *Id.* at 36.

backs have forced OLAP to experiment with some financial means testing and other changes to the Duty Counsel system.<sup>49</sup> During 1996, Duty Counsel assisted a total of 495,129 people.<sup>50</sup>

*B. OLAP's Budgetary Crisis and the 1994 Funding Agreement*

In 1994, OLAP was faced with extraordinary budgetary pressures because of a higher demand for certificates and economic pressures resulting from the recession in the early 1990s.<sup>51</sup> The federal government announced that it would no longer simply increase its annual OLAP contribution. Thus, OLAP suffered an unprecedented financial blow, and for the first time in its history, OLAP ended the fiscal year with a deficit (Can. \$39 million).<sup>52</sup> As the deficit rose to \$75 million in August and September of 1994, OLAP officials held discussions with the Ministry of the Attorney General about ways to keep the plan running. The discussions led to an agreement between the two sides in September 1994.<sup>53</sup> While the agreement allowed OLAP to maintain operations, it slashed federal spending on the plan through OLAP's fiscal year 1999. The government of Ontario agreed to fund OLAP for the certificate system at the following levels: \$194.7 million for fiscal year 1994 to 1995; \$188 million for fiscal year 1995 to 1996; \$167.2 million for fiscal year 1996 to 1997; \$167.2 million for fiscal year 1997 to 1998; and \$167.2 million for fiscal year 1998 to 1999.<sup>54</sup> Thus, with the new agreement, OLAP made a "fundamental departure" from the "open-ended, demand-driven" funding of years past.<sup>55</sup>

---

49. See Tam, *supra* note 46, at C3.

50. See LEGAL AID PLAN ANNUAL REPORT, *supra* note 21, at 6.

51. *Id.* See also Horne, *supra* note 18, at 66 (observing that the greater demand for legal aid services was due to rising unemployment, higher immigration rates, and increased police efforts to curtail crime); Ruth Lawson, *Changes to Legal Aid: The Ontario Legal Aid Plan in the 90's*, 16 WINDSOR Y.B. ACCESS JUST. 252, 252 (1998), (observing that Canada's early 1990s economic recession also contributed to the increase); Corelli & Eisler, *supra* note 33, at 122 (stating that a higher crime rate contributed to the increase).

52. See ACCESS TO JUSTICE, *supra* note 23, at 18.

53. *Id.*

54. See LEGAL AID PLAN ANNUAL REPORT, *supra* note 21, at 12.

55. *Id.*

### C. OLAP's 1994 Service Cuts and Restrictions

The 1994 budgetary crisis resulted in a dramatic decrease in OLAP's ability to administer services. In response to the funding cutbacks, OLAP was forced to place restrictions on a host of legal services, including: the ability to change lawyers (except in extraordinary circumstances, although one change of a lawyer for "good reason" was permitted in family law);<sup>56</sup> personal injury cases (only disbursements paid); debt claims; real estate cases; and most criminal law cases, except where a defendant's liberty or ability to earn a living were at risk.<sup>57</sup> Additionally, the fees paid to lawyers for uncontested divorces and bail hearings were reduced,<sup>58</sup> and eventually it began to take longer for OLAP to pay fees to lawyers for work already performed.<sup>59</sup> Many lawyers expressed concern over OLAP's inability to pay their accounts in a reasonably orderly manner, and some lawyers stopped accepting legal aid certificates, or refused to perform work in some cases.<sup>60</sup>

### D. OLAP's 1995 Service Cuts and Restrictions

OLAP's fiscal difficulties were not solved by the 1994 cuts. Ongoing budgetary difficulties forced OLAP to make further cutbacks in 1995. In family law, the 1995 service restrictions cut off assistance for uncontested divorces, and placed restrictions on changes to child support agreements. In drinking and driving cases, OLAP no longer covered cases for any criminal charge which would not result in jail upon conviction.<sup>61</sup>

Additionally, time restrictions were placed on the number of hours an attorney was permitted to work on some cases.<sup>62</sup> For example, OLAP instituted a five and one-half hour maximum for initial services in a variation of a financial support application, up to and including a settlement conference.<sup>63</sup> Also, OLAP instituted a maximum cap of ten hours on professional services per day in all cases, as well as an annual limit

---

56. *Id.* at 20.

57. *See* ACCESS TO JUSTICE, *supra* note 23, at 20.

58. *Id.*

59. *Id.*

60. *Id.* at 21.

61. *Id.* app. A.

62. *See* ACCESS TO JUSTICE, *supra* note 23, at 22.

63. *Id.*

on the amount of money a lawyer could earn from performing legal aid work.<sup>64</sup>

Left with few other options, in April 1996, OLAP introduced a prioritization system in all areas of legal services that set limits on the Plan to help preserve its financial stability.<sup>65</sup> Although OLAP did not explicitly rule out handling cases that it deemed to be non-urgent, it stated that in family law, for example, only those cases regarded as most serious were given first priority.<sup>66</sup> Generally, however, coverage was limited only to first priority matters.<sup>67</sup> Also, criminal law coverage was limited to those cases in which the defendant's liberty was at issue.<sup>68</sup> Additionally, the cuts affected family law cases. The reason, OLAP officials asserted, was mostly due to the higher cost per average of family law cases, as opposed to criminal cases for example, because family law cases generally are more complicated.<sup>69</sup>

#### *E. Effects of the OLAP Service Cuts and Restrictions*

In response to the service restrictions, the number of certificates issued since the restrictions came into force dramatically fell. From 1992 to 1993, OLAP issued 61,704 certificates in family law cases.<sup>70</sup> In 1996, there were only 40,575 certificates issued for family law cases.<sup>71</sup> Similarly, from 1992 to

---

64. *Id.* See also LAW SOCIETY OF UPPER CANADA, LEGAL AID BULLETIN (May 1996) (on file with author) (explaining the amount of "caps" on the fees which can be paid to lawyers working on Legal Aid certificates. The least experienced lawyers are capped at \$150,000 per year, and the most experienced lawyers are capped at \$187,500 per year). See *id.*

65. See LAW SOCIETY OF UPPER CANADA, LEGAL AID BULLETIN (Apr. 1996) (on file with author) (explaining that "first priority" matters in the family law context include those cases in which the child may be removed from the home by a governmental authority, where the safety of the child or an established parent/child bond is at risk, or where there is sexual abuse).

66. *Id.*

67. *Id.*

68. See LEGAL AID PLAN ANNUAL REPORT, *supra* note 21, at 14; ACCESS TO JUSTICE, *supra* note 23, at 51. As of 1996, the "governing principle" in the decision of whether to grant a certificate for a criminal matter was the likelihood of incarceration. The potential for loss of earning power upon a possible conviction was not taken into account. See Lawson, *supra* note 51, at 256.

69. See Okey Chigbo, *Women and Children Last; Availability of Legal Aid in Canada*, CHATELAINE, Dec. 1997, at 76-77.

70. See ACCESS TO JUSTICE, *supra* note 23, at 46.

71. See LEGAL AID PLAN ANNUAL REPORT, *supra* note 21, at 6.

1993, OLAP issued 115,579 certificates in criminal cases.<sup>72</sup> By 1996, that number fell to just 71,747.<sup>73</sup>

The effects of the 1994 and 1995 service cuts have been documented extensively in the mainstream press, as well as by OLAP itself.<sup>74</sup> First, OLAP reported that there was a substantial decline in the numbers of certificates issued to clients.<sup>75</sup> In fact, LSUC statistics document that the 80,000 certificates budgeted for 1996 and 1998 were a decrease of 41% from the 1995 to 1996 fiscal year total of 135,182, and a 65% decline from the 231,383 issued in the 1992 to 1993 fiscal year.<sup>76</sup> According to the 1994 agreement, an average of 155,000 certificates were projected to be available until 1999.<sup>77</sup> However, higher costs per case (average cost per case in 1992 to 1993 was \$1137; in 1996 to 1997, that rose to \$1644)<sup>78</sup> have caused much tighter restrictions on certificates than planned. This restriction on issuance of certificates has imposed hardship on potential clients, particularly in the family law area, which suffered a 75% cut in certificates issued since 1992 to 1993.<sup>79</sup>

A second effect of the restrictions was that many people appeared in court without any legal representation. News reports stated that on some days up to 90% of defendants facing criminal charges appeared in court unrepresented.<sup>80</sup> In the criminal context, large numbers of unrepresented people may result in an increase in guilty pleas, longer sentences, and longer, more inefficient trials which further tax the already over-burdened court system.<sup>81</sup> The LSUC reports that in some courts, approximately 80% of the litigants did not have law-

---

72. See ACCESS TO JUSTICE, *supra* note 23, at 51.

73. See LEGAL AID PLAN ANNUAL REPORT, *supra* note 21, at 6.

74. See, e.g., Dave Rogers, *Legal Aid Requests Drop Drastically in Ottawa-Carleton: New Eligibility Rules, Lawyers' Boycott Affect Applications*, OTTAWA CITIZEN, May 22, 1996, at C3; Trish Tervit, *Lawyers Bench Legal Aid; Poor and Facing Impaired Charge? You're on Your Own*, TORONTO SUN, Mar. 12, 1996, at A4; Tracy Nesdoly, *Legal Aid Tottering; Services Cut, Fees Set*, TORONTO SUN, Dec. 26, 1995, at A7.

75. See ACCESS TO JUSTICE, *supra* note 23, at 42.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. See *Legal Aid: Panel Told Poor Not Getting Help*, WINDSOR STAR, May 1, 1997, at A4.

81. See ACCESS TO JUSTICE, *supra* note 23, at 43; Lawson, *supra* note 51, at 258.

yers.<sup>82</sup> With restricted access to certificates for representation, individuals attempted to rely on the in-court Duty Counsel.<sup>83</sup> In 1996, Duty Counsel assisted almost 500,000 people, an increase of 126% since 1988.<sup>84</sup>

In the face of the restrictions, Ontario's Chief Justice was quoted as saying that the number of unrepresented people appearing in trial courts was a "major concern," as were questions about the type and quality of justice dispensed.<sup>85</sup> Also, the LSUC asserted that some unrepresented people signed settlement agreements to resolve disputes on the spot. Often, however, those same people quickly found themselves back in court when their agreements fell apart.<sup>86</sup> News reports quoted judges and lawyers claiming that the family court system had "broken down" and was in "chaos."<sup>87</sup> The Geneva-based Centre for the Independence of Judges and Lawyers, an international agency monitoring human rights abuses, said that changes to the OLAP system are "a cause for concern," as higher numbers of people representing themselves may mean "reliance on judges to protect their interests, thereby threatening the independence of the judiciary."<sup>88</sup>

Additionally, many clients reported having difficulty finding a lawyer willing to take on their case, given the concern over prompt payment.<sup>89</sup> Because of billing restrictions, many lawyers who performed legal aid work in the past refused to take cases because they feared inability to cover the costs of working on the case.<sup>90</sup> In the family law context, parents with

82. See ACCESS TO JUSTICE, *supra* note 23, at 43.

83. The difficulties of relying on Duty Counsel for comprehensive services are discussed *supra* Part II(A).

84. See *The Ontario Legal Aid Plan*, CAN. NEWSWIRE, Mar. 31, 1997, available in LEXIS, News Library, Curnws File.

85. See Corelli & Eisler, *supra* note 33, at 123. See also Chigbo, *supra* note 69, at 78 (stating that in instances of self-representation, "[a]nyone who goes into [self-representation] feeling that they will get their day in court will be left with a feeling of impotent rage.").

86. See ACCESS TO JUSTICE, *supra* note 23, at 43.

87. See Ian Harvey, *Jammed Family Courts Near Collapse*, TORONTO SUN, Mar. 4, 1997, at A24. See also Tracy Nesdoly, *Cuts Crippling Legal Aid; 'Preserve of the Rich' Chief Justice Warns*, TORONTO SUN, Nov. 24, 1996, at A7 (reporting comments of Ontario's Chief Justice Roy McMurtry).

88. See Tracey Tyler, *World Agency Alarmed Over Legal Aid Cuts, Restricted Coverage 'Cause for Concern'*, TORONTO STAR, May 6, 1996, at A8.

89. See ACCESS TO JUSTICE, *supra* note 23, at 43.

90. See Moira MacDonald, *Lawyers Shut Door on Legal Aid Clients; Protest*

complex child custody and separation issues reported trouble finding a lawyer.<sup>91</sup>

As the LSUC pointed out, hourly restrictions on how much work a lawyer may perform on a given case adversely affected lawyers' quality of service. For example, initially in family law cases, the maximum number of hours that could be spent on any given case was fifteen, eventually dropping to six and one-half hours.<sup>92</sup> Not surprisingly, many lawyers maintained that it was nearly impossible to do careful, comprehensive work in such a limited time span.<sup>93</sup> In immigration law, which may involve complex international law principles and issues, some lawyers were forbidden from spending more than sixteen hours preparing a case.<sup>94</sup>

As word of the cutbacks spread, the LSUC suggested that some potential clients may not have even bothered to apply for aid, out of a mistaken belief that legal aid no longer existed, or that their case would not qualify for help. From 1992 to 1993, there were 257,346 applications for certificates and 14% were refused;<sup>95</sup> from 1995 to 1996 there were 171,741 applications, with 25% refused.<sup>96</sup> The LSUC predicted that from 1996 to 1997, there would be 98,159 applications, with 29% refused.<sup>97</sup>

Although some people who were deemed ineligible for legal aid initially were able to afford to retain a private attorney, many found themselves unable to continue paying as their cases stretched out over time. The LSUC asserted that this results in clients giving up their cases, or private lawyers having to work without payment.<sup>98</sup> The grave situation in Ontario was pointedly summed up by the LSUC when it stated:

The funding squeeze on [OLAP] has fundamentally undermined its ability to fulfill the access to justice mandate . . . .  
[T]he service cuts necessary to bring [OLAP] within the [bud-

---

*Against Cutbacks*, TORONTO SUN, Apr. 2, 1996, at A8; Mark Bourrie, *Lawyers Take Action To Clog Up The Courts*, TORONTO STAR, Apr. 2, 1996, at A3.

91. See ACCESS TO JUSTICE, *supra* note 23, at 43.

92. *Id.*

93. See Michele Landsberg, *Accused Criminals Will Get Legal Aid, Most Women Won't*, TORONTO SUN, Apr. 20, 1996, at K1.

94. See ACCESS TO JUSTICE, *supra* note 23, at 43.

95. *Id.* at 44.

96. *Id.*

97. *Id.*

98. *Id.*

get agreement] have left virtually no service in important areas, and inadequate service in others. It is becoming accepted by policy-makers, and even by judges . . . that the 'self-representation' of large numbers of people in the justice system is a reality.<sup>99</sup>

### III. CHALLENGES TO THE ONTARIO CUTBACKS AND RESTRICTIONS

#### A. *The Ontario Courts*

The provincial and appeals courts of Ontario have recognized a limited right to counsel at trial in certain circumstances.<sup>100</sup> The issue has not yet reached the Supreme Court of Canada. When it does, however, the reasoning offered by the lower courts provides a compelling basis for the Court to articulate such a right. Although the right to counsel is found in sections 7 and 11(b) of the Charter, it is not unlimited. Certain criteria must exist, according to the Ontario courts, including the inability of the defendant to retain private counsel. Also, the defendant must be facing charges of such a degree of complexity that to force the defendant to trial without the benefit of counsel would deprive the defendant of a fair trial.<sup>101</sup>

The landmark case of *Rowbotham v. Regina*,<sup>102</sup> decided in the Ontario Court of Appeals, furnishes a credible legal framework for those who would challenge the legal aid restrictions as violative of the Charter. *Rowbotham* involved a defendant who was charged as part of a drug trafficking conspiracy.

99. *Id.* at 29.

100. This Note focuses on the right to counsel in criminal trials. However, the strain on family law cases due to the cuts should not be overlooked. Cuts to family law cases disproportionately affect poor women involved in child custody or child support cases. See generally Chigbo, *supra* note 69, at 77; Landsberg, *supra* note 93, at K1. As one commentator generally noted, "[w]hat are the unstated values of a society which regards the consequences of possible imprisonment for an accused charged with a property offence as more significant than the loss of custody of one's children in protection proceedings?" Mary Jane Mossman, *Gender Equality, Family Law and Access to Justice*, 8 INT'L J.L. & FAM. 357, 366 (1994). For an example of a Charter-based right to counsel case in Ontario's General Court, Provincial Division, see *Fowler v. Fowler* [1997] D.L.R.4th 569 (denying state-funded legal aid in family law proceeding classified as a non-priority under Ontario's legal aid program).

101. *Id.*

102. *Rowbotham v. Regina* [1988] O.A.C. 321; [1988] C.C.C.3d 1 (Ont. C.A.).

She was denied legal aid, and the trial judge refused to stay the proceedings.<sup>103</sup> Examining the Charter-based claim, the Court of Appeals stated that, although the Charter does not in explicit terms constitutionalize the right of an indigent defendant to be provided with funded counsel, in cases where a defendant does not qualify for provincial legal aid, sections 7 and 11(d) of the Charter require funded counsel to be provided if representation is essential to a "fair trial."<sup>104</sup> The court stated the right in no uncertain terms: "[W]here the trial judge finds that representation of the accused is essential to a fair trial, the accused . . . has a constitutional right to be provided with counsel at the expense of the state if he or she lacks the means to employ one."<sup>105</sup> If the defendant is entitled to state-funded counsel, the court continued, the trial judge has the discretion to call the court proceedings to a halt until the necessary funding for counsel is provided.<sup>106</sup>

In its analysis of the right to counsel, the *Rowbotham* court conducted an examination into the legislative history of the Charter.<sup>107</sup> The court maintained that the framers of the Charter did not create the right of indigent defendants to be provided with counsel, because it was believed that the various provincial legal aid systems would provide adequate coverage for people charged with serious crimes who lacked the means to employ counsel.<sup>108</sup> The court stated:

The right to retain counsel, constitutionally secured by s. 10(b) of the Charter, and the right to have counsel provided at the expense of the state are not the same thing . . . In our opinion, those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, *in cases not falling within provincial legal aid plans*, ss. 7 and 11(d) of the Charter . . . require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and repre-

---

103. See *Rowbotham*, [1988] C.C.C.3d, at 58-61.

104. *Id.* at 66.

105. *Id.* at 70.

106. *Id.*

107. *Id.* at 66.

108. See *Rowbotham*, [1988] C.C.C.3d, at 66.

sentation of the accused by counsel is essential to a fair trial.<sup>109</sup>

This analysis becomes particularly important in the context of the legal aid service cuts. If OLAP is in fact no longer adequate to provide legal assistance at trial for large groups of indigent defendants and the right to a fair trial is jeopardized, a *Rowbotham*-based analysis mandates that the trial cannot proceed until the necessary funding for counsel is provided.

A year after *Rowbotham*, the Ontario Court of Appeals expanded on the issue of a Charter-based right to counsel in *R. v. McGibbon*.<sup>110</sup> In *McGibbon*, the court affirmed the right, but also qualified it, finding that the right may be waivable by the defendant.<sup>111</sup> The court found that, although the accused had been represented by counsel during some pre-trial proceedings, there was nothing in the record to indicate that the defendant wished to have counsel at trial, or that he was denied the right to legal representation.<sup>112</sup>

Later cases in the lower provincial Ontario courts followed *Rowbotham* and *McGibbon*. The lower courts often grappled with evaluating factual circumstances in order to determine what constitutes serious and complex charges.

In *Queen v. Hill*,<sup>113</sup> the Ontario Provincial Court examined the issue of serious and complex charges in the context of a drinking and driving case. The defendant Hill was charged with driving while intoxicated.<sup>114</sup> Hill was on welfare,<sup>115</sup> and twice attempted to obtain a legal aid certificate from OLAP, but was refused because, as a first offender he stood little chance of being incarcerated upon conviction.<sup>116</sup> At trial, Hill brought a motion to either stay the proceedings or order the Attorney General of Ontario to pay for funded counsel and the services of a toxicologist.<sup>117</sup> At the outset of the case, the

109. *Id.* at 65-66. (emphasis in original).

110. *R. v. McGibbon* [1988] O.A.C. 10; [1988] C.C.C.3d 334 (Ont. C.A.).

111. *Id.* at 346-47.

112. *Id.*

113. *Queen v. Hill* [1996] C.R.R.2d 344 (Ont. Prov. Div.).

114. *Id.* at 347. The formal charge was operating a motor vehicle while having consumed more than the legal limit of alcohol (known as "over 80").

115. Hill's 1995 income was slightly more than (Can.) \$5000, plus welfare benefits. *Id.*

116. The prosecution indicated that it would seek a monetary penalty from Hill upon conviction, rather than a jail sentence. *Id.*

117. The motion was brought on Hill's behalf by the Community and Legal Aid

court noted that the issue of state-funded counsel at trial had become "increasingly prevalent in the courts of our country."<sup>118</sup>

Hill argued that to force him to trial without counsel violated his section 7 guarantees. Although there may have been little chance that Hill would go to jail if he was convicted, he argued, that in itself did not mean the case was not serious.<sup>119</sup> If he was convicted, Hill would face a criminal record, which would hinder his efforts to find a job, and the monetary fine would be a "significant penalty" because of his financial circumstances.<sup>120</sup> In opposition, the prosecution argued that Hill would only have such a right in situations where the case is "lengthy and complex."<sup>121</sup> Further, the Crown argued that there was no prospect that Hill would be imprisoned, and therefore the charge was, by definition, not serious.<sup>122</sup>

Noting that there was a "paucity" of case law dealing with whether a stay should be issued where the accused is unlikely to serve jail time if found guilty, the court examined the existing case law and recognized two main factors that should appear in the analysis of a right to counsel:

- 1) Does the case appear to be complex in the sense of raising any question of law or fact as to which an accused is likely to be at a significant disadvantage if he is unrepresented by counsel?; and
- 2) Does the case appear to be one raising any question of fact or law to which without the benefit of counsel an accused is likely to find it difficult to marshal relevant evidence?<sup>123</sup>

The issue of whether or not Hill was likely to be incarcerated upon conviction was "significant" to the Charter analysis, but "not determinative" said the court.<sup>124</sup> Rather than stand

---

Services Programme, which is staffed by law students from Osgoode Hall Law School in Toronto. *Id.*

118. See *Hill*, [1996] C.R.R.2d, at 347.

119. *Id.* at 348.

120. *Id.*

121. *Id.*

122. *Id.*

123. See *Hill*, [1996] C.R.R.2d, at 349-50 (quoting *R. v. White* [1976] D.L.R.3d 275, 287 (Alta. T.D.)).

124. See *Hill*, [1996] C.R.R.2d, at 353. The court noted, "[a] trial may be unfair

as the sole factor in determining a possible Charter violation, the possibility of incarceration should be viewed as one factor that might tip the balance either way in the overall analysis, said the court.<sup>125</sup> Other factors in the right to counsel analysis should include the penalties, both financial and social, that might result from conviction.

The court observed that if Hill were found guilty, he would have a criminal record, which could affect his employment opportunities.<sup>126</sup> In addition, he would face a fine, which could be a significant burden on an indigent accused.<sup>127</sup> Additionally, the court considered whether the case raised a factual question that would place the defendant at a serious disadvantage<sup>128</sup> if left unrepresented by counsel, and whether the defendant would have difficulty gathering and understanding the evidence.<sup>129</sup>

Applying the foregoing principles to the case, the court found that the charge against Hill was "serious."<sup>130</sup> Further, it found that the charges were "complex" because it was unrealistic for Hill, a non-lawyer, to understand the technical testimony of the toxicologist.<sup>131</sup> Thus, the court granted Hill's motion on the basis that Hill would be deprived of a fair trial if counsel were denied.<sup>132</sup> Although it stayed the proceedings, the *Hill* court was careful to note that the floodgates had not opened for all indigent citizens:

It will be an unusual case where the absence of counsel will so fundamentally alter the trial process as to render it unfair. The facts of each case must be measured against the criteria enunciated . . . In some situations it may not initially be apparent at the outset of the trial whether the absence of counsel would render the trial unfair . . .<sup>133</sup>

---

even when incarceration is unlikely." *Id.*

125. *Id.*

126. *Id.* at 348.

127. *Id.*

128. *Id.* at 352.

129. *See Hill*, [1996] C.R.R.2d, at 352.

130. *Id.* at 352.

131. *Id.*

132. *Id.* at 354.

133. *Id.* at 353. In addition to the decisions in the Court of Appeals, various provincial Ontario courts have considered the issue post-*Rowbotham*. *See, e.g., R. v. Zylstra* [1996] O.R.3d 452 (Ont. Gen. Div.) (ordering a stay of proceedings against a defendant accused of sexual assault until either OLAP or the Attorney

*Rowbotham* and its progeny present a helpful course for a Charter-based challenge to the current legal aid restrictions. Where indigent citizens are unable to obtain assistance from legal aid, forcing them to proceed to trial without counsel or to represent themselves will, in many cases, be violative of the Charter according to the *Rowbotham* analysis. Although no court in Ontario (or anywhere in Canada) has ventured so far as to state that the right to counsel for indigent defendants is absolute, where the charges are serious and complex, and an unfair trial would result if counsel were not appointed, the Charter-based right to a stay of proceeding until funded counsel is appointed, articulated in *Rowbotham* and successive cases, is built on a strong foundation.<sup>134</sup>

### *B. The Canadian Supreme Court*

Although the Supreme Court of Canada has not yet considered the question of the right of an indigent defendant to be represented by counsel at the time of trial, the Court has ruled on the related issue of the section 10(b) to retain counsel at the time of arrest or detention, and to be informed by police of the right to do so. The Court's decision in these cases gives insight into its view of the role of state-funded legal aid and the right to counsel, and offers insight into how the Court may ultimately decide the related issue of state-funded counsel at trial.

---

General paid for counsel); *R. v. Greco* [1995] O.R.3d 430 (Ont. Gen. Div.) (ordering a stay of proceedings in a case involving cocaine trafficking charges until legal aid was provided).

134. Although this Note concerns only the availability of counsel in Ontario, several other provinces have considered this issue. See, e.g., *Panacui v. Legal Aid Society of Alberta* [1998] Alta. L.R.2d 342 (Alta. Q.B.) (finding a Charter-based right to government-funded counsel but declining to extend right to choice of legal aid lawyer); *Regina v. Rain* [1996] Alta. L.R.3d 119, (Alta. Q.B.) (finding that indigent defendant charged with drunk driving would be deprived of a fair trial if funded counsel were not appointed, and noting that an average layperson could not mount a competent defense to the drinking and driving charges or competently argue the Charter issues); *Regina v. Wilson* [1997] N.S.R.2d 206, (N.S.C.A.) (finding that before ordering a stay, trial judge must determine whether seriousness and complexity of charges rendered accused incapable of representing herself.); *Deutsch v. Law Society of Upper Canada Legal Aid Fund* [1985] C.R.3d 166 (Ont. Div. Ct.) (finding that where legal aid is denied to an accused facing trial in a serious and complex case and judge is satisfied that accused cannot receive a fair trial without counsel, there is a right to funded counsel under the Charter).

In *R. v. Prosper*,<sup>135</sup> *R. v. Matheson*,<sup>136</sup> *R. v. Bartle*,<sup>137</sup> *R. v. Pozniak*,<sup>138</sup> *R. v. Harper*,<sup>139</sup> and *R. v. Cobham*,<sup>140</sup> a group of cases handed down contemporaneously in September 1994, the Supreme Court of Canada considered the issue of a Charter-based right to free legal services at the time of arrest.<sup>141</sup> According to the judgments, such a Charter-based right does not exist. However, the Charter does require that those who are arrested be immediately given information about the availability of legal aid services in the area and an opportunity to contact them.<sup>142</sup> In such a case, the police must "hold off" until the accused has a reasonable opportunity to contact counsel.

It is important to note that in this group of judgments, the Supreme Court did not consider the issue of whether the Charter grants a right to state-funded counsel at trial. However, these cases, considered together with the principles articulated in *Rowbotham*, suggest that while the right to free counsel is not triggered automatically at arrest, it will have force if the accused is charged with serious and complex charges that must be defended at trial.

*Prosper* dealt with the issue of a right to immediate state-funded counsel upon arrest.<sup>143</sup> The defendant was arrested

---

135. *R. v. Prosper*, [1994] S.C.R. 236.

136. *R. v. Matheson*, [1994] S.C.R. 328.

137. *R. v. Bartle*, [1994] S.C.R. 173.

138. *R. v. Pozniak*, [1994] S.C.R. 310.

139. *R. v. Harper*, [1994] S.C.R. 343.

140. *R. v. Cobham*, [1994] S.C.R. 360.

141. The charges in each of the cases were as follows: Harper was charged with assault and was advised of his right to consult with legal aid. Before speaking with a lawyer, Harper made an inculpatory statement. See *Harper*, [1994] S.C.R., at 348. Bartle was charged with driving while intoxicated. The arresting officer notified him that he had the right to call a lawyer, but failed to notify him about the availability of Duty Counsel. Before talking with counsel, Bartle made an incriminating statement. See *Bartle*, [1994] S.C.R., at 173. Prosper and Pozniak were each charged with driving while intoxicated. Each were advised of the right to consult an attorney. Neither of the defendants did so before submitting to a breathalyzer, which each failed. Both sought to have the evidence against them excluded on the basis that the state had a section 10(b) obligation to provide them with free, immediate legal advice upon arrest. See *Prosper*, [1994] S.C.R., at 236-37; *Pozniak*, [1994] S.C.R., at 311. Matheson and Cobham were arrested for driving while intoxicated, but refused to take a breathalyzer test. See *Matheson*, [1994] S.C.R. 328-29; *Cobham*, [1994] S.C.R., at 360.

142. For example, where Duty Counsel exists, a recently-arrested defendant has the right to be informed of that fact, and an opportunity to contact the Duty Counsel.

143. The cases all had similar factual circumstances, involving an arrest for

for car theft and driving while intoxicated.<sup>144</sup> On arrest, the officer informed the defendant that he had the right to apply for free legal aid.<sup>145</sup> The officer then informed Prosper that he wanted him to submit to a breathalyzer, and asked if he wanted to take the test, or first talk to a lawyer. The defendant indicated that he wanted to speak with a lawyer, and he was taken to the Halifax police station, where he was given a telephone list of local legal aid lawyers.<sup>146</sup> Because it was Saturday afternoon, all fifteen of the lawyers he called were unavailable outside of regular office hours. The defendant did not call lawyers in private practice, because he could not afford their services. He then agreed to take the breathalyzer test,<sup>147</sup> which he failed.

At issue in the Supreme Court was whether section 10(b) of the Charter imposed a positive constitutional obligation on governments to ensure that free and immediate preliminary legal advice is available upon arrest or detention.<sup>148</sup> The Court found that section 10(b) of the Charter does not impose such a right. However, in jurisdictions where Duty Counsel service does exist but is unavailable at the precise time of detention, the Court found that section 10(b) imposes an obligation on state authorities to "hold off" from eliciting evidence from a detainee, provided that the detainee asserts his or her right to counsel and is reasonably diligent in exercising it.<sup>149</sup> Importantly, the Court made clear, however, that it was not considering the issue of the right to state-funded counsel at trial.<sup>150</sup>

---

drinking and driving. While the holdings varied from each case, the common element of right to counsel was treated most extensively in *Prosper*.

144. See *Prosper*, [1994] S.C.R., at 248-49.

145. The arresting officer read from a card: "you have the right to retain and instruct counsel without delay. You may call any lawyer you wish. You have the right to apply for legal assistance without charge through the Provincial Legal Aid Program." *Id.*

146. *Id.* at 248-49.

147. *Id.* at 249.

148. *Id.* at 256.

149. See *Prosper*, [1994] S.C.R., at 269.

150. *Id.* at 266 (stating "[t]o be absolutely clear, the issue of whether the Charter guarantees a right to state-funded counsel *at trial* and *on appeal* did not arise here.") (emphasis in original). The Court added, "[t]he right to retain and instruct counsel and to be informed of that right . . . is simply not the same thing as a universal right to free, 24-hour preliminary legal advice." *Id.*

The Court noted that although free legal advice for all citizens upon arrest might be beneficial or desirable, it was not constitutionally mandated.<sup>151</sup> However, towards the end of its opinion, the Court stated, "It must also be noted that, although there is no constitutional obligation on governments to provide duty counsel services, the non-existence or unavailability of such services could, in some circumstances which I need not speculate on, give rise to issues of fair trial."<sup>152</sup>

In reaching its conclusion, the Court examined the framers' intent when creating the Charter.<sup>153</sup> The Court observed, "the fact that such an obligation would almost certainly interfere with government's allocation of limited resources by requiring them to expend public funds on the provision of a service is . . . a further consideration which weighs against his interpretation."<sup>154</sup>

#### IV. CONCLUSION

The importance of legal services available to indigent citizens in a democratic society has long been recognized.<sup>155</sup> For many years, legal help for the needy has helped Canada to advance the democratic ideals of fairness and equality before the law that are represented through the guarantees in the Charter. It is through providing comprehensive legal assistance to the needy that Canada will continue to work toward the ideal of equality of justice. When that access is taken away, or restricted so severely as to be meaningless, then the entire Canadian society is the poorer for it.

Certainly, there is room for debate about the form or type of legal service that should be available to the indigent. Also, in an age of diminished public resources and increasing budgetary pressures, it is clear that some legal services may have to be restricted. But when the restrictions encompass a fundamental shift in service delivery, and preclude assistance in entire categories of cases, as in Ontario, the courts are in a unique position to preserve access to justice by even the poorest citizens. The legal community is in a unique position to

---

151. *Id.* at 267.

152. *Id.* at 274.

153. *Id.* at 267.

154. *See Prosper* [1994] S.C.R., at 267.

155. *See KESSLER, supra* note 1; *BROWNELL, supra* note 1.

respond to the crisis if others will not. Indeed, with these ideals in mind, one official of OLAP recently observed, with concern, "[t]he idea of having two justice systems—a law for the rich and a law for the poor—is something that society is prepared to accept. What's more disturbing in some ways is that the legal profession is prepared to accept it."<sup>156</sup>

A Charter-based *Rowbotham* approach is the best method of preserving access to Canada's justice system for poor citizens. When the Canadian Supreme Court does take up the issue, *Rowbotham* offers a reasonable interpretation of sections 7, 10(b) and 11(d) of the Charter, and provides an equitable solution for those Canadians who otherwise would be denied aid. The distinction between "[t]he right to retain counsel . . . and the right to have counsel provided at the expense of the state"<sup>157</sup> is clear, and cannot be disregarded. However, the possibility of a "fair trial"<sup>158</sup> for indigent citizens in cases involving complex factual and legal circumstances is dubious, at best, in the context of self-representation. *Rowbotham* and other cases that follow offer a promising avenue to those who would attempt to preserve access to the legal system by impoverished citizens. It is through this approach that the original Legal Aid mandate of assistance to the needy will be best preserved.

*Dorothy Nicole Giobbe*

---

156. See Corelli & Eisler, *supra* note 33, at 125-26 (quoting Robert Holden, provincial director of OLAP).

157. *Rowbotham*, 41 C.C.C.3d, at 65-66.

158. *Id.*

