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The Journey to Universal Legal Aid: Protecting the Criminally Accuseds' Charter Rights by Introducing a Public Defender System to Ontario

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The Journey to Universal Legal Aid: Protecting the Criminally Accused's Charter Rights by Introducing a Public Defender System to Ontario

Abstract
There is a significant gap between the demand for legal aid and Legal Aid Ontario (LAO)'s ability to fulfill that demand, meaning that there is a sizeable percentage of the population who, when facing criminal charges, neither qualify for legal aid nor can afford legal representation. This has the effect of denying the accused their Charter protected right to a fair trial and their ability to make full answer and defence, as studies show that a self-represented accused faces significant barriers at trial leading to negative outcomes. The few mechanisms available to help assist a self-represented accused with their charges do not go far enough to remedy these situations (twenty minutes with Duty Counsel or assistance from a Trial Judge), absorb too many resources (Rowbotham applications), or are too situational (Fisher/Peterman orders). As a whole, LAO's unsustainability results from two major problems: demand fluctuates year-to-year, which causes a constant shift in resource requirements, and certificates place limits on billable hours, restricting the quality of service. While inflation rises each year and the population increases, freezes have been made on resources. In other words, while demand for legal aid has increased, LAO's income thresholds have remained largely stagnant. Each of these two problems could be alleviated by introducing salaried Public Defenders. The system would exist by LAO redistributing the majority of its existing criminal funding into an organized body of staff-lawyers, whose sole job would be to carry files defending the criminally accused. On the whole, while LAO should be able to transition to a Public Defender system through its existing funding, creative fundraising endeavors, such as the legalization of marijuana and the Criminal Code's seized funds provisions could help ease the transition.

Keywords
legal aid, policy reform, ontario, public defender, criminal law, charter

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THE JOURNEY TO UNIVERSAL LEGAL AID: INTRODUCING A PUBLIC DEFENDER SYSTEM IN ONTARIO TO PROTECT THE CHARTER RIGHTS OF THE CRIMINALLY ACCUSED

BENJAMIN D. SCHNELL

Introduction

"A man from the countryside comes up to the door and asks for entry. But the doorkeeper says he can’t let him in to the law right now. The man thinks about this, and then he asks if he’ll be able to go in later on. ‘That’s possible,’ says the doorkeeper, ‘but not now’...the man from the country had not expected difficulties like this, the law was supposed to be accessible for anyone at any time."¹

Pleasantville, an entirely hypothetical city, has recently increased funding for their police services and now has a police officer on every street corner. As a result of these changes, Pleasantville sees a significant reduction in the number of murders occurring within its city limits. In an attempt to eradicate murder entirely, Pleasantville expands its police services even further, deploying police officers to stand in front of every home and installing sophisticated monitoring systems within each of those homes. One year later, there hasn’t been a single murder in Pleasantville; however, many citizens of Pleasantville have died from common ailments, injuries, and fires because there were no hospitals or doctors to treat them. Expanding police services in this manner comes at a cost, and most societies elect to allocate their resources more evenly among essential services.

All societies must grapple with resource allocation, and this dilemma extends to the right to legal representation, particularly in the context of criminal law. The decision about how to divert resources to provide legal representation can be more difficult than the illustration above, since preventing crime is likely to be considered a greater concern to the general public than providing legal services to individuals accused of crime. The willingness of the public and the government to provide funds for legal representation depends on various factors, including how much public money is available, what else that money could be allocated to, how complex the legal system is, and what the stakes are for a given accused person.

The current legal aid scheme in Ontario is insufficient for meeting society’s needs; the eligibility requirements do not reflect current economic realities,² which

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² *R v Moodie*, 2016 ONSC 3469 at para 6 [*Moodie*].
means that there are many people who cannot afford to retain legal counsel yet remain ineligible for legal aid. The inability to retain counsel is particularly problematic in the criminal justice system, where incarceration is a possible outcome, as Canadians not only hold liberty as a fundamental right but as core to the human experience. The legal system is complex, and criminally accused persons are particularly vulnerable to the consequences that can follow when one fails to navigate that complex system effectively. This risk is illustrated by the fact that self-represented accused persons face a higher rate of conviction than those represented by counsel. Ensuring that accused persons have the right to a fair trial and to make full answer defence under sections 7, 11(b) and 15 of the Canadian Charter of Rights and Freedoms (“Charter”) requires systemic increases in the availability of legal representation.

This paper seeks to answer the question of how the Ontario justice system can properly address the issues presented by the shortage of legal representation in criminal proceedings in light of limited resources. This paper will show that these concerns can be effectively addressed through the creation of a public defender system. A public defender system appears to be viable in Ontario without raising existing legal aid expenditures and should be adopted to provide legal representation to all criminal accused persons.

II. THE HISTORY OF LEGAL AID IN ONTARIO

In order to effectively argue that a public defender system would be superior to Legal Aid Ontario’s (“LAO”) current structure, it is necessary to understand how Ontario’s current legal aid system was created and evolved, and how a public defender system would operate differently. While legal aid regulators in Ontario have always been forced to prioritize the disposition of their limited resources, this problem has been exacerbated at an exponential rate since LAO’s creation. A change in structure, rather than merely an increase in funding, is necessary to ensure that the rights of citizens are protected.

In 1951, the Law Society of Upper Canada (“LSUC”) introduced the first example of legal aid in Ontario. Lawyers would volunteer their services, but only to

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3 R v Clay, 2003 SCC 75 (The Court described liberty as “touch[ing] the core of what it means to be an autonomous human being blessed with dignity and independence” at para 31) [Clay].
7 The Law Society Amendment Act, SO 1951, c 45.
clients that met certain criteria (for example, lack of a criminal record.) The system operated this way for over sixteen years, and resulted in 100,000 people gaining representation and many more receiving free legal advice. By the 1960s it became clear that the voluntary services could not keep up with demand, which was only expected to increase. The attitude towards legal aid also shifted, with the public generally believing that representation should be a societal right rather than a charitable mechanism. A joint committee recommended the establishment of a comprehensive province-wide legal aid program to be funded by the government.

In 1967 the Ontario Legal Aid Plan (“OLAP”) became operational and saw the issuance of legal aid certificates for applicants in any case where “there [was] a likelihood of imprisonment or loss of means of earning a livelihood.” The Department of Public Welfare received all applications, and factors such as “the income, disposable capital, indebtedness, requirements of persons dependent upon the applicant, and any other circumstances [the welfare officer] considers relevant” were considered in the decision to grant a certificate. Once a certificate was ordered, an accused could choose his or her lawyer from among those who were registered with OLAP and practiced within the area. Each registered lawyer continued to maintain a private practice. Duty counsel were assigned to every criminal court of first instance and were present in court to advise accused persons of their rights to plead guilty or not guilty, to apply for bail, or to ask for an adjournment. The 1967 plan was followed by a significant surge in the number of barristers specializing in criminal law, and approximately 70 per cent of all criminal cases in Ontario were handled through the OLAP.

Unfortunately, the 1967 plan had several issues that needed to be resolved, such as a complicated application procedure that caused delays in the court process. While

8 Larry Taman, "Legal Aid in Ontario: More of the Same?" (1976) 22 McGill LJ 369 at 370; Ontario Legislative Assembly, Report on the Joint Committee on Legal Aid, 27th Parl, 1st Sess (14 April 1965) at 10 (Donald Hugo Morrow) [Ontario Legislative Assembly].
9 Canada, Department of the Solicitor General, Report of the Canadian Committee on Corrections, by Roger Ouimet (Ottawa: The Queen’s Printer) at 156-159.
10 John D Honsberger, "The Ontario Legal Aid Plan" (1968) 15:3 McGill LJ 436 at 437 [Honsberger].
11 Ibid.
12 Ibid at 437; Ontario Legislative Assembly, supra note 8 at 97.
13 Ontario Legislative Assembly, supra note 8 at 97.
14 Authority to enact the OLAP was derived from the Legal Aid Act, 1966, Bill 130, 14-15, Eliz II, SO 1966, c 80, which was the forerunner to the Legal Aid Act, RSO 1970, c 239.
15 Honsberger, supra note 10 at 438.
16 Ibid at 439.
17 Ibid.
18 Frederick H Zemans, "Legal Aid and Legal Advice in Canada: An Overview of the Last Decade in Quebec, Saskatchewan and Ontario" (1978) 16:3 Osgoode LJ 663 at 684 [Zemans].
19 Honsberger, supra note 10 at 443.
the 1967 system had important implications, such as the introduction of duty counsel, OLAP was no longer viable given its shortcomings, and a 1973 task force recommended that the administration of legal aid be taken from the LSUC and given to a statutory non-profit corporation named Legal Aid Ontario. A large-scale overhaul was again necessary to increase access to justice.

As will be shown, the enactment of the Charter in 1982 led to the notional expansion of the right to legal aid; however, few changes to the legal aid regime in Ontario were actually implemented. In 1983, facing an economic recession, the Ontario government substantially eroded access to legal aid. Discussions in the 1990s were largely focused on controlling costs rather than meeting needs, and significant budget cuts were made, which served only the short-term financial interests of the provincial government. A 1997 report on the “legal aid crisis” again recommended authority be shifted from LSUC to a statutorily regulated form of governance and urged a return to the pre-1967 fixed-budget system. The same report recommended a staff lawyer model to reduce “the power of the private profession to dictate the terms of legal aid delivery through an organized withdrawal of service.” The creation of LAO in 1998 addressed many of these issues.

The Creation of Legal Aid Ontario

In response to the 1997 report, the government of Ontario enacted the Legal Aid Services Act, which established LAO as a non-profit statutory corporation. The Act and LAO continue to maintain authority over legal aid in Ontario today. LAO’s stated purpose is to “promote access to justice throughout Ontario for low income individuals by means of providing consistently high quality legal aid services in a cost-effective and efficient manner.” LAO provides funding and support for some civil cases as well as for criminal, family, and immigration cases, depending on a person’s annual income. Some 4,000 private lawyers contribute to LAO by accepting reduced rates and limits on billable hours for the legal services they provide to clients. The annual income

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21 Ibid at 39.
24 Ibid at 262.
26 Ibid at 151.
27 SO 1998, c 26 [Act].
28 Ibid, s 1.
29 Legal Aid Ontario, “About Legal Aid”, online: <www.legalaid.on.ca/en/about/default.asp>.
30 Ibid.
required in order to qualify is quite low, although a contribution program (in which clients make monthly payments) was created to slightly raise the allowable thresholds. The system also heavily relies on student legal aid services societies within law schools and is driven by a handful of lawyers, students, and paralegals, who all assist low-income clients facing less serious criminal charges.\footnote{Legal Aid Ontario, “Community Legal Clinics”, online: <www.legalaid.on.ca/en/contact/contact.asp?type=cl>.
}

Despite expansive review, overhaul, and improvements, LAO has also fallen victim to the same resource scarcity issues that plagued OLAP and its predecessors.

### III. The Legal Aid Gap

The history of the access to justice movement has been described as “an ongoing struggle to overcome the discrepancy between the claims of substantive justice and the formal legal system.”\footnote{Christine Parker, \textit{Just Lawyers: Regulation and Access to Justice} (Oxford: Oxford University Press, 1999) at 31.} Legal aid systems facilitate the access to justice movement and, as such, should strive to allow the legal system to be “equally accessible to all.”\footnote{Mauro Cappelletti \& Bryant Garth, “Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective” (1977-1978) 27 Buff L Rev 181 at 182.} LAO currently uses unreasonably low thresholds to determine what is considered ‘low income,’ hindering equal access to justice.

### A Lack of Funding

LAO now faces the same problems that required an overhaul of the OLAP in the 1990s. Michael Trebilcock’s 2008 legal aid review (“the Trebilcock Report”) suggests that legal aid in Ontario never fully recovered from the sizeable cuts imposed on it in the 1990s. The Trebilcock Report highlights that, as of 2008, financial eligibility criteria had not been adjusted since the reduction in the early 1990s.\footnote{Trebilcock Report, \textit{supra} note 6 at 72. By March 2017, the financial eligibility thresholds were actually lower than in 2008.\footnote{Legal Aid Ontario, “Financial Eligibility for Legal Aid Ontario Services: April 1 2016 to March 31, 2017” (1 April 2016), online: <www.legalaid.on.ca/en/publications/downloads/LAO-Financial-Eligibility-EN.pdf?t=1511483993341> [LAO Financial Eligibility].} The growth of funding in other jurisdictions further demonstrates that LAO’s funding provides cause for concern. In 1975, under the OLAP, per capita expenditure on legal aid in Ontario was $3.64,\footnote{Zemans, \textit{supra} note 18 at 664.} which exceeded that of both England and the United States by a wide margin. Ontario’s per capita expenditure rose to approximately $29.30 for the 2014/15 fiscal year,\footnote{Statistics Canada, “Estimates of Population, by Age Group and Sex for July 1, Canada, Provinces and Territories”, CANISM Table No 051-0001 (Ottawa: Statistics Canada, 26 September 2017), online: <www5.statcan.gc.ca/cansim/a26?lang=eng&id=510001>; Statistics Canada, Legal Aid Plan Revenues,}
In comparison, England’s expenditure on legal aid has risen to the equivalent of about $48.52 per capita in Canadian dollars, and roughly $24.26 of the expenditure is devoted to criminal matters. The United States has previously struggled with similar budgetary cuts; however, the legal aid system of the United States now has some jurisdictions, such as Wisconsin, with robust public defender systems. The services LAO currently offers are inadequate when compared with the legal aid systems of England and the United States.

Three Factors Causing the Gap

LAO has not kept up with the growth of similar jurisdictions, nor is it able to meet the demand for its services. Ensuring that the legal system is equally accessible to all will require an internal operational restructuring. The unfortunate gap in LAO’s services has developed as a result of three major limiting factors: the services duty counsel can perform are extremely narrow, certificates are offered for only very serious and specific charges, and the annual income ceiling is unrealistically low.

The first and most significant major factor leading to the legal aid gap is the unrealistic income levels needed to qualify for LAO’s services. The annual income threshold for the 2017/18 fiscal year is set at $13,635 for a single house family and $33,726 for a five-member family. LAO’s contribution program raises these thresholds by 15-25 per cent in exchange for monthly repayments (a one-person household in 2017 earning $13,636 might qualify for a legal aid certificate only if the case is quite serious and only in exchange for $50 a month for the duration of the

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By Type of Revenue” CANISM Table No 258-0001 (Ottawa: Statistics Canada, 20 April 2014), online: <www5.statcan.gc.ca/cansim/a26?lang=eng&id=2580001>.


39 Currie, supra note 38.


41 Gideon v Wainwright, 372 US 335 (1963) [Gideon].

42 While there is undoubtedly much to improve with regards to the outcomes of justice within other jurisdictions (particularly in the United States), the legal aid systems within those jurisdictions nonetheless facilitate much more broad access to justice.

43 Legal Aid Ontario, “Criminal Law” online: <www.legalaid.on.ca/en/getting/type_criminal.asp> [LAO Criminal Law].

44 Ibid.

45 LAO Financial Eligibility, supra note 35.

46 Ibid.
representation).\textsuperscript{47} In a May 2016 Ontario Superior Court decision, Nordheimer J. 
disparaged LAO’s thresholds, explaining, “the income thresholds being used by Legal 
Aid Ontario do not bear any reasonable relationship to what constitutes poverty in this 
country.”\textsuperscript{48} The comments of Nordheimer J. hold true when examining the actual costs of 
living in Ontario.

The second factor leading to the gap are the barriers to entry which LAO places 
on its certificate system. LAO’s certificate system operates by providing certificates to 
accused persons, which cover the cost of a lawyer for a certain number of hours. The 
certificate system includes more expansive services than duty counsel, but “certificates 
are provided for only the most serious legal matters.”\textsuperscript{49} LAO defines a serious criminal 
matter as one where the accused is likely to “have to go to jail if found guilty and 
convicted”; the accused is between 12-18 years of age; the accused is already in jail 
awaiting bail; the accused is “a survivor of domestic violence without a criminal record 
who has been charged with assault against [their] abusive partner while defending 
[themselves]”; or, where the accused is aboriginal or has an ongoing refugee status 
claim.\textsuperscript{50} This definition identifies several factors that can complicate a matter and 
exacerbate the difficulty of defending a criminal charge; however, the result is that 
many individuals facing serious consequences are excluded from the certificate system.

The final factor leading to the legal aid gap is a result of the very narrow scope 
of services duty counsel lawyers are able to offer. LAO’s duty counsel program is the 
minimal amount of representation that can be provided to an accused—a step below the 
certificate system. An accused facing criminal charges only has the right to speak with a 
duty counsel lawyer for twenty minutes to receive summary advice and information.\textsuperscript{51} 
Regardless of the expertise of counsel, attempting to fully address the legal issues that 
arise on a criminal matter in twenty minutes would prove extremely difficult. Duty 
counsel lawyers are only available beyond this initial stage for accused persons with 
very low annual incomes,\textsuperscript{52} and only to conduct show cause hearings\textsuperscript{53} and assist in 
guilty pleas.\textsuperscript{54} Duty counsel lawyers do not provide representation at trial or participate 
in trial preparation conferences.\textsuperscript{55} The limited services provided by duty counsel do

\begin{footnotes}
\item[47] Legal Aid Ontario, “Contribution Agreements” online: <www.legalaid.on.ca/en/getting/eligibility.asp#contributionagreements>.
\item[48] Moodie, supra note 2 at para 6.
\item[49] LAO Criminal Law, supra note 43.
\item[50] Ibid.
\item[51] Ibid.
\item[52] Legal Aid Ontario, “Duty Counsel and Summary Legal Advice Services Eligibility” online: <www.legalaid.on.ca/en/getting/eligibility.asp#dutycounsel>.
\item[53] Show causes hearings are also called bail hearings, because the onus is on the Crown to show cause or reasons why the accused should not be released.
\item[54] Trebilcock Report, supra note 6 at 35.
\item[55] Ibid.
\end{footnotes}
little to address the shortage of legal representation in criminal matters.

**How Accessible is Legal Aid?**

In October 2016 the average monthly rent for a bachelor apartment in Windsor (the lowest rate among major cities in Ontario) was $544,\(^{56}\) and it was $955 in the Greater Toronto Area (the highest rate among major cities in Ontario).\(^{57}\) With reference to only the cost of food and shelter, the average one-person household in Windsor spends at least $11,471 annually—just under the maximum allowable income to qualify for LAO. Individuals who can afford to live in more expensive cities or who can afford to make expenditures beyond food and shelter, therefore, are unlikely to qualify under the LAO criteria. These realities would equally apply to larger households and could be more significant where criminal charges are laid against an individual who provides for multiple members of the household.

As has been shown, these three main factors significantly limit the number of people who can access LAO’s services.\(^{58}\) According to the results of *Canadian Lawyer Magazine*’s 2015 Legal Fees Survey, the average cost of representation in Ontario is $5,765 for a summary conviction offence and $8,333 for a one-day criminal trial.\(^{59}\) An accused person with an income slightly above the cut-off is unlikely to be able to retain counsel at such rates. Given that Ontario’s median annual income was $33,840 as of 2015,\(^{60}\) approximately one-quarter of the population in Ontario would be hard pressed to privately fund their defence. The legal aid gap creates several circumstances where an accused person facing criminal charges will be forced to self-represent.

**IV. PUBLIC DEFENDERS IN OTHER JURISDICTIONS**

The remainder of this paper explores persisting issues in structuring legal aid in Ontario to meet public demand as well as the potential for a public defender system to emerge for addressing this problem. One proposed solution is to eliminate the LAO

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\(^{57}\) Canada Mortgage and Housing Corporation, “Housing Market Information: Rental Market Report Greater Toronto Area” (2016) at 17.

\(^{58}\) For this purposes of this argument, $15,000 is being used as a liberal threshold to include those who choose to use the contribution program, and to easily identify the percentage of the population that meets this level of income.


\(^{60}\) Statistics Canada, “Characteristics of Individuals, Taxfilers and Dependents with Income by Total Income, Sex and Age Groups Annual (Number Unless Otherwise Noted)”, CANISM Table No 111-0008 (Ottawa: Statistics Canada, 12 July 2017), online: <www5.statcan.gc.ca/cansim/a26?lang=eng&id=1110008>.
thresholds and guarantee all citizens the right to legal representation through a public defender system. Given that public defender systems are able to operate within similar justice systems, this solution appears to be viable within Ontario.

Legal representation is guaranteed in the United States by the Sixth Amendment and is defined in the seminal decision of Gideon v Wainwright. The deployment of legal aid in the United States is managed at the state level, similar to the LAO. Some states utilize certificate programs while others have public defender programs, and many have both.

The American Bar Association has encouraged the creation of statewide systems of defence, and most states have implemented statewide systems today. The statewide systems generally follow one of two models: statewide public defender systems or state commission systems where a board provides overall direction for local programs. Most states with public defender systems have offices within each county and contract out to the private bar for rural areas, which is similar to LAO’s current model. Most of the states employing statewide public defender systems are mid-sized, and some states, such as Ohio and Georgia, have populations similar to Ontario.

In 2013, programs in twenty-eight states served approximately 104 million residents and closed an estimated 2.7 million criminal, appellate, civil, and juvenile cases. These offices spent more than one billion dollars (an average of about $9.40 per capita), which included the salaries and benefits of all part-time and full-time employees. A majority of states supplement their public funding through filing fees, cost recovery, and court costs, such as applying a mandatory fine with every conviction, similar to a victim surcharge.

While many jurisdictions with public defender programs have struggled with resource scarcity at some point, they are generally able to provide the level of service

61 US Const amend VI. 
62 Gideon, supra note 41 at 344. 
65 Spangenberg, supra note 63 at 37. 
66 Ibid at 37-38. 
67 Ibid at 37. 
70 Ibid at 8. 
71 Spangenberg, supra note 63 at 43. 
72 Ibid at 37.
to all accused persons that LAO duty counsel currently provides only to select individuals. While there are certainly limits on the quality of service a public defender system can provide, the level of service that can be provided by a public defender system far outweighs the ability of most accused persons to self-represent. Additionally, a recent comprehensive study of the United States justice system concluded that, within state courts, “assigned counsel generate significantly less favorable outcomes for indigent defendants than Public Defenders, results quantitatively in line with previous work on indigent defense at the federal level.” 73 These results indicate that a public defender system may be more suitable to defend an accused’s rights than the certificate program while more adequately addressing public demand. Of course, even if a public defender system is implemented in Ontario, certificates would likely be required in certain circumstances, such as in remote rural areas or where a conflict of interest arises. 74

V. THE TRICKLE-DOWN EFFECTS OF SELF-REPRESENTATION

LAO, in its current conception, does not provide meaningful and widespread access to justice. The disparity between funding and demand for legal aid creates a gap where a significant number of people do not qualify for legal aid but are unable afford private representation. This forces some people to self-represent in the criminal context, which causes significant problems within the justice system.

There are some circumstances in which an accused might choose to be self-represented; however, the primary explanation for self-representation stems from the legal aid gap. 75 In describing the concerns surrounding self-representation in general, Madam Justice Fuerst outlined some of the numerous problems a self-represented accused faces in court:

The self-represented accused is usually ill-equipped to conduct a criminal trial. He or she comes to court with a rudimentary understanding of the trial process, often influenced by misleading depictions from television shows and the movies. His or her knowledge of substantive legal principles is limited to that derived from reading an annotated Criminal Code. He or she is unaware of procedural and evidentiary rules. Even once made aware of the rules, he or she is reluctant to comply with them, or has difficulty doing so. The limitations imposed by the concept of relevance are not understood or are ignored, and the

74 Spangenberg, supra note 63 at 36.
focus of the trial is often on tangential matters. Questions, whether in examination-in-chief or cross-examination, are not framed properly. Rambling, disjointed or convoluted questions are the norm.76

The concerns outlined by Madam Justice Fuerst are realities that, to some degree, can affect even experienced defence counsel; however, these issues are exponentially aggravated among self-represented accused persons due to their lack of experience with the legal system as well as other socio-economic factors. Economically disadvantaged persons accused of criminal offences are among the more marginalized and vulnerable members of the population and, as such, often experience other issues including low literacy, low education, mental health issues, and addictions.77 These issues often contribute to an individual’s involvement with criminal charges78 and certainly prevent these litigants from effectively advocating for themselves.79

The Department of Justice’s court site study of unrepresented accused adults in the provincial criminal courts80 cautioned against drawing a causal connection between type of representation and conviction rates; however, the report was adamant in stating “that many unrepresented accused will experience serious negative impacts as a result of the court process.”81 Self-representation often leads to a significant negative impact on the accused, including a lower likelihood of bail, or of having charges reduced, as well as an increased likelihood of conviction. In a case study in the district of Scarborough, Ontario, it was found that where accused were unrepresented or under-represented, Charter arguments were not raised because matters were pled out or not properly tried,82 meaning that “the ‘audit function’ that trials serve in relation to police conduct was diminished.”83 Similar effects of self-representation were seen in other cities across the country.84 Bearing in mind that no two cases are the same, accused persons facing charges of common assault were most likely to receive a jail term if self-
represented (fifty per cent of the time, versus twenty-one per cent with duty counsel). 85

The overall impact is that self-represented accused’s are not properly afforded the right to defend themselves.

Guaranteed legal representation would also have the effect of improving court usage and efficiency, since self-represented accused persons often exacerbate these already existing issues. More court time and more Crown resources are required when accused persons are self-represented. 86 These delays require the increased use of police officers and social workers, 87 and they add stresses and complexities to the work of court officers. 88

Ensuring proper representation is also necessary to protect the integrity of the legal process as a whole. Self-representation disrupts the courts with constant motions and verbal abuse, which cause “chaos in the courts which could be held to ransom by any accused person who takes it upon himself to disrupt the course of justice.” 89 Self-representation also gives rise to safety concerns in the court due to conduct that includes shouting at and threatening spectators in the gallery. 90 Such situations may be prevented if the accused persons have representation.

Finally, and more broadly, the entire legal system is premised on the assumption and principle that the Crown and defence are equally matched. 91 If an accused is forced to self-represent and cannot navigate the complexity of the legal system, this results in an imbalance that has negative consequences for all involved.

VI. THE CHARTER RIGHT TO REPRESENTATION

LAO denies access to justice for many people due to limited funding and its internal structure, which involves a certificate system, and unrealistically low economic

85 Ibid at 204.
87 Department of Justice, Maximizing the Federal Investment in Criminal Legal Aid, Prairie Research Associates (Ottawa: Department of Justice, 2014) at 5; Matthews, supra note 77.
89 R v Pawliw, [1985] BCJ No 2987 (the Court found that continuing to allow a self-represented accused to interrupt proceedings with his misconduct would lead to “chaos in the courts which could be held to ransom by any accused person who takes it upon himself to disrupt the course of justice” at para 19); LeSage, supra note 75 at 160-162.
90 R v Sharp, 2002 YKSC 68 (the Court found that accused, who shouted at and threatened spectators in the gallery, would pose a safety risk if allowed to conduct his own trial at paras 5-7, 13-15, 19); LeSage, supra note 75.
thresholds. In the following section, I will consider constitutional arguments in support of the conclusion that all individuals charged with criminal offences should be entitled to legal representation.

Whether or not the state should be required to provide counsel to persons who cannot afford representation has been an ongoing debate since the introduction of the *Canadian Bill of Rights*, which provided that “no law of Canada shall be construed or applied so as to ... deprive a person who has been arrested or detained ... of the right to retain and instruct counsel without delay.”\(^{92}\) The debate around the state’s obligation to provide counsel is affected by the issue of whether the right to counsel is a positive right, such that counsel should be provided in all instances, or a negative right, such that counsel should merely be privately available. Martland J. of the Supreme Court of Canada (“SCC”) viewed it as a negative right, finding that section 2 did not create new rights;\(^{93}\) however, much has changed since the *Bill of Rights* was the supreme legislation in Canada, and the affirmative wording of s. 10(b) of the *Charter* could be consistent with a positive right.\(^{94}\) The following section will examine the right to legal representation and the extent to which the judiciary has recognized this right under sections 7, 11(d) and 15 of the *Charter*.

**The Right to a Fair Trial**

The question of whether an accused is guaranteed the right to legal representation has been framed through the section 11(d) *Charter* right “to be presumed innocent until proven guilty according to law in a fair and public hearing.”\(^{95}\) The concept of fairness has been argued to include legal representation. The complexity of the legal system makes it more difficult to navigate without a lawyer. Some scholars view the role of lawyers as neutral conduits,\(^{96}\) where lawyers hold an institutional role designed solely to remedy the system’s complexity, acting as facilitators of an accused’s desires. These discussions again address the concerns raised by Madam Justice Fuerst and the trickle-down effects of lack of representation.\(^{97}\) While the complexity of the legal system is not restricted only to criminal law, the effects of a lack of representation are significantly more egregious when an accused is facing the prospect of criminal sanctions, including, most significantly, the deprivation of his or her freedom.

As will be discussed when examining existing attempts at reconciliation, the right to a fair trial may require a Rowbotham application or a Fisher/Peterman order, or

\(^{92}\) SC 1960, c 44, s 2.
\(^{93}\) *R v Burnshine*, [1975] 1 SCR 693 at 705.
\(^{94}\) Peter W Hogg, *Canada Act, 1982 Annotated* (Toronto: Carswell, 1982) at 35.
\(^{95}\) Charter, supra note 5, s 11(d).
\(^{97}\) Full commentary can be found at 14.
at least assistance from a judge. Beyond these mechanisms, the philosophical question of whether representation ought to be required to allow a fair hearing has been examined by the judiciary. In 1974, the British Columbia Court of Appeal in Re Ewing and Kearney and the Queen upheld the trial judge’s dismissal of the motion to prohibit the trial of the two eighteen-year-olds who could not obtain counsel under legal aid because incarceration was not anticipated. This approach was consistent with that of assigning legal aid in both British Columbia and the United States. However, while legal aid was denied in Ewing, in his dissent, Farris C.J. found that if “(1) an accused person is entitled to a fair trial, (2) he cannot be assured of a fair trial without the assistance of counsel ... [then] the State has an obligation to provide one.” Significantly, this decision is pre-Charter. Determining the representation requirements for a fair trial in the age of the Charter must be done with regard to sections 7 and 15 of the Charter.

**The Right to Make Full Answer and Defence**

While the enactment of the Charter did little to explicitly extend an accused’s right to legal representation, section 7 guarantees the right to “liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” This right has often been interpreted to include the right of an accused to make full answer and defence and a right to procedural due process as a form of fundamental justice.

The case of Duke v The Queen dealt with an accused charged with impaired driving in a pre-Charter era and introduced the section 7 concept of the principles of fundamental justice: the court “must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.” Duke gives us an excellent definitional starting point for how legal representation fits within the principles of fundamental justice.

A few years later, in the post-Charter decision of R v Potma, the Ontario Court of Appeal addressed the definition of the principles of fundamental justice within a post-Charter context, stating, “an accused precluded from making full answer and defence is denied a fair hearing.” The Court went on to state that the definition within

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98 See Part VII, below, for further discussion of the mechanisms used by the courts to ensure a fair trial.
99 (1974), 49 DLR (3d) 619 (BCCA) [Ewing].
100 Powell v Alabama 287 US 45 (1932), cited in Gideon, supra note 41 (the importance of counsel was highlighted through an exploration of the difficulties faced by “even the intelligent and educated layman”, and the risk of improper convictions in such situations at 345).
101 Ewing, supra note 99 at 623.
102 Charter, supra note 5, s 7.
103 [1972] SCR 917 at 923.
"Duke is still operational, but the “standards of fairness essential to the attainment of fundamental justice are in no sense static, and will continue as they have in the past to evolve and develop in response to society’s changing perception of what is arbitrary, unfair or unjust.” While Potma still did not go so far as to explicitly impart a right to representation under section 7, the Court recognized the right to full answer and defence and recognized that the fulfillment of such a right will evolve with society.

The Alberta Provincial Court’s 1984 decision in R v Powell went further, reassessing their earlier decision of R v White in a post-Charter era. The court found that an accused has a right to procedural due process as a form of fundamental justice under section 7, and if the accused’s rights can only be preserved with the appointment of counsel, the court may appoint one pursuant to section 24(1) of the Charter. In his decision, Lisky J. did not discuss the practical implications of the extension of the right to counsel but focused solely on determining whether the accused would have a fair trial in the absence of counsel. The decision was upheld on appeal and was adopted by the Ontario Provincial Court in R v Hill, where it was held that, “although [the accused did] not as a practical matter risk incarceration if convicted ... to force him to proceed without legal representation would adversely affect the fairness of the trial.”

The Right to Equality and Access to Justice

Finally, the Charter’s guarantee of the right to representation should also take into account the section 15 right to equality. Section 15 of the Charter provides that “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” In New Brunswick (Minister of Health & Community Services) v G (J), the SCC declared:

All Charter rights strengthen and support each other … and s. 15 plays a particularly important role in that process. The interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights where applicable, and in my opinion, principles of equality, guaranteed by both s. 15 and s. 28, are a significant influence in interpreting the scope of protection offered by s. 7.

105 Ibid at para 24.
107 (1976), 1 Alta LR (2d) 292, (Sup Ct).
109 Ibid.
110 (1996), 30 WCB (2d) 205 (Ont Prov Ct) at para 20.
111 Charter, supra note 5, s 15.
112 [1999] 3 SCR 46 at 99 [New Brunswick].
The legal aid gap currently prevents a subset of Ontario’s population from engaging with the full scope of the law because of a lack of means, which could engage the Charter right to equality. In Ontario, it is clear that one’s income affects the availability of legal representation, and it has been shown that where criminally accused persons are not able to retain counsel, their case can be negatively affected. Without considering the enumerated grounds in s. 15 of the Charter, the legal aid gap can be conceptualized as discrimination due to the differential treatment of individuals owing to their socio-economic status.\textsuperscript{113} However, when one considers the racial disparities in the criminal justice system,\textsuperscript{114} and the fact that racialized persons are at greater risk of living in poverty in Canada,\textsuperscript{115} the failure of the state to provide counsel for all criminally accused persons could infringe s. 15 of the Charter due to the disproportionate and discriminatory effect on racialized persons.

\textbf{Position of the Supreme Court of Canada}

Many important actors in the Canadian legal system have demonstrated their position that criminally accused persons should not be barred from adequate representation due to their socioeconomic status. In 1976, Canada became a party to The International Covenant on Civil and Political Rights and its optional protocol, which provides for a right to legal assistance “without payment” by a criminally accused person “if he does not have sufficient means to pay for it.”\textsuperscript{116} More recently, the Canadian Bar Association has suggested that the provision of counsel for low-income persons facing serious criminal charges is critical to maintaining the rule of law and upholding democracy.\textsuperscript{117} Newly appointed SCC Justice Sheilah Martin, for the Canadian Institute for the Administration of Justice in 2012, stated that access to justice must be made a priority and that the justice system’s structure should be changed to ensure justice for all.\textsuperscript{118} The SCC, however, has been more hesitant in declaring a right to universal legal representation.

\textsuperscript{113} Andrews \textit{v} Law Society of British Columbia, [1989] 1 SCR 143, (introduced the test for infringement of equality rights, including the requirement for differential treatment to flow from an enumerated or analogous ground in s. 15)

\textsuperscript{114} John Howard Society of Canada, “Race, Crime and Justice in Canada”, (19 October 2017), online: <www.johnhoward.ca/blog/race-crime-justice-canada/>.


\textsuperscript{117} Canadian Bar Association, “Legal Aid in Canada” (2014), online: <www.cba.org/CBA/Advocacy/Additional_Information/Legal_Aid_in_Canada.aspx>.

\textsuperscript{118} Address (delivered at the Architecture of Justice in Transition Conference, 11 October 2012) [unpublished], online: <www.ciaj-icaj.ca/en/videos/conference-overview-the-honourable-justice-sheilah-martin-1749/> (access to justice was noted as a priority that needs to be addressed).
The SCC’s unanimous 2007 decision in *British Columbia (AG) v Christie* stated that while “access to legal services is fundamentally important in any free and democratic society… a review of the constitutional text, the jurisprudence and the history of the concept does not support… a broad general right to legal counsel.”\(^{119}\) With no right to representation explicitly codified in the *Charter*, the SCC now appears nervous about reading in such a right.

Even with the Court’s hesitance to introduce a right to legal counsel, allusions to the need for enhanced representation have been made by members of the Court. In an articulate dissent in the 2002 SCC decision of *Gosselin v Quebec (AG)*, Arbour J. distinguished between economic rights, which are fundamental to human life or survival, and corporate-commercial economic rights, which suggest a right to a minimum level of social assistance. He emphasized the need for legal rights to evolve as a living tree.\(^{120}\) In concluding her argument, Arbour J. stated that “while it may be true that courts are ill-equipped to decide policy matters concerning resource allocation, this does not support the conclusion that justiciability is a threshold issue barring the consideration of a substantive claim.”\(^{121}\) In essence, Arbour J. argued that the courts must be willing to expand legal rights to impose positive rights on individuals rather than simply acting as safeguards against state interference. The comments of Arbour J. suggest that a positive right to legal representation for the criminally accused should be recognized, particularly given the potential impacts the current system has on the accused’s right to make full answer and defence.

Other members of the SCC have built on the position of Arbour J. In *R v Sinclair*, LeBel, Fish, and Abella JJ. stated in dissent that section 10(b) “supports a broad application of the right to counsel, which includes *an ongoing right to consult with counsel*.\(^{122}\) This sentiment suggests that the dissenting justices wish to expand the right to counsel well beyond the rights afforded upon arrest. Similarly, in the 2014 SCC decision of *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, the majority declared that provincial governments are prohibited from imposing court fees that cause undue hardship if the fees prevent people from being able to appear in Court.\(^{123}\) While this clearly is not as expansive as recognizing a full right to legal representation, preventing the punishment of an accused because of an inability to pay legal fees is a concept that is core to the right to universal criminal representation and, as such, is an excellent starting point.

In conclusion, while the SCC as a whole has been hesitant to explicitly

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\(^{119}\) 2007 SCC 21 at para 23.
\(^{120}\) 2002 SCC 84 at para 332.
\(^{121}\) *Ibid*.
\(^{122}\) 2010 SCC 35 at para 154 [emphasis added].
\(^{123}\) 2014 SCC 59 at para 46.
recognize and introduce a right to universal representation for criminal matters, some of the country’s top judges have used their dissents to suggest that the recognition of such a right may be possible under the Charter.

VII. EXISTING ATTEMPTS AT RECONCILIATION

The Ontario legal system has recognized many of the aforementioned trickle-down effects stemming from the legal aid gap and has attempted to respond by instituting a series of mechanisms through which self-represented litigants may either obtain or be assigned counsel. During trials, obligations are placed on Crown counsel and judges to ensure candour in their dealings with a self-represented accused; however, in certain circumstances, these obligations are expanded and the Court is required to secure legal representation for the accused.

Assistance from the Trial Judge

When a self-represented accused appears in court, the judge should explain to the accused how important it is to be represented by counsel. If the self-represented accused wants to be represented, the trial judge should find out if there is any reasonable thing that could be done to help the accused gain representation. Before going so far as to appoint a counsel for the accused, “the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect.”

While the s. 7 Charter right to make full answer and defence and the s. 11(d) Charter right to a fair trial impose some obligation on trial judges to assist a self-represented accused, the Ontario Court of Appeal been clear on the limit of that obligation: “a judge is not required to become the advocate for the accused.” A trial judge may assist the accused procedurally, and may even be lenient towards the accused on the rules of criminal procedure, but cannot sacrifice the integrity of the trial process. Furthermore, the nature of criminal procedure and of a judge’s role is such that there are circumstances in which a judge should not and cannot be made aware of the entirety of an accused’s circumstances. Regardless of trial judges’ attempts to

124 Steering Committee, supra note 75 at 2.1.
125 Ibid.
127 Ibid at para 37.
128 Ibid at para 34.
129 See e.g. R v Fabrikant (1995), 97 CCC (3d) 544 (Que CA).
130 For example, the evidentiary rules are relaxed within a preliminary inquiry. An accused, or any other witness, may give hearsay evidence in a preliminary inquiry that should not be heard by the Judge in the
assist the self-represented accused, these individuals continue to experience a higher rate of guilty convictions.\textsuperscript{131}

**Rowbotham Orders**

The trial judge may appoint a lawyer in cases where legal aid is denied to an accused but where the trial judge finds that the accused would not face a fair trial as a result of their self-representation. As per Deutsch v Law Society of Upper Canada Legal Aid Fund, these scenarios are restricted to cases where “[T]here may be rare cases where legal aid is denied to an accused person facing trial, but, where the trial judge is satisfied that, because of the seriousness and complexity of the case, the accused cannot receive a fair trial without counsel. In such a case it seems to follow that there is an entrenched right to a funded counsel under the Charter.”\textsuperscript{132} The Courts have used a mechanism referred to as a “Rowbotham order” to address this issue.

Where the accused lacks the means to employ counsel privately but has nevertheless been refused legal aid, the Court can make an order staying the proceedings until the necessary funding for counsel is provided by the state. The trial will not proceed until either the government or the relevant legal aid organization provides funding for counsel. This mechanism was created by the Ontario Court of Appeal’s decision in \textit{R v Rowbotham}.\textsuperscript{133} The Court clarified that “it does not follow that a person will be deprived of a fair trial in every case where that person cannot afford to retain the services of counsel. In each case it will depend on the complexity and seriousness of the charges and the ability of the accused to provide full answer and defence.”\textsuperscript{134} While Rowbotham orders are effective at mitigating the dilemma of a self-represented accused, they take up valuable court resources and require the accused to have knowledge of their availability.

**Fisher/Peterman Orders**

Rowbotham orders allow an accused to obtain representation where he or she lacks financial resources and cannot conduct his or her own defence. This is because, as per \textit{R v Peterman}, “a criminal trial court’s jurisdiction rests solely on the obligation to

\begin{footnotes}
\footnote{\textsuperscript{131} See Part I, above.}
\footnote{\textsuperscript{132} (1986), 48 CR (3d) 166 (Ont Div Ct) (judges have been extremely hesitant to classify cases into these categories, “first, because an accused has an absolute right to proceed without counsel regardless of the complexity of the case, [and] second, [because] where an accused has been denied legal aid without error in law or jurisdiction on the part of the Legal Aid authorities … his appearance in court without counsel may be construed as an exercise on him of his right to proceed without counsel.” at para 19); See also \textit{R v Ciglen} (1979), 10 CR (3d) 226 (Ont HC).}
\footnote{\textsuperscript{133} (1988), 41 CCC (3d) 1 (Ont CA).}
\footnote{\textsuperscript{134} \textit{R v Fok}, 2000 ABQB 695 at para 18.}
\end{footnotes
ensure that an accused person receives a fair trial,” and not to set legal aid rates. As a further extension, this means that, as a whole, the right of an accused person to his or her choice of counsel does not impose a positive obligation on the state to provide funds for counsel of choice (if, for example, the lawyer’s fee is outside of the tariff allotted).

In a Rowbotham order the accused is able to retain a lawyer of their choice, provided that the lawyer the accused seeks to retain accepts the standard terms and fees of LAO. Despite this rule, the court’s decision in R v Fisher has provided one exception. In unique situations, the accused may be able to establish that he or she would only obtain a fair trial if represented by a particular counsel, even where that counsel does not accept the standard terms and fees of LAO. In these unusual circumstances, the court may be entitled to make an order, called a Fisher order, to ensure that the accused is represented by that specific attorney.

While Fisher orders still exist under the common law, some courts have suggested that it is an anachronism because the decision in Fisher itself set out no tests or principles. In 2010, the Manitoba Queen’s Bench suggested in R v Grant that Fisher has been “relied on incorrectly for a range of applications, usually which involves motions for orders to appoint counsel of choice and/or legal fees well above legal aid tariffs.” The court went on to suggest that Manitoba courts have been unequivocal in dismissing Fisher applications and that Fisher applications have also been essentially reversed in New Brunswick with the decision of New Brunswick v G. In 2011, the British Columbia Supreme Court adopted Manitoba’s decision in Grant, effectively ruling out Fisher orders in British Columbia as well.

Ontario has not explicitly ruled out Fisher orders; however, such orders are have an important qualification in the province:

In Ontario, a judge has no jurisdiction to set fees in criminal cases after a finding that the accused person requires counsel to have a fair trial within the meaning of s. 7 of the Charter...Similarly, where a Fisher or Fisher-type order is made, a court cannot set the fees to be paid. The court makes an order,

135 (2004), 70 OR (3d) 481(Ont CA) at para 21.
136 R v Robinson (1989), 51 CCC (3d) 452 (Alta CA); R v Howell (1995) 103 CCC (3d) 302 (NSCA), aff’d [1996] 3 SCR 604; R v Rockwood (1989), 49 CCC (3d) 129 (NSCA) [Rockwood].
137 Rockwood, supra note 136.
138 [1997] SJ No 530 (Sask QB) at para 18 [Fisher].
139 Ibid (the accused in Fisher required a specific defence attorney, whose fee was higher than the tariff set by Legal Aid, and the court held that the unique circumstances of the case warranted an order that the Minister of Justice pay “reasonable legal fees for [the attorney]” at para 12).
140 2010 MBQB 258 at para 54, Joyal CJ.
141 Ibid.
142 Ibid; New Brunswick, supra note 112.
143 R v Bacon, 2011 BCSC 135 at para 39.
including the specifics under which the accused must be represented, or the proceedings are stayed. It is for the Attorney General, not the courts, to determine how that counsel will be retained, and at what rates. If there is no counsel provided, the proceedings are stayed or remain stayed.\footnote{\textit{R v Cairenius} (2008), 232 CCC (3d) 13 (Ont Sup Ct J) at para 39-40.}

While these orders can occasionally be applied to ensure that an accused can exercise his or her \\textit{Charter} right to a fair trial, their narrow availability will not resolve the legal aid gap.

\textbf{VIII. REORGANIZING LEGAL AID}

While Rowbotham and Fisher/Peterman orders allow a criminal accused to access their \\textit{Charter} rights in some circumstances, the procedural complexity and narrow applicability associated with such orders limits their ability to have a widespread effect. The rights of the accused and the scarcity of court time would be much better served by having a more accessible legal aid system in the first place, rather than through reparative mechanisms.

In 2008, the Trebilcock Report set out a series of themes and priorities to direct the legal aid system going forward. Specifically, the Trebilcock Report argues that management of the legal aid system cannot be approached in isolation from the broader justice system,\footnote{Trebilcock Report, supra note 6 at 177.} that financial eligibility criteria need to be significantly raised to a more realistic level that “bears some relation to the actual circumstances of those in need,”\footnote{\textit{Ibid.}} and that “legal aid services should be provided to all Ontario citizens on a non-means-tested-basis.”\footnote{\textit{Ibid} at 178.}

As a whole, LAO’s unsustainability results from two major problems: (1) demand fluctuates from year to year, which causes a constant shift in resource requirements, and; (2) certificates place limits on billable hours, restricting the quality of legal service provided. While LAO grants a large number of certificates, the current system does not adequately afford all citizens their \\textit{Charter}-protected rights. Even where an accused does qualify for legal aid, the certificate system provides defence attorneys with only a certain number of billable hours on which to work on that accused’s file.\footnote{Legal Aid Ontario, “Am I Eligible for a Legal Aid Certificate?”, online: <www.legalaid.on.ca/en/getting/eligibility.asp>.} While LAO certificates tend to be very accurate with their calculation of the hours required for any file, in theory the certificate arbitrarily restricts the amount of work a lawyer should do on a case (that is, while still being paid for the work). The driving factor becomes the hours the certificate allots rather than representing the

\footnote{144 \textit{R v Cairenius} (2008), 232 CCC (3d) 13 (Ont Sup Ct J) at para 39-40.}
accused to the best and fullest degree possible. In cases where certificates run out prior to the end of a trial, it is conceivable that defence counsel would be discouraged from pursuing all possible avenues, jeopardizing the right of an accused to make full answer and defence. Each of these two problems could be alleviated by introducing salaried public defenders. This paper suggests that since the LAO’s current modus operandi is insufficient for meeting demand, it should be reorganized into a public defender system to improve access to justice.

The Ontario Public Defender System

An Ontario public defender system could exist through a redistribution of the majority of the LAO’s existing criminal funding into an organized body of staff lawyers whose sole job would be to carry files defending the criminally accused. This group of lawyers would mirror the structure of the Ontario Ministry of the Attorney General’s (“MAG”) Crown Attorney’s offices, although it would not be quite as expansive because of the expected continued existence of the private defence bar. Student legal aid services societies could also continue to handle less serious charges and persist in more remote areas.

The first question that must be addressed is precisely which cases a public defender system will be available for. Some public defender offices in other jurisdictions “defend” civil lawsuits or human rights matters. Because the impetus for a public defender stems from the Charter, the public defender system should begin by defending only the criminally accused whose Charter rights are jeopardized when counsel is not available. This author proposes that any person should be able to use state-funded public defence, regardless of annual income. Many criminally accused are likely to retain private counsel due to perceived quality of service and greater control over how much time is spent on a given file. This author further proposes that the Ontario public defender system should be accessible for all accused persons charged with criminal offences, including offences under the Controlled Drug and Substances Act or the Firearms Act, for example, but not for provincial regulatory offences such as offences under the Highway Traffic Act. While provincial regulatory offences can have serious consequences, including license suspensions and fines, given the resource constraints and the more serious nature of a criminal conviction, this limit is likely to be required. No limit should be placed on accused persons charged with

149 See Part IV, above, for further discussion of how the Charter is related to access to justice and a public defender system.
150 SC 1996, c 19.
criminal offences, even where incarceration is unlikely.

In the 2013/14 fiscal year, MAG’s Criminal Law Division operated from a head office in Toronto and had six regional offices and 54 Crown Attorney’s Offices across Ontario.153 These offices employed about 1,500 staff including 950 Crown attorneys.154 A 2012 report outlined that within each of these offices, “no staffing model had been established to determine how many Crown attorneys should be at each local office, and there was no benchmark for what a reasonable workload for each Crown attorney should be. Workloads varied significantly among local offices and between regions—572 charges per Crown attorney at one office and 1,726 at another office, for example.”155 Since 2013/14, the hiring of additional Crown attorneys and the rollout of the new management system, Scheduling Crown Operations Prepared Electronically (“SCOPE”), has made operations much more consistent and efficient across each office.156

The proposed Ontario public defender’s office should emulate MAG’s Criminal Law Division by placing offices in the same 54 locations across Ontario. These offices should effectively be able to serve the vast majority of criminally accused persons. A provincial office and regional offices should be created, or restructured from LAO, to ensure that hiring of public defenders and assistant public defenders at each office is correlated with demand. There will naturally be some office-to-office fluctuation in caseloads, although attorneys should be hired or transferred to ensure workloads are relatively consistent across the province. A program similar to SCOPE should be adopted and information sharing (in the way LAO currently does with its memos) between offices should be emphasized. On the whole, fewer assistant public defenders would need to be hired at each office because of the persistence of the private defence bar.

Finally, it is important to allow some of LAO's current procedures to remain in place. In order to ensure the continued fulfillment of R v Brydges,157 duty counsel would still need to continue to be available to provide an accused with twenty minutes of summary advice and information. Duty counsel should also remain within larger jurisdictions to help clients with guilty pleas and other brief procedural concerns. Maintaining duty counsel to a self-represented accused with simple procedures will alleviate the caseloads of the other public defenders. Student legal aid services societies should also be maintained. These clinics should either operate in rural areas where

154 Ibid.
155 Ibid at 446.
156 Ibid at 447.
157 [1990] 1 SCR 190 (where the Court held that s. 10(b) of the Charter imposes a duty on police to inform detainees of the availability of duty counsel and Legal Aid in the jurisdiction).
public defenders offices are not viable or in larger jurisdictions where they can represent clients facing less serious criminal charges. Where an accused cannot be served by a public defender's office or a community legal clinic, his or her defence should be contracted out to the private bar at a fixed rate of pay. An accused's financial situation should be irrelevant to his or her ability to obtain defence counsel.

The above paragraphs outline broad, high-level recommendations about how a public defender system could operate in Ontario. If Ontario were to implement a public defender system, such a large-scale overhaul would require extensive thought, research, and planning that is beyond the scope of this paper. The remainder of this paper will focus on addressing two potential objections to a public defender system: conflicts of interest and its economic viability.

Conflicts of Interest

The first challenge facing the introduction of a public defender system is that it would inevitably raise concerns regarding conflicts of interest. Implementing a public defender system would create a branch of government that would necessarily act in opposition to the government itself, since all criminal matters are prosecuted by the Crown. Would Canadian society be supportive of such an idea? While some might be opposed to such an arrangement, the rights of the accused should be considered important enough that the appearance of such “conflicts” would be trifling. While LAO’s current services are insufficient for meeting the needs of a significant portion of the population, LAO lawyers currently represent the criminally accused in exactly this manner. Recent commentary on legal aid in Ontario has only called for its expansion, not its reduction. Concerns about a conflict of interest between publicly funded defence and publicly funded prosecution were also discussed by Black J. in Gideon:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to
face his accusers without a lawyer to assist him.\footnote{158}{Gideon, \textit{supra} note 41 at 344.}

While the comments of Black J. are persuasive, the reality of the decision boils down to a political choice. As early as 1967, when the Legal Aid Plan was adopted, concerns about conflicts between the state’s prosecution service and defence service were raised, particularly with respect to economic limits. The Treasurer of LSUC, former Ontario Court of Appeal Justice John D. Arnup, Q.C., shared his views on the debate:

The government must be vigorous and vigilant on its part to see that this Plan does not cost the Province of Ontario more money than it can afford to pay... The profession is dedicated to providing appropriate services at a modest cost and if the Province cannot afford the aggregate of a full scale, across the board legal aid plan, then the government will have to cut back the Plan by making \textit{the political decision} that in some areas legal aid will no longer be given.\footnote{159}{John D Arnup QC, “The Government and the Society: The Roles in Legal Aid” (1968) 2:1 L Soc’y Gaz 1 at 12 [emphasis added].}  

Mr. Arnup’s comments reflect the realities of the current legal aid system and LAO’s failure to implement a full-scale across-the-board legal aid plan. Is the decision not to implement a public defender system a political one? The Ontario Judges' Association explains that while legal aid is supposed to create equality between criminal defence and prosecution, as the system currently stands, “there is an inevitable imbalance between the power and resources of the Crown and the power and resources of an individual accused.”\footnote{160}{Ontario, Ministry of the Attorney General, \textit{Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services}, (Toronto: Ontario Legal Aid Review, 1997) ch 9, online: <www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch9.php>.} If the government can afford the resources to prosecute the criminally charged, why can they not afford the resources to defend the criminally charged? The SCC’s comments in \textit{Clay} suggest that liberty (and the opportunity for it) is a fundamental right,\footnote{161}{Clay, \textit{supra} note 3.} but despite the impact adequate counsel has on an accused’s rights and the administration of justice, criminal defence remains inadequately funded. This gap may be partially attributed to the difficulty in imagining how a public defender system would interact with both the Crown and the private bar.

Proponents of a public defender system argue that because public defenders devote all of their time to criminal defence, they become experts in the field (rather than working in multiple areas of law, or, as is required of most defence lawyers, managing a business alongside their legal duties).\footnote{162}{Martin L Friedland, \textit{Cases and Materials on Criminal Law and Procedure}, 5th ed (Toronto: University of Toronto Press, 1978) at 128.} Conversely, Toronto defence lawyer Jacob
Stillman suggests, “the universal experience of full-time public defenders has demonstrated that it delivers a much poorer level of service [than paid defence counsel].”¹⁶³ The role of private defence counsel, if a public defence system were to be implemented, may have to adapt significantly; however, the 1973 Task Force on Legal Aid described the interplay between private and public defence counsel that is unlikely to change:

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... what we seek is not to maximize the use of one of technique or the other, but rather to maximize the chance that the Plan will be used by its intended beneficiaries.¹⁶⁴

This complementary model of public and private defence should not be affected by a reorganization of LAO’s criminal services. The public defender system applied across the United States has demonstrated that public and private defence bars can operate in harmony.¹⁶⁵ Private defence counsel will still exist for those accused who are able to and choose to use them.

**Economic Viability**

The second concern facing the introduction of a public defender system arises from concerns about economic viability. The resources required by public defenders should never exceed those required by the prosecution. Neither the job of the defence nor that of the prosecution begins until charges are laid (unless the Crown is giving investigative advice to police), and because both roles spawn from the same charges, the resources of each party should be, at most, equal. When factoring in the continued role of private defence counsel, the continued existence of community legal clinics, and the fact that the prosecution does, on occasion, give investigative advice to police, the financial resources required by public defenders should be significantly less than those of the Crown. Given the relative resource requirements of the prosecution and defence counsel, a public defender system could be economically viable in Ontario. The remainder of this section will demonstrate that there is an opportunity for this type of system to be implemented in Ontario if the political will to do so exists.

In the 2014/15 fiscal year, the total legal aid expenditure on criminal matters in

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¹⁶⁴ Osler, supra note 20 at 25.
¹⁶⁵ See Spangenberg, supra note 63.
Ontario was approximately $190 million. In that same year, the Ministry of Attorney General’s Criminal Law Division had estimated expenses of $259 million. Considering that the cost of legal aid in criminal matters is shared between the provinces and the federal Department of Justice, a public defender system should certainly be viable. Again, the resources required by public defenders will never exceed those required by the prosecution because of the persistence of community legal clinics and the private defence bar.

A public defender system also appears viable in Ontario because of its demonstrated effectiveness in other jurisdictions. While Wisconsin only has a population of approximately 5.779 million (42 per cent of Ontario’s), its public defender’s offices operate on a budget of $85.96 million, which is 45 per cent of LAO’s current criminal matter expenditure. If Ontario’s public defender system were to be modelled after the system in Wisconsin, it could likely be viable.

As outlined above, LAO appears viable through existing funds, though overseeing the transition will undoubtedly require an initial influx of expenses. On November 27, 2017, Bill C-45 received final approval in the House of Commons. Once it passes through the Senate, recreational marijuana sales will be legalized. According to Canada’s Parliamentary Budget Officer (“PBO”), pending approval, sales for recreational use are slated to begin by the end of 2018. Canada’s PBO estimated that sales would bring an initial $618 million per year through taxation, which would eventually grow into billions. The federal government announced in October 2017 that its budget would include $546 million over five years to prepare the legal framework to restrict and regulate access, and another $150 million over six years to enforce restrictions on drug-impaired driving. Any unassigned revenue from taxation could be assigned to legal aid within each of the provinces.

The reform of legal aid in Ontario may also be supported by the seizure of funds

166 Ibid.
169 Statistics Canada, “Population Counts”, supra note 68; Census Bureau, supra note 68.
172 Ibid.
provisions under the *Criminal Code*. Under sub-paragraph 462.34(4)(c)(ii) of the *Criminal Code*, courts may order the release of seized funds for the purpose of funding an accused’s payment of legal fees.\(^{174}\) The legal basis for the application is an accused’s right to make full answer and defence. In order to be successful on the application, an accused is obliged to establish an interest in the funds, show that there are no other assets available to cover the legal expenses, and demonstrate that no other person is the lawful owner of the seized monies.\(^{175}\) As the law currently stands, the accused does not need to apply for legal aid to invoke these provisions, since that would see “the Court interfering with an accused’s constitutional right to counsel of choice.”\(^{176}\) By the same rationale, “there is no statutory requirement for the release of funds to only those cases where Legal Aid is not available.”\(^{177}\)

The Ontario Court of Appeal outlined the purpose of these provisions in the 1993 decision of *R v Wilson*:

> Where funds are seized pursuant to s. 462.32 the person from whom the funds were seized may apply under s. 462.34(4)(c)(ii) for the release of sufficient funds to pay reasonable legal expenses. The clause is intended to allow a person, whose property has been seized or restrained, access to that property in order to pay reasonable legal expenses. Typically, the legal expenses will relate to proceedings connected with or flowing from the seizure or restraint of the person’s property. The provision recognizes that the state should not be allowed to beggar a person who will often need to retain the assistance of counsel in order to defend himself or herself against state action directed at depriving that person of their property and liberty.\(^{178}\)

The combination of the legalization of marijuana, including its taxation, and the seized funds provisions in the *Criminal Code* provides significant economic potential. The potential amount of money available from marijuana taxation is substantial and could revitalize legal aid within each of Canada’s provinces. Further, while the *Criminal Code* currently requires applications to be made to order the release of seized funds, a percentage of those funds could feasibly be diverted from the police\(^{179}\) to legal aid. The legislatures could even institute a change to automatically divert all seized money from a certain offence, such as the illegal trafficking of marijuana, into legal aid. While such revenues will likely diminish over time, an influx will likely only be necessary for the transition period.

On the whole, while LAO should be able to transition to a public defender

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\(^{174}\) *Criminal Code*, RSC 1985, c C-46.  
\(^{175}\) *R v Granger*, 2012 ONSC 6169 at para 24.  
\(^{176}\) *R v Black*, 2016 ONSC 3702 at para 56.  
\(^{177}\) *Ibid* at para 57.  
\(^{178}\) (1993), 15 OR (3d) 645 (ONCA), Doherty J.  
system through its existing funding, creative fundraising endeavors, such as taxation pursuant to the legalization of marijuana and the seized funds provisions could help ease the transition.

**CONCLUSION**

“All animals are equal, but some animals are more equal than others.”¹⁸⁰

Spending money on defending the criminally accused will always be a hard sell to taxpayers. In 2008, the (tangible) social and economic costs of Criminal Code offences in Canada totaled at least $31.4 billion.¹⁸¹ The costs associated with policing, court administration, prosecution, legal aid, correctional services, and mental health review boards accounted for approximately 2.5 per cent of the total annual expenditures by all levels of governments.¹⁸² Breaking down this amount reveals that policing services used the majority of expenditures (57.2 per cent), followed by corrections (32.2 per cent), courts costs (4.5 per cent), prosecutions (3.5 per cent), and legal aid (2.5 per cent).¹⁸³ Criminal legal aid expenditures are not as high as those on the prosecution, nor do they need to be with the existence of the private defence bar. With the enactment of the Charter, however, criminal legal aid must be restructured to ensure all accused persons are given their rights to a fair trial and to make full make full answer and defence. The fulfillment of these rights is long overdue and should be addressed through the introduction of a public defender system.

The prioritization of criminal defence as a fundamental right in the United States has been extremely successful since Gideon v Wainwright; this phenomenon has recently resulted in discussions about further expanding legal aid and “entering a new era in civil legal aid.”¹⁸⁴ If the United States is at the point of development where it can devote enough resources toward access to justice so as to allow the expansion of civil aid, Ontario must realistically consider a public defender system to prevent unrepresented accused persons from being deprived of their liberty, a much more serious concern. As the system currently stands, many citizens are denied meaningful access to justice and face deleterious effects within the courts because of their socioeconomic status. This paper has demonstrated the need to remedy this problem and has concluded that a public defender system is a viable solution.

¹⁸⁰ George Orwell, Animal Farm (London, UK: Secker and Warburg, 1945) at 40.
¹⁸² Ibid.
¹⁸³ Ibid.
¹⁸⁴ Alan Houseman, “Civil Legal Aid in the United States: An Update for 2009” (Paper delivered at the International Legal Aid Group Conference, Wellington, NZ, 1-3, April 2009) (Houseman was the Director of the Center for Law and Social Policy).